JUDGMENT OF THE COURT (Second Chamber)
11 October 2001 *

In Case C-77/99,

Commission of the European Communities, represented by R.B. Wainwright and K. Schreyer, acting as Agents, assisted by M. Núñez-Müller, Rechtsanwalt, with an address for service in Luxembourg,

applicant,

v

Oder-Plan Architektur GmbH, in liquidation, established in Berlin (Germany), represented by its liquidator, C. Schlote,

NCC Deutsche Bau GmbH, formerly NCC Siab Bau GmbH, established in Fürstenwalde (Germany), represented by D. Stoecker, Rechtsanwalt,

and

Esbensen Consulting Engineers, established in Virum (Denmark), represented by D. Stoecker,

defendants,

* Language of the case: German.

APPLICATION by the Commission of the European Communities under Article 181 of the EC Treaty (now Article 238 EC) for repayment of an advance paid by the Commission under the Thermie Programme referred to in Article 1 of 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),

THE COURT (Second Chamber),

composed of: N. Colneric (Rapporteur), President of the Chamber, R. Schintgen and V. Skouris, Judges,

Advocate General: S. Alber,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the Commission and from NCC Deutsche Bau GmbH and Esbensen Consulting Engineers at the hearing on 6 December 2000,

after hearing the Opinion of the Advocate General at the sitting on 25 January 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 3 March 1999 the Commission of the European Communities brought an action under Article 181 of the EC Treaty (now Article 238 EC) for an order requiring Oder-Plan Architektur GmbH ('Oder-Plan'), NCC Deutsche Bau GmbH ('Deutsche Bau') and Esbensen Consulting Engineers ('Esbensen') jointly and severally to pay it EUR 54 510, plus interest of EUR 20 798.70 for the period 1 January 1993 to 15 January 1999, and, as from 16 January 1999, interest at the rate applied by the European Monetary Cooperation Fund for its euro transactions, plus 2% of the principal amount of EUR 54 510.

Facts and legal background

2 On 15 September 1992 the European Community, represented by the Commission, concluded with Oder-Plan, Deutsche Bau and Esbensen a contract granting to them, jointly and severally, financial support for implementation of a project entitled 'Oderhaus — Passive Solar Energy in an Innovative Office Building' ('the contract'). The registered offices of Oder-Plan and Deutsche Bau are in Germany and that of Esbensen in Denmark.

3 The contract was concluded under 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).

4 In Article 9.1 of the contract, the parties agreed to apply German law and, in Article 12 of Annex II thereto, they conferred jurisdiction on the Court of Justice of the European Communities.

5 The contract designates Oder-Plan, Deutsche Bau and Esbensen as the 'contractors' which, according to the preamble and Article 2 of Annex II to the contract, are joint and several debtors. The latter article provides *inter alia* that the contractors are in principle to be jointly and severally liable vis-à-vis the Commission if any of them should breach its obligations.

6 For the purposes of the contract, Oder-Plan was assigned the role of coordinator. Under Article 1.4 of the contract, the coordinator takes responsibility on behalf of the contractors for presenting all documents to the Commission and for relations between the contractors and the Commission. Furthermore, under that provision, all general communications sent by the Commission to the contractors and vice versa are to pass through the coordinator.

7 Paragraph B.4 of Annex I to the contract allocates obligations as between the contractors in respect of the project. Oder-Plan and Esbensen are responsible for 'engineering/design', Deutsche Bau is responsible for 'construction' and 'erection' and Oder-Plan alone is responsible for 'administration'.

8 Under Article 2 of the contract, work was to start on 1 June 1992 and to be completed by 30 April 1996. Paragraph B.7 of Annex I to the contract sets out the work programme to be executed by the contractors. Under the first sentence of Article 2.2 of the contract, the Commission was to be informed promptly of any delay in implementation of the project.

9 Under Article 3.1 of contract, the total cost of the project was set at ECU 10 321 865. Under Article 3.2, the Commission was to bear 30% of reimbursable expenditure, excluding VAT, incurred in respect of the project, up to a maximum amount of ECU 233 100. The reimbursable expenses are set out in paragraph B.11 of Annex I to the contract. They are divided into project design expenses, execution expenses and monitoring expenses. The reimbursable expenses allocated for project design in that paragraph amount to DEM 161 000. According to Table 2 in Annex I to the contract, that amount is divided into DEM 96 600 for preliminary design and DEM 64 400 for detailed design.

10 Under Article 4 of the contract, read in conjunction with Article 17.2 of Annex II, the Commission was to pay to the coordinator, within two months of signature of the contract by all the parties, an advance of ECU 69 930, which represents 30% of the maximum sum of ECU 233 100 mentioned in Article 3.2 of the contract.

11 According to Article 5 of the contract and Article 6.1(a) of Annex II, the contractors were required to forward to the Commission, through the coordinator, various half-yearly technical and financial reports.

12 Under Article 17.3 of Annex II to the contract, the contractors were required, to the extent to which, upon completion or suspension of the contractual works, the payments so far made by the Commission exceeded the total financial contribution due from the Commission under that annex, to repay the surplus without delay.

13 The second sentence of Article 2.2 of the contract stipulates that it may be terminated in the circumstances described in Article 8 of Annex II. Pursuant to Article 8.2(d) of that annex, if one or more contractors fail to fulfil their obligations and there are no reasonable technical or economic grounds justifying

such failure, the Commission may, after calling on the contractors, in a letter sent by registered post or delivered against a receipt, to fulfil their obligations, terminate the contract if they have still not fulfilled them one month after receiving that letter.

14 If the contract has been terminated under Article 8.2(d), the Commission may, under Article 8.4 of Annex II, require reimbursement of all or part of the Community aid. Moreover, in such circumstances it may claim interest on the amount to be reimbursed at the rate applied by the European Monetary Cooperation Fund to its transactions in euro, plus two percentage points, as from the date on which the aid was received by the contractors.

15 However, under subparagraph (c) of the third sentence of Article 2 of Annex II to the contract, an individual contractor is not required to effect reimbursement under Article 8.4 of that annex if he can show, to the Commission's satisfaction, that he himself has not contributed to the default and that he has fulfilled his reporting obligations under Article 1.4 of Annex II. Under the latter article, the contractors are required *inter alia* to inform the Commission promptly of any stoppage of the works and of all circumstances liable to have a substantial impact on performance of the contract.

16 The half-yearly financial and technical reports referred to in Article 5 of the contract were not submitted to the Commission. The Commission therefore sent to each of the contractors on 20 January 1995 a registered letter with a form for acknowledgement of receipt, giving them a period of two months in which to meet the obligation of submitting a report, and giving notice that if that obligation was not fulfilled it would terminate the contract and call for repayment of the aid paid.

17 Esbensen denies having received that letter. Oder-Plan, by letter of 27 March 1995, informed the Commission that implementation of the project had not commenced since the requisite site had not been purchased. It also stated that,

since it was having no success in buying the sites originally chosen for implementation of the project or replacement sites, the project could not be executed.

18 The contractors did not submit the reports asked for within the period set by the Commission in its letter of 20 January 1995. On 17 October 1995, the Commission then sent them by registered post, with forms for acknowledgement of receipt, identical letters terminating the contract. The reasons which it gave for termination were that the reports called for in the formal notice had not reached it and that the project could not be carried out. The Commission also called for repayment of the advance paid, plus interest. Deutsche Bau and Esbensen deny having received that letter from the Commission.

19 By letter of 24 October 1995 Oder-Plan submitted to the Commission a report dated 28 July 1995 which recorded the state of progress of the project and its failure, and the use made of the advance disbursed by the Commission. According to that letter, the project was to be regarded as having definitively failed at the end of 1993.

20 In that report, Oder-Plan claimed that costs relating to implementation of the project amounting to a total of DEM 282 790 had been incurred. The expenditure was broken down as follows:

— DEM 84 000 for changes to the project design made necessary by the adoption of a different location (Karl-Marx-Strasse/ Bergstrasse instead of Mühlengasse 1) (see paragraph 7.1 of the report);

— DEM 16 970 for changes affecting energy technology (innovative energy sources) in relation to the new design (see paragraph 7.2 of the report);

— DEM 24 500 for changes to the project in relation to problems concerning the site, subdivision of the site, etc.; that sum includes DEM 20 000 repaid by Oder-Plan to NCC Siab Bau GmbH (see paragraph 7.3 of the report);

— DEM 14 760 for negotiations that had to be undertaken with the energy suppliers in relation to the energy aspects of the new project design (see paragraph 7.4 of the report);

— DEM 142 560 for project management, in particular the requisite negotiations with the municipal administration and site owners (see paragraph 7.5 of the report).

21 By letter of 12 February 1996 the Commission informed the contractors that it agreed to reimbursable expenses only of DEM 96 600, or ECU 51 401, incurred in the 'preliminary design' phase. It thus calculated the aid as 30% of ECU 51 401, namely ECU 15 420. It therefore called on the contractors to repay it the sum of ECU 54 510 (the advance of ECU 69 930 less the approved aid of ECU 15 420), plus interest which it calculated as amounting to ECU 11 175 for the period from 1 January 1993 to 30 September 1995, giving a total of ECU 65 685. At the end of the letter, the Commission stated that in the next few days its accountant would inform the contractors of the arrangements for reimbursement and asked them not to make any payment in the intervening period.

22 None of the contractors made any payment.

23 The Commission's application was sent to Oder-Plan by registered post on 9 March 1999. The acknowledgement of receipt was duly returned to the Court Registry, but the signature on it was illegible. On 7 April 1999, the envelope was returned unopened to the Court Registry, bearing the following handwritten words: 'Please return to sender — Oder-Plan Architektur GmbH was dissolved on 15 November 1996 — there is no longer any director named Christian Schlote'. A further endorsement on the envelope indicated that it was delivered to the addressee on 22 March 1999.

24 On 15 June 1999, the Commission produced a notarially certified extract from the Registry of Commerce of the Amtsgericht Charlottenburg, Berlin, Germany, stating that Oder-Plan had been dissolved under Paragraph 1 of the Law of 9 October 1934 and that an application for insolvency proceedings had been dismissed because of insufficiency of assets by order of the Amtsgericht Charlottenburg, of 14 November 1996, which had become final.

25 Since Oder-Plan had lodged no defence, on 15 June 1999 the Commission asked the Court to find in its favour. A copy of the Commission's application to that effect was sent to Oder-Plan on 21 July 1999 by registered post. However, it was returned to the Registry bearing the following endorsement from the Post Office: 'Gone away without leaving a forwarding address'.

Admissibility of the application

26 The Commission's application is inadmissible to the extent to which it claims, for the period starting on 16 January 1999, interest at the rate applied by the

European Monetary Cooperation Fund to its transactions in euro, plus two percentage points. Since the Fund no longer exists, the relevant interest rates have not been published since at least 1994. The Commission itself put forward that argument in Case C-172/97 OP *SIVU* v *Commission* [2001] ECR I-6699. It is therefore impossible to determine the amount of interest claimed by the Commission as from 16 January 1999. That part of the form of order sought by the Commission is, to that extent, indeterminate. A judgment of the Court granting that relief could not be enforced. The interest claimed could not be calculated. The application must therefore be dismissed as inadmissible to the extent to which it relates to interest reckoned from 16 January 1999.

27 For the rest, the Commission's application is admissible, including the claims directed against Oder-Plan.

28 According to the law of the country where it has its registered office, namely German law, Oder-Plan has legal capacity and can be a party to legal proceedings pursuant to Paragraph 13 of the Gesetz betreffend Gesellschaften mit beschrankter Haftung (Law on limited liability companies, hereinafter 'GmbHG').

29 Oder-Plan has not lost its legal capacity or the capacity to be a party to legal proceedings as a result of the fact that, after dismissal, on grounds of insufficient assets, of an application for the opening of insolvency proceedings an entry was made in the registry of commerce under Article 1 of the Gesetz über die Auflösung und Löschung von Gesellschaften und Genossenschaften (Law on the dissolution and de-registration of companies and cooperatives) indicating that it has been dissolved (see to that effect the judgment of the Bundesarbeitsgericht of 22 March 1988 — 3 AZR 350/86 — *Neue Juristische Wochenschrift* 1988, p. 2637). On the contrary, it has become a company in liquidation, and its chief executive has become the liquidator under Paragraph 66(1) of the GmbHG.

30 Nor has Oder-Plan lost its legal capacity or the capacity to be a party to legal proceedings as a result of the loss of its assets. Its entry in the register of commerce has not yet been removed. According to an opinion prevailing in the context of German law, based on the theory of legal clarity, that means that, regardless of any loss of its assets, it has lost neither its legal capacity nor its capacity to be a party to legal proceedings (see judgment 3 AZR 350/86, cited above; Bork, in Stein Jonas, *Kommentar zur Zivilprozessordnung*, 21st edition, 1993, Article 50, paragraph 34(c)). The Court accepts that opinion.

The merits of the action against Deutsche Bau and Esbensen

Arguments of the parties

31 The Commission maintains that Deutsche Bau and Esbensen are jointly and severally liable to reimburse ECU 69 930, being part of the advance of ECU 54 510.

32 In its view, the contract between the parties came to an end when it was terminated by its letters of 17 October 1995.

33 Esbensen also received the formal notice of 20 January 1995 threatening termination of the contract. That fact is clear from a letter from Esbensen to the Commission of 7 March 1995, in which it gave its specific views on the Commission's charges. Deutsche Bau and Esbensen also received the letters of termination of 17 October 1995, as is clear from the acknowledgements of receipt produced by the Commission.

34 Because first, in breach of Article 1.1 of the contract, the contractors did not execute the project, second, in breach of the first sentence of Article 2.2 of the contract, they did not promptly inform the Commission of the occurrence of delays, and, third, in breach of Article 5 of the contract, read in conjunction with Article 6 of Annex II, they did not submit the reports required by the contract within the additional period granted to them by the letter of 20 January 1995, the Commission considers that it was entitled, under Article 8.2(d) of Annex II to the contract, to terminate the contract by letter of 17 October 1995.

35 According to the Commission, the contractors are jointly and severally liable to reimburse the advance. It submits that Deutsche Bau and Esbensen cannot claim exemption from liability under Article 2(c) of Annex II to the contract because they did not fulfil their obligations to provide information under Article 1.4 of that annex.

36 The Commission states that the reimbursable expenses amount to a maximum of DEM 96 600.

37 In its view, the expenditure referred to in paragraphs 7.1, 7.3 and 7.5 of the report of 28 July 1995 is not reimbursable because it is essentially attributable to the fact that the contractors were not in a position to acquire the site originally intended to be used for the project. Moreover, reimbursement ceased to be available as a result of the very fact that the expenses mentioned in paragraph 7.1 of the report relate to a totally new project. That project had nothing to do with the one originally submitted to the Commission on the basis of which the Commission had concluded the contract.

38 Deutsche Bau and Esbensen contend that the termination notified by the Commission's letters of 17 November 1995 did not bring the contract to an end.

39 First, they say they did not receive the letters of termination of 17 October 1995. It is true that the acknowledgement of receipt of the letter sent to Deutsche Bau bears the ink-stamp of the Fürstenwalde post office but there is no signature in the space provided for that purpose. Moreover, Esbensen did not, it says, receive the letter of 20 January 1995.

40 Second, the termination is invalid because there were no grounds for termination. The Commission relied solely on the fact that, contrary to the provisions of Article 5, or indeed Article 6, of Annex II to the contract, the contractors failed to fulfil their reporting obligations. It is true that, under Article 2 of Annex II to the contract, the contractors are jointly and severally liable to the Commission. However, according to the special provisions of Article 1.4 of the contract, fulfilment of those obligations is the exclusive responsibility of Oder-Plan, as coordinator. Only as regards fulfilment of reporting obligations could the Commission purport to terminate the contract, given that its letter of 20 January 1995 had created the contractual conditions for repudiation only on that basis (see Articles 8.2(d) and 8.4 of Annex II to the contract).

41 The breach of the contract by Oder-Plan cannot, however, be imputed to Deutsche Bau or Esbensen.

42 The latter have breached no obligation regarding the failure to submit financial reports. It was incumbent on Oder-Plan alone to forward to the Commission a financial report covering all expenditure. In that connection, Esbensen encouraged Oder-Plan to fulfil its obligations regarding the submission of reports.

43 According to Esbensen, the Commission might at least have considered the possibility of terminating the contract, under Article 8.5 of Annex II, solely as

regards Oder-Plan and considered pursuing the project with the other contractors, with new partners.

44 In the alternative, Deutsche Bau and Esbensen contend that, even if they were liable, they could be liable only in accordance with the principles applicable to unjust enrichment. However, in their view, in the absence of enrichment there is no law allowing reimbursement to be sought from them, as is clear from Paragraph 818(3) of the German Civil Code ('BGB').

45 They also contend that the Commission made a mistake in calculating the reimbursable expenses.

46 In its letter of 12 February 1996, the Commission was wrong to consider that the definitive grant amounted only to ECU 15 420 (30% of ECU 51 401, or DEM 96 600). The Commission made the mistake of interpreting the contract as meaning that the reimbursable expenditure for the design phase was limited to DEM 96 600. In doing so it overlooked the fact, first, that table 2 in annex I to the contract shows only the estimated expenditure used as a basis for calculating the advance provided for in the first indent of Article 4.1 of the contract. However, the total Commission aid is not limited to that advance. Second, the Commission ignored the fact that the estimated costs for design are not limited to DEM 96 600: the total amount allocated for project design was DEM 161 000, namely the expenses for a 'preliminary design' and those in respect of a 'detailed design'. The expenditure actually incurred by Oder-Plan, however, related not to general preliminary designs, as might appear to be implied by the term 'preliminary design', but to detailed planning for the project at the intended location.

47 Since the Commission was aware, when the contract was concluded, that the site was to be used for the project had not yet been purchased by Oder-Plan, the

additional planning expenditure resulting from the required reorganisation clearly fell within the risks to be borne by the Commission. The expenses shown in paragraphs 7.1, 7.3 and 7.5 of the report of 28 July 1995 are therefore reimbursable.

48 Furthermore, Deutsche Bau and Esbensen contend that the Commission also made a mistake which contributed significantly, first, to the loss of interest which it claims and, second, to the impossibility for the actual recipient of the payments from the Commission to reimburse the amounts advanced by the Commission.

49 In their view, if the Commission had called for a reimbursement of the advance at an earlier stage, the funds would not yet have been fully used and since Oder-Plan at that time had sufficient resources to cover the sum advanced, the Commission would not have suffered any loss.

50 As regards the interest claimed by the Commission, Deutsche Bau and Esbensen submit that the claim is time-barred. They also contend that they are not under any obligation to pay interest for the period following 12 January 1996 because, in its letter of 12 February 1996, the Commission asked them not to make any payments immediately and no request for payment was made to them subsequently.

51 The Commission considers that the objection based on lapsed enrichment (*Wegfall der Bereicherung*) is unfounded since Paragraph 818(3) of the BGB is not applicable to rights of termination incorporated in a contract or to subsequent implementing measures.

52 In response to the claim by Deutsche Bau and Esbensen for reimbursable expenses of a higher amount than that indicated by the Commission, on the ground that they undertook not only a preliminary design but also a detailed design, the Commission objects that it has not at any time received evidence of any such detailed design. Moreover, the project was never initiated, still less completed, so that in any event the availability of subsidies for it was a matter to be treated with caution.

53 The Commission considers that it bears no share of responsibility. In its view, the allegation that it does so is irrelevant, being contrary to good faith.

54 Finally, it considers that its claim for interest is not time-barred, because the limitation period of four years did not start to run before 31 December 1996.

Findings of the Court

55 Pursuant to Article 8.4 of Annex II to the contract, the Commission is entitled to call on Deutsche Bau and Esbensen to reimburse part of the advance of ECU 69 930 disbursed, namely the sum of EUR 54 510.

56 When it sent to Deutsche Bau and Esbensen letters of termination on 17 October 1995, the Commission was entitled, under Article 8.2(d) of Annex II to the contract, to terminate the contract.

57 There was at least one ground for termination. Oder-Plan, in its capacity of coordinator, had informed the Commission by letter of 27 March 1995 of the failure of the project, which dated back to the stage of acquiring the requisite site. Deutsche Bau and Esbensen did not therefore fulfil their obligation under Article 1 of the contract to execute the project and cannot invoke reasonable and proven technical or economic grounds for failing to do so.

58 Admittedly, the Commission ought, under Article 8.2(d) of Annex II to the contract, to have invited the contractors, before termination, to pursue the project in accordance with their contractual obligations. However, in accordance with the principles of good faith (Paragraphs 242 and 157 of the BGB), no such invitation was necessary in this case. In its letter of 27 March 1995, Oder-Plan had informed the Commission in definitive and unequivocal terms that the project had come to an end. Moreover, the relationship of trust between the parties to the contract, a precondition for due performance thereof, was destroyed. Almost three years after the official starting date of the works, 1 June 1992, and after prompt payment of the advance by the Commission, the contractors had not yet even acquired the site necessary for execution of the project. For that reason, contrary to Esbensen's argument, it was no longer possible to require the Commission, under Article 8.5 of Annex II to the contract, to terminate the contract only vis-à-vis Oder-Plan and to continue it with the other two contractors.

59 Since the Commission was thus entitled to terminate the contract, it is unnecessary to consider whether it could also do so on the ground that the contractors had not submitted the requisite technical and financial reports requested of them by letter of 20 January 1995.

60 Furthermore, the Commission properly declared the contract terminated vis-à-vis Deutsche Bau and Esbensen. It is undisputed that Oder-Plan received the Commission's letter of termination of 17 October 1995, from which it is absolutely clear that it had terminated the contract vis-à-vis all the contractors. The Commission has also produced evidence to show that, despite its denials, Esbensen had received the letter of termination of 3 November 1995. The Commission produced an acknowledgement of receipt on which the delivery of the packet to Esbensen is duly recorded. The position is different regarding the

acknowledgement of receipt of the letter of 17 October 1995 sent to Deutsche Bau, which was not properly signed. However, it is unnecessary to decide whether the letter of termination sent to Oder-Plan brought the contract as a whole to an end on the ground that Oder-Plan, as coordinator, was under a duty to receive all communications addressed to the other contractors, or whether that duty extended to a declaration of termination. The Commission's termination of the contract vis-à-vis Deutsche Bau took place in any event at the time of notification of the application, to which the letter of termination of 17 October 1995 was annexed.

61 The Commission may therefore, after termination of the contract, require total or partial reimbursement of its financial contribution under Article 8.4 of Annex II to the contract. In that connection, Deutsche Bau and Esbensen are jointly and severally liable under Paragraph 421 et seq. of the BGB. That is clear from the contract itself, which states expressly that the contractors are jointly and severally liable, implying that they are required to execute the project and not only to execute certain works appertaining to each of them. It thus follows from the contract that each of the contractors must be answerable, under Paragraph 425(1) of the BGB, for another contractor's failure to fulfil its obligations. Furthermore, joint responsibility of that kind for default on the part of joint and several debtors is normally accepted in German law where, as in this case, a number of undertakings give a commitment to carry out works (see the judgment of the Bundesgerichtshof of 18 October 1951 — III ZR 138/50 — *Neue Juristische Wochenschrift* 1952, p. 217).

62 Deutsche Bau and Esbensen must therefore also accept liability, in principle, for the default of Oder-Plan, which they hold responsible for the failure of the contract. However, Article 2(c) of Annex II to the contract provides for an exception to the joint and several liability of the contractors regarding the reimbursement obligation laid down in Article 8.4 of that annex. A contractor is relieved of liability if he can prove that he did not contribute to the breach of contract committed by the defaulting contractor and that he satisfied his reporting obligations under Article 1.4 of Annex II to the contract. Deutsche Bau and Esbensen have not satisfied those conditions. They have not produced detailed evidence to prove that they were not implicated in the failure to execute the project. In particular, they have not shown that they fulfilled their reporting obligations.

63 The Commission's entitlement to repayment of the advance also derives from Article 17.3 of Annex II to the contract. According to the provision, the contractors are required, in the event of stoppage of the works, to repay the Commission the difference between the payments in excess already made by it and the total financial contributions due from the Commission under the clauses of Annex II. It is undisputed that the contractors stopped work on the project at the end of 1993. They are therefore required, under Article 17.3 of Annex II to the contract, to repay the advance received to the extent to which it does not correspond to expenses that are reimbursable under the contract.

64 As regards the amount concerned, the Commission is right to claim repayment of EUR 54 510.

65 The reimbursable expenses amounted to DEM 96 600, or ECU 51 401, 30% of which (ECU 15 420) must be deducted from the advance paid, which amounts to ECU 69 930, in accordance with Article 3.2 of the contract. Contrary to the submissions of Deutsche Bau and Esbensen, it is not appropriate to allow reimbursable expenses in excess of that sum. In the first place, as the Advocate General explained in detail in points 79 to 82 of his Opinion, by virtue of the contractual relationship between the parties, the advance paid by the Commission could not be used, without the Commission's consent, for a project other than that described in detail in Annex I to the contract. Next, contrary to the contention of Deutsche Bau and Esbensen, detailed studies could not have been carried out before the final location of the project was determined. In any event, Deutsche Bau and Esbensen have not produced any evidence in that regard.

66 The defence of lapsed enrichment raised by Deutsche Bau and Esbensen under Paragraph 818(3) of the BGB cannot succeed. In the first place, by paying the advance to the coordinator, the Commission satisfied vis-à-vis all contractors its obligations under Article 3.2 of the contract to grant an advance. That payment from the Commission is consequently effective vis-à-vis all the contractors and they, for their part, are therefore jointly and severally liable to effect reimbursement under the conditions mentioned above. Deutsche Bau and

Esbensen cannot, in order to resist that contractual obligation of reimbursement, rely on the argument of lapsed enrichment under Paragraph 818(3) of the BGB. On the contrary, it is clear from the actual agreement between the parties concerning the advance that the recipients must reimburse it if and to the extent to which execution of the contract does not give rise to reimbursable expenses to be offset by the advance under the contract. In view of the fact that the Commission performed its obligations in advance, the contractors were under an obligation to make arrangements to meet any repayment obligation that might arise. Consequently, the argument based by Deutsche Bau and Esbensen on lapsed enrichment cannot be upheld.

67 Finally, Deutsche Bau and Esbensen cannot refuse to reimburse the advance in reliance on the fact that the Commission should have sought repayment of it from Oder-Plan at an earlier stage, when it was still solvent, and that the Commission thus made a major contribution to causation of the damage.

68 In that connection, it must be made clear that the Commission is not enforcing a right to compensation but is claiming partial reimbursement of the advance paid by it. Paragraph 254 of the BGB, on which Deutsche Bau and Esbensen seem to be relying in alleging that a fault on the part of the Commission contributed to causation of the damage, is therefore not applicable (see Heinrichs, in Palandt, *Bürgerliches Gesetzbuch*, 60th edition, 2001, Paragraph 254 of the BGB, paragraph 5 et seq.).

69 Pursuant to Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), it is necessary, as regards the principal amount and the interest, to replace the reference to ecu by a reference to the euro at the rate of one euro for one ecu.

70 According to Article 8.4 of Annex II to the contract, the contractors are required to pay interest at the contractual rate. Contrary to the contention of Deutsche Bau and Esbensen, that obligation did not cease on 12 February 1996. In its letter of 12 February 1996, although it asked them, for accounting reasons, not to make any immediate payment, the Commission certainly did not waive its contractual right to interest in the event of the contractors not making any subsequent payment. However, Deutsche Bau and Esbensen are right to claim that the arrears of interest for 1993 and 1994 are time-barred. Under Paragraph 199 of the BGB, the starting point of the limitation period must be the date on which the contract could have been terminated for the first time. That position already obtained in 1993 because the contractors had ceased work during that year. Consequently, for 1993 and 1994, the limitation period of four years laid down in Paragraphs 197 and 201 of the BGB expired on 31 December 1997 and 31 December 1998 respectively, that is to say before the action was brought. Deutsche Bau and Esbensen are therefore liable to pay interest only as from 1 January 1995.

71 According to the calculation made by the Commission in its letter to the contractors of 12 February 1996, the interest rate for 1993 was 9.75% and for 1994 6.25% on the sum of ECU 54 510. That gives a sum of ECU 5 314.73 for 1993 and ECU 3 406.88 for 1994, totalling ECU 8 721.61. That sum is to be deducted from the total amount of interest, ECU 11 175, which the Commission claims for the period from 1 January 1993 to 30 June 1996. That leaves therefore ECU 2 453.39 for the period from 1 January 1995 to 30 June 1996. For the following period, it is appropriate to accept the calculation made by the Commission, which is not disputed by Deutsche Bau or Esbensen. For the period from 1 July 1996 to 30 July 1998 it is therefore appropriate to adopt the sum of ECU 7 874.55, for the period from 31 July 1998 to 15 December 1998 the sum of ECU 1 428.30, and for the period from 16 December 1998 to 15 January 1999 the sum of ECU 320.85, giving a total of ECU 9 623.70. The interest for the period from 1 January 1995 to 15 January 1999, which Deutsche Bau and Esbensen must be ordered to pay, thus amounts to a total of ECU 12 077.09. As indicated in paragraph 69, that sum must be stated as EUR 12 077.09.

Admissibility of the application for judgment by default to be given against Oder-Plan

72 The Commission's application for judgment by default to be given against Oder-Plan is admissible pursuant to Article 94(1) of the Rules of Procedure.

73 The application was duly notified to Oder-Plan by registered post with a form for acknowledgement of receipt in accordance with the combined provisions of the first sentence of Article 39 and the first paragraph of Article 79(1) of the Rules of Procedure. Oder-Plan lodged no defence and therefore the Commission's request for judgment by default, which was duly notified to Oder-Plan by the posting of the relevant document on 23 July 1999, in accordance with Articles 79, 40(1) and 38(2) of the Rules of Procedure, is admissible.

The merits of the application for judgment by default to be given against Oder-Plan

74 In accordance with Article 94(2) of the Rules of Procedure, the same orders must be made against Oder-Plan, by way of the judgment by default, as against Deutsche Bau and Esbensen, since the action against Oder-Plan appears well founded for the same reasons — and to the same extent — as those which have led to judgment against Deutsche Bau and Esbensen.

Costs

75 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Oder-Plan, Deutsche Bau and Esbensen have essentially been unsuccessful in their submissions, they must be ordered jointly and severally to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **By way of judgment by default, orders Oder-Plan Architektur GmbH, jointly and severally with NCC Deutsche Bau GmbH and Esbensen Consulting Engineers, to pay to the Commission of the European Communities the sum of EUR 54 510, plus interest of EUR 12 077.09 for the period from 1 January 1995 to 15 January 1999;**

2. Orders NCC Deutsche Bau GmbH and Esbensen Consulting Engineers, jointly and severally as between each other and with Oder-Plan Architektur GmbH, to pay to the Commission of the European Communities the sum of EUR 54 510, plus interest of EUR 12 077.09 for the period from 1 January 1995 to 15 January 1999;

3. Dismisses the remainder of the application;

4. Orders Oder-Plan Architektur GmbH, NCC Deutsche Bau GmbH and Esbensen Consulting Engineers, jointly and severally, to pay the costs.

Colneric Schintgen Skouris

Delivered in open court in Luxembourg on 11 October 2001.

R. Grass N. Colneric

Registrar President of the Second Chamber