OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 12 June 2001 [1]

1. By this action brought under Article 181 of the EC Treaty, the Commission seeks repayment of an advance, together with interest, as a result of the termination of a contract concluded as part of the Thermie programme. The Commission terminated the contract on the ground that the defendants had failed to fulfil their contractual obligations.

I — Contents of the contract

2. On 17 December 1992, the Commission entered into a contract with Manuel Pereira Roldão e Filhos Lda., established in Portugal ('MPR'), Instituto Superior Técnico, also established in Portugal ('IST'), and King, Tandevin & Gregson (Holdings) Ltd, established in the United Kingdom ('KTG'). The contract concerned a financial contribution by the Commission to a project entitled 'Low Emissions — Low Cost Melting Tank for Superior Lead Crystal' ('the contract'). The contract, numbered IN 90/91 PO/UK, was concluded within the framework of the promotion of energy technology in Europe (Thermie programme), provided for by Regulation (EEC) No 2008/90. [2]

3. Two annexes form an integral part of the contract. Annex I concerns the technical and financial specifications. Annex II sets out the general conditions ('the general conditions').

4. Under Article 2(1) of the contract, the duration of the project was to be 36 months with effect from 1 January 1993, and MPR, IST and KTG ('the contractors') undertook to carry out the work referred to in Annex I of the contract in accordance with the timetable set out therein.

5. MPR was appointed as the project coordinator. Under Article 1(4) of the contract, the coordinator assumed responsibility for liaising between the Commission and the contractors. The coordinator was also required to send to the Commission, on behalf of the contractors,the documents

1 — Original language: Dutch.

2 — Council Regulation (EEC) No 2008/90 of 29 June 1990 concerning the promotion of energy technology in Europe (Thermie programme) (OJ 1990 L 185, p. 1).

more particularly specified in the contract. For example, under Article 5(1) of the contract, the coordinator was required to supply the Commission with half-yearly progress reports containing information about the technical and financial situations. That obligation is further specified in Article 6(1)(a) of the general conditions.

6. Pursuant to Article 4(1) of the contract, the Commission was to finance the project in accordance with a programme providing, in particular, for the payment of an advance of ECU 357 813.

7. Under the first sentence of Article 4(3) of the contract, the Commission was to make all payments to the coordinator, who was responsible for transferring the appropriate sums directly to each of the contractors. Furthermore, under the second sentence of that provision the Commission could not, under any circumstances, be held liable for any failure by the coordinator to comply with that obligation.

8. The first sentence of Article 17(2)(a) of the general conditions provided that the Commission was to pay the advance within two months of signature of the contract by all the parties. Under the second sentence of Article 17(2)(a), the advance was to be used for the purposes set out in the contract.

9. The contract contained a series of provisions under which the contractors were required to provide information. Pursuant to the first sentence of Article 2(2), the Commission had to be informed of any delay in the performance of the contract. Under Article 1(4) of the general conditions, the coordinator was required to inform the Commission, on behalf of the contractors, of the date of commencement of work on the project under the contract and also to inform it without delay of completion or cessation and of any event or circumstance liable to affect significantly the performance of the contract.

10. Under the second sentence of Article 2(2) of the contract, the Commission was entitled to terminate the contract in the circumstances set out in Article 8 of the general conditions. Article 8(2)(d) of the general conditions provides, in particular, that where a contractor fails to fulfil one of its obligations, the Commission may, after giving notice in writing on the defaulting party requiring it to perform its obligations, terminate the contract if the contractor is still in breach of its obligations one month after receipt thereof, except where non-performance occurs for reasonable and justifiable technical or economic reasons.

11. Under the first sentence of Article 2 of the general conditions, the three contractors are jointly and severally liable to the Commission for any failure by any of them to discharge their responsibilities. The last sentence of this article also provides that a contractor is not liable in respect of a

defaulting contractor to make any reimbursement under Article 8(4) of the general conditions, if it can show to the reasonable satisfaction of the Commission that it has not contributed to the default and has complied with Article 1(4) of the general conditions.

12. If the contract is terminated under Article 8(2)(d), Article 8(4) of the general conditions provides that the Commission may require reimbursement of all or part of its financial contribution under the contract. The Commission may also claim interest from the date on which the contractor received the financial contribution.

13. Under Article 9(1) of the contract it is governed by Portuguese law. Under Article 12 of the general conditions, the Court of Justice of the European Communities has sole jurisdiction in respect of any dispute concerning the contract.

II — The facts

14. The contract was signed by MPR on 17 December 1992, by IST on 21 December 1992, and by KTG on 8 January 1993.

15. On 22 February 1993, the Commission paid an advance of ECU 357 813 to MPR, in its capacity as project coordinator. This sum was transferred to bank account number 2702410/000/001 (Banco Fonsecas & Burnay, Leira).

16. On 20 September 1993, the Commission carried out a technical audit and investigation at MPR's premises.

17. On 20 October 1993, the Commission sent a letter to MPR, which was copied to IST and KTG, stating that MPR had failed to fulfil its contractual obligations. As a result of its investigation of 20 September 1993, the Commission established that work on the project had still not been commenced. Moreover, MPR had failed to inform the Commission, in accordance with Article 2(2) of the contract, that there had been a delay in carrying out the project. The Commission went on to observe that, contrary to Article 17(2)(a) of the general conditions, the advance payment had been used for purposes other than those set out in Annex I to the contract. In view of the fact that MPR had failed to fulfil its contractual obligations, the letter contained the notice of termination of the contract referred to in Article 8 of the general conditions. The Commission stated that if MPR did not repay the advance payment into the account at the Banco Fonsecas & Burnay in Leira, it would terminate the contract without further notice.

18. In reply, MPR sent a letter to the Commission which was received on 7 December 1993. In the letter, MPR denied that the contract had not yet been commenced, stating that IST and KTG had already carried out work on the project. Any delay, MPR claimed, was due to late payment of the Commission's financial contribution and to unforeseeable circumstances, about which MPR claims the Commission had been fully informed. The coordinator also stated that it was agreeable to the possibility of studying alternative ways of ensuring continuance of the contract as part of an amended plan. MPR was willing to exchange ideas in this respect with the Commission in Brussels.

19. In a letter dated 11 January 1994, which was copied to IST and KTG, the Commission agreed to discuss continuation of the project, provided that MPR submitted a bank certificate to prove that the advance payment was available in the aforementioned bank account.

20. It emerges from a letter to the three contractors dated 16 May 1994 that, by this date, the Commission had not yet received the bank certificate confirming that the advance payment had been transferred back into the aforementioned bank account. The Commission granted the three contractors a final extension of one month to return the advance payment. The Commission stated in the same letter that if no bank certificate was submitted during that period Article 8 of the contract would be applied with immediate effect.

21. By a letter dated 14 June 1994, MPR requested the Commission, in light of a number of special circumstances, to postpone the decision communicated in the letter of 16 May 1994. MPR stated that it intended to carry out a project which was part of the restructuring of 'Indústria Portuguesa de Cristais', which was to begin one month later. MPR also stated that it was also undergoing a restructuring phase. MPR went on to say that, in the meantime, KTG had become insolvent and that it would therefore have to look for a new partner.

22. In a letter dated 7 July 1994, which was addressed to MPR and IST, the Commission stated that, to its regret, the contractors had failed to submit the bank certificate which it had requested on 16 May 1994. Nevertheless, in the light of the financial prospects which the restructuring of the project would create, and of the possible introduction of a new partner, the Commission agreed, exceptionally, to postpone its earlier decision to terminate the contract pursuant to Article 8. It granted a further time-limit, which was to expire on 31 December 1994. In the interim, the contractors were required to provide the Commission with full details of the existing difficulties. The Commission stated that if it was not possible to guarantee performance of the project after 31 December 1994, the contract would be terminated with immediate effect.

23. According to the Commission, MPR and IST did not act upon the letter of 7 July 1994.

24. On 7 June 1995, the Commission notified MPR and IST in writing of its decision to terminate the contract, in line with the notice it had given in the letter of 7 July 1994. In the letter of 7 June 1995, the Commission observed that: (i) the advance payment was not available in the appropriate bank account; (ii) work on the project had still not commenced; and (iii) there was no information or guarantee regarding the execution of the project. The Commission stated that termination would take effect two months following receipt of the letter.

25. On 11 November 1995, the Commission sent MPR a demand for payment, requesting reimbursement of the advance payment of ECU 357 813. Since, by 17 October 1996, that sum had still not been transferred, the Commission then sent MPR a reminder in which it called for the advance payment to be reimbursed immediately.

26. By 10 March 1997, the sum had still not been transferred. By a written demand, the Commission requested payment within 15 days of receipt of the demand. The Commission indicated that with effect from that date it would also claim interest. It stated that it would take legal action if MPR continued to fail to discharge its obligation. On 18 March 1997, MPR received the demand by registered post. On 4 July 1997, the Commission again requested repayment of the advance. In the same letter, the Commission stated that it would take legal action to recover the monies advanced.

27. On 16 February 1999, the Commission had still not received a reply from the contractors.

III — The procedure and the claims of the parties

28. The Commission's application was received by the Court of Justice on 22 February 1999.

29. In its application, the Commission claims that the Court should:

(a) order the defendants to repay to the applicant the sum of ECU 357 813, together with ECU 185 833.78 by way of interest accrued until 1 January

1999, plus any interest accrued until the date of full repayment;

(b) order the defendants to pay the costs.

30. IST contends that the action should be dismissed and that the Commission should be ordered to pay the costs in full.

31. MPR did not lodge a defence. Accordingly, on 25 June 1999, the Commission applied to the Court for judgment in its favour against MPR, in accordance with the procedure for judgment by default contained in Article 94(1) of the Rules of Procedure.

32. The application could not be served on KTG owing to the lack of information as to the correct address of that company. It appears from the case-file that this contractor has since become bankrupt. In a document dated 26 April 1999, the Commission indicated that it wished to continue the proceedings against MPR and IST alone.

33. At the hearing, which was held on 15 March 2001, the Commission and IST presented oral argument.

IV — Pleas in law and main arguments of the parties

34. The Commission states that MPR failed to perform its obligations under Article 2 of the contract, since it failed to adhere to the timetable set out in Annex I thereto. The grant of additional time-limits, in respect of which the Commission was under no obligation, did not alter that situation. The Commission states that it took all necessary steps to seek repayment of the advance of ECU 357 813. It then terminated the contract in accordance with Article 2 thereof and with Article 8 of the general conditions. In the Commission's view, once the time-limit indicated in its letter of 4 July 1997 had expired, the contract was terminated.

35. The Commission also claims that, under Article 2 of the general conditions, the defendants are jointly and severally liable to it. That joint and several liability is also recognised in Portuguese law.

36. The Commission also relies on Article 4(3) of the contract. Under this provision, the coordinator is responsible for transferring the appropriate portion of the advance to the other contractors and the Commission cannot, under any circumstances, be held liable for any delay by the coordinator in performing this obligation. Moreover, it follows from the recent case-law of the Court that the joint and several liability of each of the contractors

creates in each one of them an obligation to reimburse the advance if the obligations for which that payment constitutes the consideration are not fulfilled. [3]

37. IST's defence is essentially founded on two arguments.

38. First of all, IST claims that it had no knowledge of MPR's delay until it received the copy of the Commission's letter to MPR of 20 October 1993, in which the latter was requested to transfer the advance payment to the original bank account. IST also contends that it took all necessary steps to perform the contract, both before and after discovering MPR's irregularities. The documents which it has submitted clearly demonstrate its efforts and its commitment with regard to performance of its contractual obligations.

39. In IST's opinion, the Commission also erred in seeking to recover the advance payment, together with interest, from it. Even if joint and several liability were held to apply in this case, IST cannot be held liable for payment of the sums in question since it fulfilled the requirements for exemption set out in Article 2 of the general conditions. In the light of those requirements, IST asserts that the facts prove indisputably that it did not contribute to MPR's failure to discharge its contractual obligations. IST contends that it regularly encouraged the coordinator to perform the contract. In addition, IST argues that it is not bound by the obligations of Article 1(4) of the general conditions because those obligations apply exclusively to the project coordinator, namely MPR. Furthermore, IST states that it notified the Commission about the delays which had arisen as a result of MPR's difficulties, in accordance with Article 1(4) of the general conditions.

40. IST goes on to claim that it acted in good faith from the pre-contractual period through to the termination of the contract. IST states that it has been conducting research for a long time and that it has received financial contributions from the European Union in the past.

41. Second, as a subsidiary point, IST claims that in the present case the Commission may not rely upon the principle of joint and several liability to require payment in full from each of the contractors. This plea in law is founded on certain articles of the Portuguese Civil Code ('CC'). IST interprets Article 519(1) of the CC as meaning that, where a creditor sues all the co-debtors simultaneously, the applicable legal position changes from joint and several liability to joint liability, because Article 519 of the CC provides that a creditor has the right to demand the full sum from each joint and several debtor or to demand a portion of it from each of

3 — Judgment in Case C-65/97 *Commission* v *Cascina Laura and Gariboldi* [1999] ECR I-1017, paragraphs 21 to 23.

them, but that, where the creditor has sought satisfaction from one of the debtors through the courts, he may not sue the remaining debtors for the sum he has claimed from the first debtor, except where there are reasonable grounds why he is unable to obtain satisfaction from the first debtor.

42. According to IST, by suing all the contractors for the full amount of the debt, the Commission has waived the right to a joint and several claim. Therefore, in IST's opinion, the Commission cannot claim from the other debtors any amount in excess of their share of the whole. The whole of the advance was paid to MPR, while IST did not receive any of it. Consequently, MPR is the only defendant from which the Commission may seek to recover the advance, together with interest.

43. In its reply, the Commission argues that there is a reasonable ground in this case, namely the fact that it is unable to recover the advance from MPR, which became insolvent on 26 April 1999. IST rejects this argument, stating that, in its opinion, it was submitted out of time and must therefore be ruled inadmissible.

44. Finally, as regards the payment of interest, IST relies on Article 520 of the CC. Under this provision, the responsibility for restitution falls only to the jointly and severally liable debtor to whom the non-performance is attributable. IST states that it cannot be held liable for payment of compensation in the form of interest, because the failure to repay the advance is wholly attributable to MPR.

45. The Commission rejects that argument. The Commission relies, in particular, on the wording of the second subparagraph of Article 8(4) of the general conditions, under which it is entitled to claim interest on repayments of financial contributions, and also on recent case-law in which the Court has upheld the obligation of the defaulting party to pay interest in actions for the repayment of advance payments. [4]

V — Assessment

46. Article 39 of the Rules of Procedure provides that an application must be served on the defendant. The Commission's application was not served on KTG. Consequently, the requirement of notification was not fulfilled and the action against KTG must accordingly be ruled inadmissible. The Commission itself has indicated that it has abandoned the action against KTG and that it only wishes to proceed against MPR and IST. I will therefore confine my assessment to those parties.

4 — Cases C-172/97 *Commission* v *SIVU and Hydro-Réalisations* [1999] ECR I-3363 and C-334/97 *Commission* v *Montorio* [1999] ECR I-3387.

47. The differences in the factual and legal circumstances warrant a separate examination of MPR and IST in this Opinion.

A — *MPR*

48. It appears from the evidence adduced by the Commission that the application was lawfully served on MPR. Pursuant to Article 39 of the Rules of Procedure, the application was served on 1 April 1999 by registered post with an acknowledgement of receipt on Mr Carlos Manuel Bueri Alves Antero, who had signed the contract on behalf of MPR in his capacity as managing director. However, MPR failed to lodge a defence within the time-limit laid down in Article 40(1) of the Rules of Procedure. Consequently, the Court of Justice is required to give judgment by default, in accordance with Article 94(1) of the Rules of Procedure.

49. Since there are no doubts as to the admissibility of the action against MPR, the Court must examine, under Article 94(2) of the Rules of Procedure, whether the Commission's claims against this party are well founded.

50. It has been established that the advance payment was indeed made to MPR. The Commission has submitted a copy of a payment order in favour of MPR, dated 22 February 1993, for the sum of ECU 357 813 in favour of MPR, which was credited to bank account number 2702410/000/001 (Banco Fonsecas & Burnay, Leira). Consequently, in accordance with Article 17(2)(a) of the general conditions, the advance was transferred within the time-limit of two months from 8 January 1993, this being the date on which KTG, as the last contractor, signed the contract.

51. Under Article 8(2) of the general conditions, the Commission is entitled to terminate the contract unilaterally if any of the conditions stipulated therein are met. In its correspondence with the contractors, the Commission did not specify exactly which of the grounds stipulated in Article 8(2) it was relying on. However, from the way it is worded, there can be no reasonable doubt that the Commission's first letter of formal notice of 20 October 1993 referred to the ground for termination contained in Article 8(2)(d) of the general conditions.

52. Under Article 8(2)(d) of the general conditions, the Commission may terminate the contract if (i) one of the contractors has failed to perform any of its obligations, (ii) the defaulting contractor is given notice in writing to remedy the non-performance, (iii) the non-performance continues one month after receipt of the letter of formal notice, and (iv) the non-performance is not justified by reasonable technical or economic grounds.

53. In my opinion, the four requirements have been fulfilled in this case.

54. With regard to the performance of contractual obligations, in its letter of 20 October 1993, the Commission refers to two provisions which MPR allegedly failed to fulfil, namely, Article 2(2) of the contract and Article 17(2)(a) of the general conditions.

55. The Commission claims, first of all, that MPR omitted to inform it of the delay in carrying out the project, which it was required to do under Article 2(2) of the contract. This claim appears to me to be well founded.

56. According to the timetable set out in Table 1 of Annex I to the contract, during the period from January 1993 to September 1993 inclusive, work was to be carried out on the section of the project entitled 'design and basic engineering'. In addition, according to a table contained on page 3 of Annex I, this section of the project was to be carried out in Marinha Grande, the location of MPR's registered office. It can be inferred from the above that MPR should already have carried out work in performance of the contract during the first phase of the project.

57. In its letter which was received by the Commission on 7 December 1993, MPR denied that performance of the contract had not yet commenced during that first phase, stating that IST and KTG had already carried out work. In its letter, MPR did not deny that it had not actually commenced work on the project itself. Furthermore, by citing *force majeure* reasons and by suggesting to the Commission that they search together for alternative ways of ensuring that the contract continued, MPR essentially acknowledged its breach of its obligations.

58. In all other respects, there is nothing in the case-file which suggests that MPR, in its capacity as coordinator of the project, discharged its obligation under Article 5(1) of the contract, in conjunction with Article 6(1) of the general conditions, to provide the Commission with half-yearly progress reports containing information about the technical and financial situations. Nor does the case-file contain any evidence to prove that the Commission received substantive information from the coordinator regarding the progress of the project by any other means. In my opinion, besides not complying with the obligation to provide information contained in Article 2(2) of the contract, MPR also failed to fulfil the obligation under Article 5(1) of the contract, read with Article 6(1) of the general conditions, to submit reports.

59. Second, in the letter of 20 October 1993, the Commission alleges that MPR used the advance payment for purposes

other than those set out in the contract, contrary to Article 17(2)(a) of the general conditions. In the correspondence which ensued between MPR and the Commission, in particular the letters of December 1993 and June 1994, that fact is not disputed. Although the Commission regularly urged MPR to transfer the advance back to the original bank account, MPR did not comply with that request. In my opinion, therefore, it follows that the claim that the provision in question was breached is also well founded.

60. As to the other three requirements for termination of the contract, it is sufficient to make the following observations.

61. First of all, in the letters of 11 January 1994 and 7 July 1994, the Commission gave MPR ample opportunity to perform the contract. It can be inferred from the case-file that MPR did not avail itself of that opportunity.

62. Second, the Commission also did more than merely comply with the one-month notice period, by stating in its letter of 7 June 1995, addressed to all the contractors, that the decision to terminate the contract would not take effect until two months following receipt of that letter.

63. Third, the non-performance cannot be regarded as justified on technical or economic grounds. Despite the fact that MPR stated in its letter of 14 June 1994 that it was undergoing internal restructuring, a reason of this kind cannot be relied on since it relates to circumstances specific to the company concerned and not to technical or economic problems relating to execution of the research project. [5]

64. Consequently, I deduce from the case-file that, in its letter of 7 June 1995, the Commission acted correctly in deciding to terminate the contract unilaterally, in accordance with Article 8 of the general conditions.

65. Pursuant to the second subparagraph of Article 8(4) of the general conditions, interest may be charged from the date of receipt of the advance at the rate applied by the European Monetary Cooperation Fund for its transactions in ECU published on the first working day of each month, plus two percentage points. In its letter to MPR of 10 March 1997, the Commission indicated that it would claim interest on the advance as from 15 days following the date of receipt of the letter, which was 18 March 1997. The Commission now claims the sum of ECU 185 833.78 by way of interest until 1 January 1999, plus interest accruing until the date of full repayment. The Commis-

5 — See the judgment in Case C-356/99 *Commission* v *Hitesys* [2000] ECR I-9517, paragraph 22.

sion specified the said sum of ECU 185 833.78 in an annex to the application. The case-file contains no evidence which would call into question that the sum is well founded. [6]

66. Therefore, the Commission's claims are well founded and comply with the requirements of Article 94(1) of the Rules of Procedure, with regard to the claim for repayment by MPR of the advance of ECU 357 813, received on 22 January 1993, together with interest.

B — *IST*

67. The question whether the Commission's action against IST is well founded must be analysed in the light of the provisions of the contract, of IST's actual behaviour and of the provisions of Portuguese civil law governing joint and several liability.

68. It is not disputed that the contract makes the three contractors jointly and severally liable for its performance. This is absolutely clear from the actual wording. The preamble provides that the contractors are to act jointly and severally within the meaning of Article 2 of the general conditions. Under Article 2, the contractors are jointly and severally liable to the Commission for failure by any one of them to perform the contractual obligations.

69. Therefore, it is perfectly clear that, with respect to the Commission, all the contractors undertook to guarantee that all the obligations under the contract would be discharged by each of them. By signing the contract, the contractors freely accepted that the risk of failure by one of them to fulfil the contract, irrespective of the reason, could not be relied upon against the Commission.

70. As I have already pointed out, my view is that MPR, in its capacity as coordinator and contractor, failed to perform its obligations as such under the contract. In my opinion, MPR breached, in particular, Article 2(2) and Article 5(1) of the contract, and Article 17(2)(a) of the general conditions, with the result that the Commission was entitled to terminate the contract under Article 8 of the general conditions. In this case, it has been established that the Commission is entitled to sue MPR and the other contractors jointly and severally for the non-performance by

6 — IST also disputes the total amounts of the advance and the interest.

MPR. The payment of the advance to MPR created in IST an obligation to reimburse that advance in the event that the obligations for which it constituted the consideration were not fulfilled. [7]

71. None of the above is altered in any respect by either IST's defence, in which it states that it was unaware that the advance had been paid until October 1993, or by that party's claim that it did not receive any portion of the advance from MPR. Specifically in relation to the advance payment, the second sentence of Article 4(3) of the contract expressly provides that the Commission cannot be held responsible for any failure by the coordinator to transfer to the other contractors their share of the monies advanced.

72. Under the contract, IST has only one means of avoiding being held jointly and severally liable for reimbursement of the advance payment. The final sentence of Article 2 of the general conditions provides that a contractor is not jointly and severally liable for the reimbursement of financial contributions which have been received from the Commission, within the meaning of Article 8(4) of the general conditions, if it can prove, to the reasonable satisfaction of the Commission, that it did not contribute to the default and that, in addition, it has complied with Article 1(4) of the general conditions. It must therefore be examined whether IST fulfilled those requirements in the present case.

7 — In this regard, see the judgment in *Commission* v *Cascina Laura and Gariboldi*, cited in footnote 3, paragraph 23.

73. In order to fulfil the first requirement, IST must have reasonably been able to convince the Commission that it did not contribute to MPR's failure to fulfil the contract.

74. The Commission alleges that in the months immediately following the signature of the contract, IST acted negligently in that, in its capacity as a contractor, it was unaware of certain facts relevant to the project, and because some time passed before agreement was reached between the contractors as to how the project was to be executed. However, at the hearing the Commission acknowledged that IST acted in good faith when it entered into the contract. Nor does the Commission dispute that IST had a great deal of interest in carrying out the project. Nevertheless, to my mind it is more significant that IST subsequently submitted several letters and a fax, which are dated, respectively, 25 January 1993, 19 February 1993, 22 June 1993 and 20 July 1993, from which it emerges that IST regularly encouraged MPR to continue executing the project and to discharge its contractual obligations. A letter from MPR to IST, dated 13 June 1994, also demonstrates that, at least until that date, IST was entitled to believe that MPR intended to continue with the project.

75. In my opinion, IST has thus succeeded in reasonably convincing the Commission that it did not contribute to MPR's failure to perform its obligations.

76. The second requirement of the last sentence of Article 2 of the general conditions concerns the obligation to provide information contained in Article 1(4) of the general conditions.

77. IST's contention that it cannot be regarded as bound by that obligation to provide information on the ground that it applies exclusively to the coordinator is founded, in my opinion, on an erroneous interpretation of the aforementioned provision. The first part of Article 1(4) of the general conditions provides that the coordinator, on behalf of all the contractors, has a duty to notify the Commission when work on the project begins. The second part of the same clause also provides that each contractor must inform the Commission without delay of the completion or the cessation of the work or of any event or circumstances liable significantly to affect the performance of the contract. Accordingly, this latter obligation, which is set out in Article 1(4) of the general conditions, also applies to IST.

78. I am of the opinion that IST has failed to establish, by means of the evidence it has submitted, that it fulfilled that obligation. In order to have done so, it would have needed to prove that it had immediately notified the Commission about the difficulties which had arisen in executing the project.

79. In my view, with regard to the foregoing, three events were crucial for IST: its receipt of the Commission's two letters of 20 October 1993 and 7 July 1994, and the expiry of the time-limit of 31 December 1994, within which the contract was required to be performed and which was laid down by the Commission in the second of the two letters.

80. The first event was the receipt of the Commission's letter of 20 October 1993, which was addressed to all the contractors and in which the Commission noted that work on the project had still not been commenced and that MPR had used the advance payment for inappropriate purposes.

81. IST does not dispute the fact that between 1 January 1993, the date on which the period for performance of the contract began to run, and receipt of the letter of 20 October 1993, it took no steps to inform the Commission about the delay which had arisen in executing the project. IST contends that until the latter date it too had been unaware of MPR's problems. IST claims that, during the period in question, it merely encouraged MPR to execute the project properly. According to IST, during that period, it expressly asked MPR whether the Commission had paid the advance, to which MPR replied in the negative.

82. In my opinion, it is clear that at that point IST ought immediately to have con-

tacted the Commission. As a result of its own experience with MPR, it should have been clear by then that there would be a delay in carrying out the project. Moreover, IST might have had doubts about MPR's assertion that the Commission had still not paid the advance provided for in the contract. Had this been the case, the Commission would have been in breach of its obligations under Article 17(2)(a) of the general conditions.

83. In any event, after it received the Commission's letter of 20 October 1993, there can be no doubt that IST was aware of the Commission's complaints about MPR and of MPR's failure to discharge its contractual obligations.

84. I consider that the second important moment for IST occurred when it received the Commission's letter of 7 July 1994 in which, in the light of special circumstances, the Commission allowed MPR and IST a further opportunity to fulfil their contractual obligations by 31 December 1994.

85. IST has attempted to demonstrate that between receiving the letters of 20 October 1993 and 7 July 1994, it contacted the Commission on two occasions and informed the latter about the problems which had arisen.

86. First of all, IST claims that it contacted the representative of the DG XVII for the Thermie programme at the State Energy Board in Portugal, namely Ms Virginia Correia. IST informed her about the delays which had been caused by MPR and asked her to bring pressure to bear on MPR to reimburse the advance payment. IST also attempted to find a new partner for the project, with the assistance of the State Energy Board.

87. However, the Commission has stated that no such 'representative of the DG XVII' ever existed and that Ms Virginia Correia is probably a national civil servant who represents Portugal on a committee set up as part of the Thermie programme. According to the Commission, Ms Virginia Correia had no authority whatsoever to represent the Commission, either in a general sense or in connection with the contract. At the hearing, IST did not dispute this point but stated that it had assumed that Ms Virginia Correia would pass on the information to the appropriate Commission officials.

88. In my view, IST's argument is implausible and is wholly inadequate to discharge the contractors' obligation under the contract to inform the Commission should problems arise.

89. Second, IST has submitted a list of the names of five officials who, it claims, work for the DG XVII of the Commission and

whom it purportedly contacted by telephone during the period in question. IST states that during those conversations it indicated that it wished to continue the project in Portugal after MPR had reimbursed the monies advanced.

90. I find this evidence too flimsy. In the absence of specific additional details, it is doubtful that the information which it is claimed was provided would have clarified sufficiently the actual problems which had arisen in the execution of the project. Furthermore, IST does not dispute the Commission's contention that one of the five officials no longer worked for the DG XVII, which does not reinforce the plausibility of its claim to have contacted the said officials. In addition, it appears quite clear that IST should have made written record of the problems which had arisen and should have notified them to the Commission in a registered letter. The obligation to provide information, in the first sentence of Article 2(2), in conjunction with the exemption clause, together with IST's joint and several liability, mean that IST had a duty to observe such a formality.

91. Therefore, IST has been unable to prove convincingly that, during the period from the end of October 1993 to the beginning of July 1994, it informed the Commission about the problems which had arisen. Nevertheless, in its letter of 7 July 1994, the Commission gave the contractors the opportunity to discharge their obligations by 31 December 1994.

92. Between the beginning of July 1994 and the end of December 1994, it should have been clear to IST that the Commission's patience had run out with respect to the performance of the contract and that 31 December 1994 was the final deadline for saving the project. If the project could not be saved, termination of the contract would be unavoidable. By that stage, it should have been obvious to IST that MPR had become an untrustworthy partner and an unreliable project coordinator. MPR had failed to fulfil its contractual undertakings and the monies advanced by the Commission had not been used for the purposes laid down in the contract. While, in the preceding period, IST, in accordance with its contractual obligations, and in particular with the fact that it was jointly and severally liable, should already have informed the Commission by registered post about the status of the work under the contract, that requirement was perhaps even more important during the period now in question. In its letter of 7 July 1994, the Commission also expressly required the contractors to inform it about possible problems.

93. However, IST has completely failed to demonstrate that, during the second half of 1994, it informed the Commission about the difficulties which had arisen. It did not even attempt to do so.

94. Subsequently, by a letter dated 7 June 1995, the Commission informed IST that the contract had in fact been terminated. IST distanced itself from the conduct of

MPR only in a letter dated 17 July 1995. In that letter, IST drew the Commission's attention to its active contribution to the project, stated that it had never received any financial contribution from MPR and attributed full blame for the failure of the project to the latter.

95. As a result of the foregoing, I conclude that between October 1993 and July 1995, IST did not inform the Commission without delay about the problems which had arisen in executing the project, which it was bound to do under the final sentence of Article 2 of the general conditions, in conjunction with Article 1(4) of the general conditions. Thus, IST did not make use of the opportunity to exonerate itself vis-à-vis the Commission and to avoid being held jointly and severally liable by means of a reply, such as the one it provided in its letter of 17 July 1995, in which it clearly explained the problems which had arisen and the reason behind them, and demonstrated how it had taken all reasonable steps to fulfil its contractual obligations. Such a reaction would have been all the more natural in view of the fact that IST claims to be a professional contractor which had already acquired the necessary experience in other projects financed by the European Union.

96. In my opinion, IST's reliance on the exemption clause in the final sentence of Article 2 of the general conditions cannot avail it.

97. In the alternative, IST contends that, under Portuguese law, the Commission cannot claim in this case that IST is jointly and severally liable in order to obtain an order against IST for repayment of the advance, together with interest.

98. In this regard, we must first of all mention Article 8(4) of the general conditions, which does not limit the sum which may be claimed — jointly and severally — to the amount of the advance, but instead provides that the Commission is entitled to claim interest from the date on which MPR received the advance payment.

99. Consequently, it must be observed that Portuguese law does not, as such, preclude debtors from being held jointly and severally liable, as is provided for by the contract in the case of the contractors, and particularly by Article 2 of the general conditions.

100. Under Article 512(1) of the CC, liability is joint and several where each of the debtors is responsible for full satisfaction of the debt, which then releases all the debtors from liability. In accordance with Article 517(1) of the CC, joint and several liability does not preclude the debtors from being sued jointly by the creditor. Article 519(1) of the CC provides that the

creditor is entitled to seek from each debtor full or partial satisfaction of the debt, irrespective of whether the share of the debtor who is sued is proportional. If the creditor seeks to recover all or part of the debt from one of the debtors through the courts, he may not sue the other debtors for the amount he has claimed from the first debtor, unless that debtor is insolvent or is at risk of insolvency, or if there is some other reason why the creditor is unable to recover the debt from the said debtor.

101. IST's argument presupposes that, by bringing a joint action against the contractors, the Commission has waived the opportunity to take action against each of them jointly and severally for reimbursement of the full amount.

102. I consider this view to be founded on an erroneous interpretation of Article 519(1) of the CC. That article provides that a creditor may seek satisfaction of the debt from each debtor, but that the creditor only waives the right to rely on the joint and several liability of the remaining debtors where he has taken *legal* action against the first debtor. That is not the situation in this case. On 11 November 1995, the Commission sent MPR a demand for payment, which should be regarded as the initial step in bringing legal proceedings in the matter. This can also be deduced from the letters of formal notice which the Commission sent to MPR on 10 March 1997 and 4 July 1997. In both letters, the Commission gives notice that it will take legal action if the advance payment is not reimbursed within the period laid down. The judicial phase of the matter only began with these proceedings before the Court of Justice.

103. Therefore, under the provisions of the contract, Portuguese law does not preclude the Commission, as the creditor, from suing the contractors jointly and severally for reimbursement of the advance, even though it had already sent letters of formal notice and demands for payment to MPR.

104. Finally, IST relies on Article 520 of the CC in support of its claim that it is exempt from any obligation to pay the interest owed to the Commission.

105. Article 520 of the CC is worded as follows: 'If performance becomes impossible for a reason attributable to one of the obligors, they are all jointly and severally liable for the amount of the debt, however only the defaulting obligor shall be liable to compensate for damage which exceeds that amount and, if there is more than one, their liability shall be joint and several.'

106. IST contends that it is not liable for the payment of compensation in the form of interest because it did not contribute to

the non-performance of the contract and because it discharged its obligation to inform the Commission, pursuant to Article 2 of the general conditions.

107. It is not disputed that the interest claimed by the Commission should be regarded as compensation within the meaning of Article 520 of the CC.

108. I will be brief on the subject of these arguments put forward by IST. In my opinion, it can be inferred from the foregoing that both MPR and IST contributed to the non-performance and, therefore, to the termination of the contract. In the case of IST, suffice it to point out that it failed to discharge its obligation, under Article 2(2) of the general conditions, to inform the Commission within an appropriate period about the delays in executing the contract. IST can also be said to have permitted the amount of interest owed to increase. IST must have been aware of MPR's problems from an early stage and, in any event, from August 1995, when the Commission finally terminated the contract, it must have known that the contract provided that the Commission was entitled to recover the advance, together with interest, from each of the contractors.

109. Even on the supposition that IST did not receive any advance, in such a situation, as the final section of Article 520 of the CC provides, each contractor who is liable for the non-performance is jointly and severally liable for payment in full of the compensation. The fact that MPR might, perhaps, be more at fault than IST for the failure to execute the contract is immaterial to the legal position *vis-à-vis* the Commission. The question of culpability is a matter for debate in proceedings concerning the contractors' reciprocal obligations.

110. Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro [8] provides that any reference to the ecu shall be replaced by a reference to the euro at a rate of one euro to one ecu.

VI — Costs

111. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Commission applied for an order for costs against both MPR and IST, and since the pleas put forward by both those parties have been dismissed, MPR and IST must be ordered jointly and severally to pay the costs.

8 — OJ 1997 L 162, p. 1.

VII — Conclusion

112. I propose that the Court should:

(1) Order Manuel Pereira Roldão e Filhos, Lda. by default to pay jointly and severally to the Commission of the European Communities the sum of EUR 357 813, together with EUR 185 833.78 by way of interest to 1 January 1999, plus interest accrued until the date of full payment.

(2) Order Manuel Pereira Roldão e Filhos, Lda. by default to pay jointly and severally the costs of the proceedings.

(3) Order Instituto Superior Técnico to pay jointly and severally to the Commission of the European Communities the sum of EUR 357 813, together with EUR 185 833.78 by way of interest to 1 January 1999, plus interest accrued until the date of full payment.

(4) Order Instituto Superior Técnico to pay jointly and severally the costs of the proceedings.