OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 15 June 2000 [1]

1. By application under Article 181 of the EC Treaty (now Article 238 EC), the Commission of the European Communities, following a breach of contract [2] which it alleges to have been committed by TVR-Tecnologie Vetroresina SpA ('the defendant' or 'TVR'), asks the Court to order the defendant to reimburse certain sums and to pay compensation for loss and damage.

I — The contract

2. On 13 August 1991, the Commission, of the one part, and the defendant and Brunel University ('Brunel'), of the other, signed Contract No 3440/1/0/187/91/6-BCR-I(30) as part of the European Economic Community's Research and Development Programme's work in the field of applied metrology and chemical analysis. [3] The contract was for research into measuring systems and instruments for products manufactured from composite materials, using filament winding technology.

3. The following clauses of the contract are directly relevant to the proceedings:

— The duration of the project was to be 36 months from the month following signature of the contract (from 1 September 1991 to 31 August 1994) and any delay was to be immediately notified to the Commission (Article 2). TVR was required to submit a progress report every six months and, upon termination of the project, a final report detailing the results obtained (Article 6.1).

— The Commission's financial contribution (up to a ceiling of ECU 584 000) was divided into an initial advance of

1 — Original language: Spanish.

2 — In Iván A. Goncharov's novel, *Oblómov*, two characters conspire to rob Ilyá Ilyich Oblómov of his wealth, remarking:
'And the agreement, the agreement we drew up!' Tarantyev boasted.
...
'But the agreement is signed: they did not trip us up there, did they?' said Tarantyev.
'That, of course, is sacred....'
(Goncharov, I.A., *Oblómov*, translated by David Magarshack, Penguin, London, 1954, pp. 356 and 357).

3 — Council Decision 88/418/EEC of 29 June 1988 (OJ 1988 L 206, p. 29).

ECU 230 000, followed by subsequent periodic payments to be made in respect of the cost statements. It was expressly stipulated that the Commission would make all payments to the defendant, which was to be responsible for immediately transferring the appropriate amount to the other contractor (Article 4).

4. The parties were entitled to terminate the contract on any of the grounds set out in Article 8 of Annex II (General Conditions). Specifically, under paragraph 2(d) of this article, the Commission could terminate the contract in the event of non-performance by one or both of the contractors, unless there were reasonable and justifiable technical or economic reasons, if the contractor concerned was still in breach one month after receipt of notice in writing from the Commission, sent by recorded delivery or registered post, requiring performance of those obligations.

5. Under Article 12 of Annex II, the Court of Justice of the European Communities has sole jurisdiction to deal with any dispute concerning the contract. Article 11 of the contract stipulates that it is to be governed by Italian law.

II — Facts

6. On 20 September 1991, the Commission transferred an advance payment of ECU 230 000 to the defendant, ECU 165 000 of which was to be transferred by the defendant to Brunel pursuant to Article 4 of the contract, referred to above. Brunel, however, did not receive that sum.

7. By letters dated 26 March and 15 April 1993, the Commission requested TVR to transfer that sum to Brunel, warning, in its second letter, that it would terminate the contract and demand repayment of the advance, together with interest, if TVR failed to prove, within one month, that it had made the transfer.

8. On 26 May 1993, the Commission notified TVR of its decision to suspend all financing of the project with effect from that date.

9. Since Brunel had still not received the transfer, the Commission, by letter dated 31 January 1994, terminated the contract under Article 8.2(d) of Annex II and required TVR to reimburse the sum of ECU 165 000, together with interest calculated in accordance with Article 8.4 of that annex.

In a further letter of the same date, the Commission rejected both the cost statement provided by TVR for the period 1 September 1992 to 26 May 1993 and the consolidated cost statement.

At the same time, the Commission notified Brunel of its decision to terminate the contract.

10. On 24 February 1994, TVR sent the Commission a new consolidated cost statement, followed, at the Commission's request, by additional documentation which it submitted on 15 March 1994.

11. By letter dated 6 April 1994, the Commission advised TVR that the information it had supplied was not sufficient to justify its consolidated cost statement. However, it accepted the revised cost statement in respect of the first project year and partially accepted the travel costs for the second project year.

12. Using those figures, the Commission calculated TVR's costs to be ECU 37 386, 50% of which (ECU 18 693) was to be borne by the Community in accordance with Article 3.2 of the contract. Therefore, in July 1994, the Commission claimed from TVR reimbursement of the difference between that sum and its share of the advance (ECU 65 000), that is to say, ECU 46 307. In a letter dated 26 July 1994, the defendant rejected that calculation and requested a review of the contract.

13. On 13 August 1993, the Commission instructed Ernst & Young to carry out an audit of the first contract year (the period from 1 September 1991 to 31 August 1992).

14. On 8 September 1994, Ernst & Young delivered their audit report. The auditors stated that they had found no evidence to show that ECU 165 000 had been transferred to Brunel. With regard to the labour costs, the auditors stated, first, that the amount of working time notified to the Commission was lower than the amount shown in TVR's books and, second, that the defendant had calculated the labour costs for 1992 using the 1991 rates, so that the actual costs could be taken to be higher than those contained in the statement.

By way of conclusion to their report, Ernst & Young stated that, in their opinion, apart from the sum which should have been transferred to Brunel, the costs submitted were in accordance with those contained in TVR's books and with the contract terms.

15. On 30 September 1994, the Commission transferred ECU 165 000 to Brunel, after verifying the accuracy of the costs it had claimed and the work it had carried out under the contract.

16. By letter to the defendant dated 22 June 1995, the Commission made a formal demand for reimbursement of ECU 203 775, including the sum which should have been transferred to Brunel (ECU 165 000), together with interest, and also ECU 46 307 to cover the difference between the work actually carried out by TVR under the contract and the advance paid to it by the Commission on 20 September 1991.

17. Since no response was forthcoming from TVR, the Commission brought the present action before the Court of Justice, seeking an order that the defendant repay the sum of ECU 211 307, plus interest, and pay ECU 20 000 by way of compensation for loss and damage, in addition to the costs of the proceedings.

III — Admissibility of the action

18. TVR claims that the action should be declared inadmissible because, as Italian law is applicable, the duty to make restitution contained in Article 1458 [4] of the Civil Code only takes effect where termination of the contract, on the ground of a breach by one of the parties, has been declared by a court. Since the Commission has not requested the Court of Justice to terminate the contract for breach by the defendant, it cannot claim reimbursement of the sums paid under the contract.

19. In its reply, the Commission asserts, first, that it acted in accordance with the procedure laid down in the contract for terminating it on the grounds of non-performance. Therefore, the contract has already been terminated automatically and there is no need to seek a declaration to that effect from the Court of Justice.

The Commission goes on to refer to the case-law of the Corte Suprema di Cassazione (Supreme Court of Cassation) concerning Article 1453 of the Italian Civil Code on the termination of contracts. The Commission claims that, according to that case-law, there is no requirement that the intention to terminate a contract for non-performance be expressly formulated in an action before the court, since such an intention may be inferred from other actions which, although having a different

4 — The defence erroneously cites Article 1958. Article 1458 of the Italian Civil Code provides: 'Termination of the contract on the ground that it has been breached shall have retroactive effect *vis-à-vis* the parties, except in the case of contracts whose performance is continuous or periodic, where termination shall not affect activities already performed. Termination, even where it has been expressly agreed, shall not adversely affect the rights acquired by third parties, save as regards the effects of the lodging of the action for termination of the contract.'

object, contain an implied application for termination. [5] The Commission states that the Corte Suprema di Cassazione has held, in particular, that the intention to terminate a contract may be contained by implication in an action whereby one of the parties to the contract seeks an order that the other party, who is in default, is to reimburse the sums he was paid when the contract was signed. [6]

For those reasons, and despite the fact that it considers it to be superfluous on the ground that the application for a declaration that the contract has been terminated is, in any event, implicit in its action for reimbursement of the sums paid and for compensation for damage, the Commission requests the Court of Justice to declare that the contract has in fact been terminated.

20. In *Commission* v *SNUA*, [7] to which I shall refer later, the Court dismissed a similar plea of inadmissibility after confirming the validity of the Commission's unilateral termination of a contract. [8] In the light of that case-law, it is appropriate to examine whether, in the present case, the contract between the Commission and TVR was automatically terminated on the ground of non-performance by the defendant.

21. In the Commission's view, the contract was terminated by application of the termination clause contained therein. Although the defendant has not claimed that that clause was invalid, I consider that a number of observations are called for in that regard.

A. *Validity of the contractual termination clause*

22. Termination clauses are governed by Article 1456 of the Italian Civil Code, [9] which allows the contracting parties to agree expressly that the contract will be automatically terminated should there be a breach *of a specified obligation*. According to the case-law of the Corte Suprema di Cassazione, two conditions must be satisfied in order for one party to be entitled to terminate the contract unilaterally by relying upon a termination clause: the clause in question must be valid and responsibility for the breach must be attributable to the other party.

23. With regard to the first requirement, the Corte Suprema di Cassazione has interpreted Article 1456 of the Italian Civil Code as meaning that, in order to be valid, a termination clause must refer to specified obligations arising under the contract, and

5 — Judgment of the Corte Suprema di Cassazione of 15 July 1980, No 4591.

6 — Judgements of the Corte Suprema di Cassazione of 4 October 1976, No 3217; 15 July 1980, No 4591; and 22 February 1992, No 1908.

7 — Case C-69/97 *Commission* v *SNUA* [1999] ECR I-2363.

8 — That is not the only case in which the Court has adjudicated on a claim for reimbursement of sums paid and for compensation for damage brought by the Commission, despite the fact that the latter had failed to seek a prior declaration that the contract had been terminated on the ground of non-performance by the other party: see Case C-334/97 *Commission* v *Comune di Montorio al Vomano* [1999] ECR I-3387 and Case C-65/97 *Commission* v *Cascina Laura and Gariboldi* [1999] ECR I-1017.

9 — Article 1456 provides: 'The parties to the contract may expressly agree that the contract will be terminated if a specified obligation has not been performed in accordance with the rules set out. If such a situation arises, the contract will be terminated automatically when the party concerned notifies the other party that he intends to invoke the termination clause.'

that clauses referring generally to non-performance of all the obligations contained in the contract are to be regarded as 'stylistic clauses' and, as such, inoperative. [10] Those stylistic clauses do not allow the parties to terminate the contract unilaterally; they must apply to the courts instead.

24. So, in the light of the case-law of the Corte Suprema di Cassazione, the termination clause in the contract between the Commission and TVR could be regarded as a stylistic clause. In fact, as I have already pointed out, the Commission reserved the right to terminate the contract if one or both of the contractors breached *any of its obligations*.

25. Nevertheless, I believe that, pursuant to the case-law of the Court of Justice, the contract between the Commission and TVR can be exempted from the requirement that the obligation whose breach could lead to unilateral termination must be specified.

26. In *Commission* v *SNUA*, cited above, the termination clause in the contract between the Commission and the defendant, which was also governed by Italian law, was drafted in different terms and provided that 'the Commission may unilaterally terminate the contract in the event of the contractor's non-performance of any of its obligations thereunder, *in particular if it fails to comply with the stipulations made in Clause 4.3 thereof...*'. [11] The latter condition led the Court of Justice to take the view that the termination clause satisfied the requirement laid down by the Corte Suprema di Cassazione that the obligation must be specified in order for Article 1456 of the Italian Civil Code to apply.

27. None the less, the defendant contended that, as the Commission had acknowledged, the breach of contract was due to *force majeure*, with the consequence that it could not incur any blame and that an express termination clause which was subject to the condition that one of the parties should be held responsible for non-performance could not in any event be relied upon as against it.

28. The Court of Justice did not accept that contention and held that it could be inferred from the termination clause in the contract that the ability to terminate automatically was not conditional upon the existence of fault on the part of the contractor, but instead depended solely upon the non-performance of certain contractual obligations, regardless of their cause or origin.

10 — By way of example, see the judgements of the Corte Suprema di Cassazione of 23 May 1985, No 3119 (Rep. Giur. it., *Obbligazioni e contratti*, 393) and 2 June 1990, No 5169 (Rep. Giur. it., *Obbligazioni e contratti*, 447). The views of Italian civil lawyers appear to be in harmony on this point; see, for example, Mosco, L., *La risoluzione del contratto per inadempimento*, Casa editrice Dott. Eugenio Jovene, Naples, 1950, pp. 196-201, and Sacco, R. and De Nova, G., *Trattato di diritto civile*, Unione Tipografico — Editrice Torinese, Turin, p. 624.

11 — Emphasis added. Clause 4.3 of the contract dealt with the periodic reports which the contractor undertook to send to the Commission.

The Court of Justice added: 'Whilst it is true that the case-law of the Corte Suprema di Cassazione requires that, in order to bring express termination clauses which are subject to Article 1456 of the Italian Civil Code into effect, it must be possible to attribute responsibility for non-performance to the contractor in default, the fact remains that, under Article 1322 of the Code, the parties' right freely to determine the terms of the Contract within the limits set by the law is recognised as forming part of the principle of freedom of contract. It does not therefore preclude the parties to a contract from deciding to insert therein a termination clause which is not subject to the condition that the contractor must be responsible for non-performance, by way of derogation from the usual format of contracts under Italian law.' [12]

29. The Court of Justice took the view that it was clearly the parties' intention to make provision for specific methods of terminating the contract given, *inter alia*, the particular nature of relations between the Community and the company in receipt of funding and the Commission's ability in practice to monitor implementation of the work schedule, which to a large degree depended on the reports which the contractor was required to submit to it under Clause 4.3 of the contract. The Court held, therefore, that the Commission was justified in relying on the termination clause in the contract to terminate the contract automatically.

30. To my mind, the same criteria used by the Court of Justice in relation to the requirement of responsibility for the breach of contract may also be applied to the requirement which Italian law imposes on termination clauses, namely that the obligations to which they apply must be specified.

31. Therefore, it can be deemed that, by availing themselves of the principle of freedom of contract recognised in Article 1322 of the Italian Civil Code, and having regard to the particular nature of the relations between the Commission and the undertaking to which it makes a financial contribution, [13] the parties freely agreed in the contract that *any* breach by TVR of its contractual obligations would entitle the Commission to terminate the contract unilaterally, regardless of the applicable provisions of Italian law. The clarity and precision with which the contract lays down the procedure for and the consequences of unilateral termination by the Commission in the event of non-performance by TVR support that view, particularly when the principle of contractual

12 — *Commission* v *SNUA*, cited in footnote 7 above, paragraph 23.

13 — In that regard, it is interesting to note the view of Professor Draetta, who argues that contracts between the Community and private individuals should be deemed *international contracts*, in respect of which Italian case-law allows the parties to agree that provisions, including compulsory provisions, of the national law of one of the parties, or of the *lex fori*, are not to apply (such as, for example, the provisions of Articles 1341 and 1342 of the Italian Civil Code, dealing with express consent to unfair clauses) (Draetta, U., 'Corte di Giustizia C.E.E. e contratti internazionali: l'art. 181 del Trattato di Roma,' *Diritto del commercio internazionale*, Giuffrè, Milan, 1989). In fact, the contract between the Commission and TVR, and in particular Annexe II thereto, bears all the hallmarks of what is known in international commerce as a self-regulatory contract, in which the parties set out in detail the rules applying to performance and termination (termination by default) of the contract (see Bianchi, M. and Saluzzo, D., *I contratti internazionali*, Il Sole 24 Ore, Milan, 1997).

good faith to which the Commission refers in its reply is taken into account. [14]

32. It is now appropriate to ascertain whether the breach of which the defendant is accused — namely failure to transfer to Brunel the sum of ECU 165 000 — actually occurred and whether the Commission complied with the procedure laid down in the arbitration clause.

14 — In order to complete this analysis, I feel it is appropriate to point out that, in my view, the Commission's unilateral termination of the contract could also be deemed to be valid under Article 1454 of the Italian Civil Code. That provision allows for one of the parties to the contract to give the other party, who is in default, written notice requiring performance of its obligations within a reasonable period, and to warn that upon expiry of that time-limit the contract will be terminated automatically. For a contract to be terminated unilaterally under Article 1454, the following conditions must be satisfied: performance must be demanded in writing; the party making the demand must stipulate a specific and reasonable time-limit to the other party, which in principle must not be less than 15 days; and the intention to terminate the contract should the party on notice fail to perform its obligations within the stipulated time-limit must be expressly stated.
Under Italian law, the court confines itself in such cases to confirming whether the abovementioned conditions have been satisfied, whether the responsibility for non-performance is attributable to the defendant, and whether, as opposed to the procedure where termination is based on an express clause, the non-performance may be defined as significant for the purposes of Article 1455 of the Italian Civil Code. As in the case of termination clauses, the judgment will declare, rather than effect, termination of the contract, since termination will already have taken place *de jure*, provided that the abovementioned circumstances are all present.
To my mind, the request contained in the Commission's letter to the defendant of 15 April 1993 satisfies all the formal conditions laid down in Article 1454 of the Italian Civil Code. Likewise, it must be deemed in the present case that the requirement that responsibility for non-performance be attributable to the party in default is also satisfied. Finally, with regard to the significance that the breach attributed to TVR held with regard to the general structure of the contract, there is no doubt whatsoever that the obligation to transfer the sum in question to the co-contractor, representing Brunel University's remuneration for the work it had carried out under the contract, must be regarded as an essential obligation, breach of which could give rise to unilateral termination of the contract by the Commission.

B. *The defendant's breach of the contract*

33. In its defence, TVR asserts that, of the ECU 230 000 which the Commission transferred to the Istituto Bancario San Paolo, Turin, ECU 65 000 was paid into the defendant's own account and ECU 165 000 transferred directly by the bank to Brunel. However, owing to lack of information relating to the beneficiary (the name of its bank and details of its current account), that sum never came into Brunel's possession and TVR's efforts to discover what had happened to it were fruitless. The defendant adds that, on 31 October 1993, its relationship with the bank concerned broke down completely and it commenced litigation over the bank's disproportionate interest charges. The defendant states that it would be appropriate for the Commission to request information from the Istituto Bancario San Paolo concerning the whereabouts of the abovementioned payment and to demand reimbursement of that sum which, it adds, 'the Istituto has probably retained by reason of the proceedings between it and TVR.'

34. Given the terms of the contract, under which TVR was required to transfer to the other contracting party the sums it received from the Commission for that purpose, there has clearly been a breach. In objective terms, it is a fact that the ECU 165 000 transferred by the Commission to TVR, which TVR was required to transfer immediately to Brunel, was not transferred to Brunel. It was TVR's responsibility to effect

the transfer and non-performance of that obligation cannot be excused by how well or badly a third party (a bank), to which TVR entrusted the transfer on its own initiative, carries out the task which it has been given.

35. The person responsible for transferring the sum of money, *vis-à-vis* both Brunel and the Commission, was TVR. If, for its part, TVR used the professional services of a bank in order to carry out the transfer and was then, at the worst, defrauded by the bank, it is not thereby relieved of its obligation both to the Commission and to Brunel. TVR can claim compensation for damage from the bank, in such form as it considers appropriate, but it is not entitled to shelter behind non-performance by a third party, a stranger to the main contract, to justify the objective breach of its own obligations to the parties to the contract.

36. I therefore conclude that there was a breach of contract and that responsibility for it can be attributed to the defendant.

C. *Delivery of notice under the termination clause*

37. As regards the procedure for termination of the contract set out in Article 8.2(d) of Annex II thereto, which I shall discuss below, to my mind there is no doubt that the Commission scrupulously complied with that procedure. The written notice was sent to the defendant by recorded delivery on 15 April 1993. In it, the Commission requested TVR to remedy its non-performance of the contract within one month and warned that, should it fail to do so, the contract would be terminated under the termination clause. Since the defendant did not comply with the notice within the stated time period, the contract was automatically terminated. Moreover, despite the fact that the termination clause did not contain any such obligation, the Commission confirmed that it had terminated the contract in a subsequent letter dated 31 January 1994.

38. For the reasons given, it is my view that the contract between the Commission and TVR was automatically terminated under the termination clause contained therein. Pursuant to the case-law of the Court of Justice to which I have already referred, the defendant's plea of inadmissibility should be rejected, since, as the contract has already been terminated, the Commission is entitled to claim reimbursement of the sums it paid and compensation for damage without first being required to bring a formal action for termination of the contract.

IV — Substance of the claim

A. *Reimbursement of the sum which was not transferred to Brunel*

39. The Commission requests the Court to order TVR to reimburse the advance of ECU 165 000 which it received in its capacity as co-ordinator of the project and which it should have transferred to Brunel.

40. The considerations which I have set out in points 34 to 36 above will permit me to be brief on this point. TVR must be held liable for failing to transfer the advance of ECU 165 000 to Brunel and the arguments it has made in its defence cannot be accepted.

41. I therefore believe that this part of the action is justified and that the Court may allow the Commission's claim, since the latter, in order to comply with its obligation to Brunel, had to make a second payment of ECU 165 000, which on this occasion it paid directly to the university. [15]

15 — Under 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), as regards the amount of the principal sum and the interest, all references to the ecu are to be replaced by a reference to the euro at a rate of one euro to one ecu.

B. *Reimbursement of part of the advance*

42. The Commission also seeks reimbursement of ECU 46 307, representing the difference between TVR's actual costs and the advance of ECU 65 000 it received from the Commission.

43. In calculating this amount, the Commission accepted the following items from the statement of expenditure submitted by TVR:

— ITL 46 675 000 in respect of labour costs;

— ITL 3 270 538 (for the period 1 September 1991 to 3 August 1992) and ITL 5 092 963 (for the second contract year) in respect of travel expenses;

— ITL 2 396 031 in respect of consumables;

— ITL 623 391 in respect of other costs; and

— ITL 11 667 000 in respect of overheads.

These items come to ITL 69 724 923 in all, of which the Commission is liable to pay 50%, that is to say, ITL 34 862 461, which is equal to ECU 18 693. Since the amount of the advance previously made was ECU 65 000, the difference comes to ECU 46 307.

44. The response to this claim contained in the defence is very unclear, since it merely states that the audit report from Ernst & Young shows that the labour costs calculated by TVR are wholly consistent with the work undertaken and with the amount charged. The defence goes on to say that, according to that report, the charge made for labour was lower than it should have been because it was based on the rate for 1991, rather than 1992, the year in which the work was actually carried out. Therefore, the defendant argues, the second part of the claim is clearly unfounded.

45. To my mind, Ernst & Young's report is of little use when it comes to deciding on this part of the Commission's claim. In fact, the audit only covers the first contract year (1 September 1991 to 31 August 1992), whereas the disagreement between the parties centres on expenditure incurred in the second year (1 September 1992 to 26 May 1993). [16]

16 — At the hearing, the Commission's Agent explained that the audit was confined to the first contract year because, at the time it was requested, the only cost statements which had been received from TVR related to this period.

46. The defendant asserts in the rejoinder that the Commission has adduced no evidence whatsoever that the working time was 'exaggerated'. To my mind, however, the main question is whether TVR justified sufficiently its calculation of the labour costs.

47. It is clear from the documents before the Court that, on 30 November 1993, TVR submitted a cost statement in respect of the second contract year. [17] The Commission rejected that statement in a letter dated 31 January 1994, on the ground, *inter alia*, that at a meeting held in Brussels on 15 March 1993 it had agreed with the contractors that, with effect from that date, certain work provided for in the contract would no longer be funded and that the contractors should confine themselves to completing the feasibility assessment. [18] The Commission therefore requested the defendant to submit details of the work undertaken during the periods 1 September 1992 to 15 March 1993 and then from the latter date up to termination of the contract on 26 May 1993, so that it could ascertain whether that agreement had been complied with.

48. The defendant replied to that letter on 24 February 1994, submitting a consolidated cost statement covering the entire duration of the contract but failing to

17 — Neither the Commission nor, surprisingly, the defendant has seen fit to lodge this statement at the Court.

18 — This time it is the Commission which has acted surprisingly in failing to lodge the minutes of this meeting at the Court. However, a memorandum from Brunel, lodged by the defendant, confirms, at length, the Commission's assertion.

provide the information requested by the Commission. The latter therefore repeated its request in a letter dated 10 March 1994.

49. On 15 March 1994, the defendant sent a further document to the Commission, in which it provided details of the travel costs for the second year but no information relating to labour costs. For that reason, the Commission, in a letter dated 6 April 1994, informed TVR that, in respect of the second year, it had decided to accept only the travel costs and not the labour costs, in respect of which the defendant had failed to supply the information requested. The defendant expressed its disagreement with that decision in a letter dated 26 July 1994, but once again failed to provide further details of the labour costs for the second contract year.

50. In order to adjudicate upon this claim by the Commission, the Court must refer to the documents submitted by the parties. Those documents contain no indication at all that the defendant, in spite of the repeated requests it received from the Commission,[19] provided sufficient information regarding the work performed during the second contract year. Therefore, it is my view that the Commission was entitled to reject the figure submitted by TVR and that this claim should also be allowed.

C. *Interest*

51. Under Article 8.4 of Annexe II to the contract, in the event of termination, the Commission should receive not only reimbursement of advance payments it has made but also interest on those amounts, to be added from the date on which payments were received by the other party to the contract. The rate of interest is the rate applied by the European Monetary Cooperation Fund for its operations in ECU, increased by two percentage points, such rate being published on the first working day of each month.

52. Therefore, the Commission seeks interest on the amount of ECU 211 307 (being the sum of ECU 165 000 paid to TVR for transfer to Brunel and ECU 46 307 representing the difference between the advance and the costs proved by TVR) at the rate of 12% from 21 December 1991,[20] which comes to ECU 69.47 per day. The defen-

19 — Under the heading 'Justification of Costs', Article 36.4 of Annexe II to the contract provides that each contractor is to provide any details reasonably required by the Commission for its management of the contract.

20 — The Commission calculates that TVR received the advance three months after the payment order (which is dated 20 September 1991).

dant submits no claim in that regard, but merely states that the primary obligation to make reimbursement is not enforceable.

53. Since, in my view, TVR must repay the abovementioned sum to the Commission, by way of a primary obligation, it follows that the secondary obligation to pay the corresponding interest — which was expressly agreed — also applies. [21]

D. *Compensation for damage*

54. Last, the Commission requests the Court to order TVR to pay compensation for the damage suffered by reason of its non-performance, which, in the Commission's view, is the following:

— A number of its officials spent a large number of hours monitoring the defendant's activities and requesting it to submit, in the appropriate conditions, the periodic reports. [22]

— The Commission was obliged to instruct a firm of auditors to undertake a financial review of TVR's work.

— The Commission has been unable to enjoy the possible advantages provided for in Article 19 of Annexe II to the contract, concerning the exploitation of information or patents acquired as a result of the research it funded.

— By entering into a contract with a party which did not honour its commitments, the Commission has suffered a loss of credibility in the eyes of all those with a potential interest in entering into a contract with it.

55. The Commission contends that the overall sum to compensate for this damage amounts to ECU 20 000, although the Court may calculate it differently using the option provided in Article 1226 of the Italian Civil Code, which provides that

21 — In answer to a question I asked at the hearing, the defendant's representative stated that he agreed with the Commission's interpretation that the second subparagraph of Article 8.4 of Annexe II to the contract provides for a *fixed* rate of interest in the event of termination of the contract. Since the parties are in agreement on this point, there is no need to analyse the question in greater detail, although I believe that the wording of this clause might perhaps allow a different interpretation.

22 — The Commission calculates that 56 working hours have been lost in this way. Using the rate of ECU 52 per hour, the total amount works out at ECU 2 912 (although the application cites the incorrect figure of ECU 2 925).

where the exact amount of the loss cannot be proved it is to be determined by the court according to equitable principles.

56. In my view, of all those heads of claim, which are disputed by the defendant, only the second, and possibly the third, should be upheld. The other two should be rejected, since:

(a) The hours worked by the Commission's officials during the period prior to termination of the contract cannot be construed as damage, since monitoring the institution's contracts is part of their normal workload. Viewed in this way, the vicissitudes of the Commission's and TVR's contractual relationship do not appear so unusual as to require a disproportionate amount of attention, to the detriment of other administrative tasks, or, as a result, to merit payment of compensation. With regard to the period following termination of the contract, the Court has already held that costs incurred by the parties for the purposes of legal proceedings cannot, in any event, be regarded as constituting damage distinct from the burden of costs. [23]

23 — *Commission* v *Comune di Montorio al Vomano*, cited in footnote 8 above, paragraph 54.

(b) There can be no 'loss of credibility' *vis-à-vis* third parties as a result of one party to a contract, such as the one in these proceedings, failing to fulfil all its obligations and causing the contract to be terminated.

57. With regard to the loss of possible advantages resulting from the exploitation of information or patents acquired as a result of the research financed, there is no reason in principle why such a loss should not be assessed. However, any such advantages in the present case are purely hypothetical and the applicant has provided no information about them. The Commission refers to them in general, abstract terms and fails to provide any firm evidence on which to base even an approximate calculation of the loss of profit. Consequently, even by having resort to the equitable principles provided for in Article 1226 of the Italian Civil Code, the Court would be unable to quantify the damage because it would be acting blindly when attempting to do so.

58. By contrast, sufficient evidence has been provided of the expenditure (ECU 6 610) arising from the consultancy contract between the Commission and Ernst & Young to enable the total cost of

that contractual relationship to be determined. The defendant should be held liable for that item of expenditure in view of its evasive attitude following termination of the contract and of its failure to justify much of the expenditure claimed. Furthermore, TVR does not dispute that head of claim, either in the defence or in the rejoinder.

V — Costs

59. Since virtually the whole application must be granted, and since the applicant has applied for costs, the defendant must be ordered to pay the costs, in accordance with Article 69(2) of the Rules of Procedure.

VI — Conclusion

60. In the light of the foregoing considerations, I propose that the Court of Justice should essentially grant the application and order the defendant to pay to the Commission:

— the sum of EUR 211 307, together with interest at the rate of EUR 69.47 per day from 21 December 1991 until the debt is paid in full;

— the sum of EUR 6 610 by way of compensation for damage; and

— the costs of the proceedings.