OPINION OF ADVOCATE GENERAL MISCHO

delivered on 23 November 1999 *

1. In the context of its jurisdiction under Article 181 of the EC Treaty, the Court of Justice has received an application from the Commission of the European Communities for an order that Van Balkom Non-Ferro Scheiding BV (hereinafter 'Balkom'), a company with which the Commission concluded a contract, reimburse to the Commission an overpayment and pay to it interest on the sum due.

2. The contract at issue falls within the scope of Council Regulation (EEC) No 3640/85 of 20 December 1985 on the promotion, by financial support, of demonstration projects and industrial pilot projects in the energy field. [1] It was concluded by the Commission on 4 December 1990 with three companies for the execution by them, in exchange for financial support given by the Community, of a project for the production of energy from crushed motor vehicle scrap metal.

3. Those three companies are:

— Balkom, whose registered office is in Oss, Netherlands,

— Van Balkom Seeliger GmbH (hereinafter 'VBS'), whose registered office is in Heidelberg, Germany,

both represented at the signing of the contract by their director, Antoon van Balkom,

and

— Deutsche Filterbau GmbH, whose registered office is in Düsseldorf, Germany (hereinafter 'DF').

* Original language: French.

1 — OJ 1985 L 350, p. 29.

4. Under the terms of the contract, the three companies are jointly and severally liable *vis-à-vis* the Community. The Community's financial support for the execution of the project is fixed at 17% of the actual cost, excluding VAT, up to a maximum of ECU 987 343.

5. Clause 8 of the contract provides the Commission with the option of withdrawing from it in the event of the contracting undertakings' failing to fulfil their obligations, whilst the first paragraph of Clause 9 stipulates that:

'The present contract may be terminated by any of the signatories, giving two months' notice, where the programme of work set out in Annex I becomes inoperative by reason, in particular, of a foreseeable technical or economic failure or an excessive overrun on the costs of the project in relation to the estimates',

and the third paragraph thereof that:

'If an audit reveals that the amounts paid by the Commission are too high, the sum paid in error, plus interest due as from the date of ending or finishing the work stipulated in the contract, shall be reimbursed forthwith by the other party to the contract.'

6. Under Clause 13 of the contract, jurisdiction to rule on any dispute between the parties concerning the validity, interpretation or application of the contract is conferred on the Court of Justice, but under Clause 14, the contract is governed by German law. Annex I to the contract contains a programme of work which is divided into five phases: 'Engineering', 'Production and Delivery', 'Installation', 'Demonstration' and 'Final Report and Documentation', and is scheduled for completion by 30 June 1993, and which the Community's partners undertake to comply with under Clause 2.

7. Performance of the contract encountered various problems which led the Commission, on 16 August 1994, to exercise the termination option open to it under Clause 9, cited above, and, on 29 November 1994, to claim from Balkom the reimbursement of a sum of ECU 334 481, including interest. To that end, on 8 February 1995, it drew up a recovery order.

8. Those various problems may be summarised as follows:

At the beginning of 1991, the Commission paid to VBS, as provided in Annex II to the contract, a sum of ECU 296 203, by way of an advance. On 21 August 1991, DF sent a letter to the Commission stating that it, DF, was no longer in a position to be involved in the project since, following measures adopted within the group of companies to

which it belonged, it no longer had a licence for the technology to be implemented.

9. In that letter, a copy of which was sent to VBS, it was stated that the contractual amendments made necessary by that withdrawal would be made with VBS.

10. On 26 August 1991, VBS informed the Commission of DF's withdrawal and told it that the technology which DF was to provide now came under another company in the same group, Deutsche Engineering der Voest-Alpine Industrieanlagenbau GmbH, Essen (hereinafter 'DE'), with which VBS had been in contact, so that continuation of the project appeared to it to be fully assured.

11. In that same letter, VBS gave assurances that negotiations had begun with DF and that other company in order to draw up the necessary contractual provisions, and that the Commission would be kept fully informed of how the negotiations were progressing.

12. Also in that letter, VBS stated that it would continue to honour its own commitments ('Selbstverständlich wird sich an der Einhaltung unserer Verpflichtungen gegenüber der EG-Kommission im Rahmen des Demonstrationsvorhabens nichts ändern') and that, in view of the negotiations which were under way, it should be assumed that all DF's commitments would be taken on by the new partner.

13. VBS did, however, mention certain difficulties which had been encountered in obtaining permission to build in Heidelberg the facilities specified in the contract, which made it impossible to comply with the programme of work stipulated, and so it was going to propose that the programme of work should be amended.

14. So far as this point is relevant, it had taken steps to obtain another site, this time in Thuringen.

15. On 7 October 1991, VBS sent to the Commission the first technical and financial reports, as stipulated in the contract, again referring to the difficulties it was encountering in obtaining the necessary administrative permission to construct the technical facilities. In the light of that report, the Commission made a further advance payment of ECU 39 169 to VBS.

16. On 29 October 1992, VBS sent to the Commission the second technical and financial reports, informing it, first, that, since the parent company of DF and DE had withdrawn from the high-temperature gasification sector, it had found a new partner, Veba Oel Technologie GmbH, and it hoped that the Commission would agree to the latter's involvement and, second, that the project required a number of technical

amendments since different technology was to be used.

17. A few weeks later, however, VBS wrote a letter to the Commission, signed by Mr Van Balkom, informing it that for various reasons it was no longer in a position to be involved in the execution of the project and that it was therefore withdrawing from it, relinquishing any rights *vis-à-vis* the Commission which it might have under the contract.

18. It also stated that it would forward to Balkom all the documents and information it had acquired so that the project could continue and requested the Commission's agreement to those measures.

19. By further letter of 16 February 1993, VBS asked the Commission to draw up the final statement on the basis of the second financial report and informed it of the financial difficulties being encountered by Balkom which would make it impossible to reimburse any overpayment.

20. On 9 March 1993, the Commission sent a letter to Mr Van Balkom, in his capacity as director of Balkom, following a meeting in which he had taken part on 3 March, in order to establish the project's progress.

21. In the Commission's view, the situation was as follows:

— VBS and DF were withdrawing from the project due to economic difficulties;

— Balkom was continuing the project on the following conditions:

— an amended version of the technical annex to the contract to be submitted,

— permission to construct the facilities to be obtained by 31 December 1993 at the latest,

— no money to be paid by the Commission until that date.

Lastly, the Commission reserved the right, if the time-limit set was not complied with, to terminate the contract under Clause 9 thereof.

A copy of that letter was sent to the person responsible for the project within VBS.

22. On 27 September 1993, Mr Van Balkom, in his capacity as liquidator of VBS, wrote to the Commission in order to inform it of a series of events. It was a matter, first, of the judicial decision refusing to allow VBS, by reason of its lack of assets, to initiate bankruptcy proceedings and, second, of Balkom's serious difficulties as a result of the difficulties of the group to which it belonged.

23. Since Balkom was in a state of insolvency, it owed its salvation entirely to an agreement between its creditors and its bank and to the arrival of a new investor, who was subsequently to withdraw. In those circumstances, Balkom was not in a state either to continue with the project alone or to meet its commitments in the event of termination of its contract with the Commission.

24. As regards the matter of VBS being in liquidation, talks were under way to find a buyer. However, Mr Van Balkom did not despair of finding one before the time-limit expired on 31 December 1993.

25. On 8 October 1993, by letter to Mr Van Balkom, the Commission confirmed that the time-limit of 31 December 1993 was mandatory. On 20 January 1994, in a 'note which could form a basis for ... discussion', the Commission planned that the reimbursement which it was entitled to claim under Clause 9 of the contract could be calculated on the basis of expenditure incurred by the other contracting parties amounting to DM 1 127 800, in so far as the corresponding documentary evidence was available.

26. On 14 April 1994, VBS informed the Commission of the existence of a buyer, who would be very interested in pursuing the project. By fax of 8 June 1994, the Commission granted to VBS an extension of the time-limit until 30 June 1994.

27. On 29 June 1994, again by fax, VBS's lawyer requested the Commission not to bring the contract to an end in view of the talks still in progress with a possible buyer.

28. On 16 August 1994, by letter sent to both Balkom and VBS, the Commission conveyed its decision to bring the contract to an end and requested them to produce the documents necessary to establish the final accounts, failing which Balkom would be required to reimburse, with interest, the full amount of the assistance already paid.

29. On 17 October 1994, Balkom's lawyer told the Commission that it was already in possession of the documents it requested,

which had been given to it by VBS, which had always dealt with all financial matters.

30. On 29 November 1994, the Commission sent a letter to Balkom and VBS, telling them that it would not set any further time-limits and that, on the basis of accepted expenditure amounting to DM 943 662.74, that is to say ECU 492 489, it was claiming from the debtors, who were jointly and severally liable, reimbursement of a sum of ECU 251 649, to which would be added ECU 82 832 in interest, due as from 16 October 1994, that is to say a total of ECU 334 480.

31. On 8 February 1995, the Commission issued a recovery order for that amount against Balkom and VBS.

32. Another three letters followed, the first from the Commission, dated 30 May 1995, proposing to Balkom that it pay off its debt in instalments, the second from Balkom's adviser, dated 15 June 1995, rejecting that proposal, and the third, also from Balkom's adviser, dated 28 June 1995, challenging the validity of the recovery order sent to Balkom and complaining that it was unreasonable to make it, Balkom, responsible for the entire reimbursement, but proposing, none the less, that a compromise be sought. Finally, the Commission brought the present action on 23 April 1997.

33. This summary of the events which took place between the time the contract was signed and the time the case was brought before the Court, as it emerges from the documents produced by the parties, may seem a little long, but I think it will prove useful when it comes to assessing the merits of the arguments between the parties, which I shall now set out.

34. In the view of the Commission, the reason for its action being brought solely against Balkom is that, by March 1993 at the latest, DF and VBS were no longer parties to the contract. Moreover, even if that withdrawal were not valid, Balkom could, by virtue of the joint and several liability agreed between the Community's three contracting parties, still be in receipt of a claim for the whole amount in respect of which the Commission is entitled to seek reimbursement under Clause 9 of the contract.

35. As regards the termination of the contract, the Commission claims that, since a precise timetable for performance had been agreed from the outset, it is not a contract of unspecified duration within the meaning of German law, which can be terminated only *vis-à-vis* all the parties. For that reason, the termination of the contract would still have been valid, although it was not notified to DF, even if, *quod non*, DF had still been a party to the contract on the date it was terminated.

36. As regards the merits of the termination, the Commission considers that the conditions of Clause 9, namely a foreseeable economic failure, were clearly satisfied in 1994, in view of the various problems

mentioned above, in particular the fact that, following withdrawal by DF and VBS, Balkom itself faced serious financial difficulties and was clearly no longer in a position to complete the project.

37. Although scheduled for completion in June 1993, the project was in any case held up because of the lack of permission to construct the facilities needed in order to complete it.

38. As regards the amount claimed, the Commission explains that it has deducted from the total of the money paid to VBS, for which Balkom is jointly and severally liable, the amount corresponding to 17% of the cost excluding VAT of the sums expended, as they appear from the first financial report, which it audited and approved, and points out that, by its letter of 9 March 1993, it had stated that it would make no further payments if administrative permission to construct the facilities were not obtained by 31 December 1993 at the latest.

39. The Commission adds that it cannot therefore be accused of not having taken action on the second financial report. It claims, moreover, that under the third paragraph of Clause 9 of the contract, on the basis of which it terminated the contract, interest is due as from 1 July 1991, since it was on that date that the first phase of the project, the only one to have been actually carried out, was completed.

40. Balkom flatly contradicts those various arguments. As far as it is concerned, the contract was never validly terminated. Since this is a contract which it deems to be of unspecified duration, termination is valid only if it takes effect *vis-à-vis* all the contracting parties. The Commission has never notified its decision to terminate the contract to DF which, contrary to what the Commission claims, was still a party to the contract on the day that decision was taken.

41. Balkom points out in this connection that DF's withdrawal must be regarded as assignment of the contract, which may be effected only by an agreement between all the parties, an agreement which, under Clause 7 of the contract, would have needed to be in writing.

42. The Commission has failed to produce any such document by which the Commission itself, VBS and Balkom agreed with DF the conditions under which DF would withdraw and the transfer of its rights and obligations to its two partners.

43. However, even if the termination had been carried out in accordance with formal requirements, it would not have been at all justified since, according to Balkom, it is impossible to claim that there was a foreseeable economic failure.

44. In order to understand the meaning of the term 'economic failure', it is necessary to refer to Annex I, A, Point 4 to the contract, which deals with the economic and technical risks of the contract and defines failure in terms of an amount of investment which is too high in relation to the conditions prevailing on the market.

45. At the stage reached in the execution of the project, there were no grounds for stating that the cost of investment would ultimately exceed that amount. Admittedly, the execution of the project had encountered difficulties leading to delays in relation to a schedule based purely on estimates, but that by no means supports the conclusion that there was a foreseeable economic failure within the meaning of the contract.

46. Taking its argument a step further, Balkom contends that the Commission was not able to rely on the third paragraph of Clause 9 in order to claim repayment of an overpayment because, since the work had not been completed, it was not possible to calculate the amount of any overpayment, and seeks to exercise a right to retention over part of the sums claimed by the Commission, on the ground that the Commission has not yet adopted a position on the second financial report submitted to it by VBS, which sets out expenditure for the period from 1 July 1991 to 30 June 1992 which is additional to that contained in the first report, which means an additional payment by the Commission.

47. In Balkom's view, the refusal to make any additional payment, which the Commission notified to it by its letter of 9 March 1993, cannot be regarded as a decision on the second financial report submitted by VBS.

48. Lastly, as regards the date as from which interest becomes payable, Balkom disputes the date of 1 July 1991 since, in its view, the date of 30 June 1991 cannot be regarded as the end of the first phase of execution of the project, which actually continued well beyond that date.

Assessment

49. How can one decide between these totally conflicting arguments? I think that, in order to proceed methodically towards a solution, it is necessary to isolate the various issues. In order to ascertain whether the Commission is indeed entitled to the amount which it is claiming from Balkom, it is necessary to examine, first of all, the validity of its decision to bring the contract to an end. That validity depends, in turn, on two conditions: did the Commission comply with the formal requirements laid down for that termination, and was the Commission entitled, in view of the state of the execution of the project at the time when it adopted its decision, to exercise the option available to it under Clause 9 of the contract? The assessment I shall have to make as to whether the formal requirements for terminating the contract were complied with will itself depend on whether, contrary to what, by the Commission's own admission, was

the case, DF should have been notified of the Commission's decision irrespective of the announcement of its withdrawal.

50. Once those various questions have been resolved, and assuming that it is concluded that the Commission was entitled to exercise the option to terminate granted to it under Clause 9, it will remain to be seen whether the amount to be recovered was calculated correctly by the Commission in respect of both the principal sum and the interest.

The validity of the termination of the contract

51. Let us begin by examining whether the Commission, when it terminated the contract by its letter of 16 August 1994, complied with the contract or German law, in so far as German law applies in the absence of a different stipulation in the contract. No-one disputes the fact that that letter was sent to VBS and Balkom, but not to DF. Should it have been?

52. Certainly not, if we must accept as proven that, on that date, of the Commission's three original contracting partners, there remained only one, Balkom, even if the termination was also notified to VBS. Can we consider that on that date DF no longer had any contractual link with the Commission? For my part, I should be tempted to reply in the affirmative in view of the problems mentioned above.

53. It is true that DF's letter to the Commission announcing its withdrawal, owing to its purely unilateral nature, could not by itself have the effect of ending the contractual links forged on 4 December 1990 and must be regarded as a declaration of intent, an offer of withdrawal and a renunciation of the rights conferred under the contract. Was that offer accepted by the other parties to the contract?

54. It seems to me that Balkom is now badly placed to dispute it. The Commission's agreement is not in doubt, although it is perhaps surprising that the Commission so readily accepted the defection of a partner who possessed the technology to be implemented in the project. It seems to me that VBS's agreement can be inferred from its letter to the Commission of 26 August 1991.

55. Admittedly, in that letter VBS mentioned the talks intended to resolve the contractual problems associated with DE's involvement in the project, which means that those problems had not been resolved by that date, but it should be pointed out that VBS did not at any time impose conditions on DF's withdrawal; on the contrary, it regarded that withdrawal as an established fact, whereas it could have expressed reservations and made its agreement to that withdrawal subject to certain requirements being met.

56. As regards Balkom, it is true that there is no sign in the file of any document which is contemporaneous with DF's withdrawal and which shows for certain that Balkom agreed to that withdrawal.

57. Admittedly, one might be justified in thinking that, if Balkom had had any objections to that withdrawal, of which it cannot have been unaware because it was headed by Mr Van Balkom, who was also director of VBS, it would have expressed them. However, there is no need at all to embark on that line of reasoning, which would imply that shared management prevailed over the existence of two separate legal persons, since we have the letter, which could not be more explicit, from the Commission to Balkom, dated 9 March 1993, in which withdrawal by DF, and also by VBS, is presented as an established fact, a letter which followed discussions in which Mr Van Balkom took part, on behalf of Balkom, and which provoked no negative reaction from Balkom.

58. One may assume that, at that time, when execution of the project appeared to be in jeopardy, Balkom would have reacted strongly to a letter stating that it agreed to the withdrawal of two partners if that agreement had not been given.

59. I believe, therefore, that we can infer from the various letters I have just mentioned, read in the light of Paragraph 157 of the BGB, according to which contracts are to be interpreted on the basis of the principle of good faith, that, by March 1993 at the latest, all the parties regarded DF's withdrawal as an established fact, and that it would be unjustifiably formalistic to consider that such an agreement should have taken the form of a single document signed by all the parties.

60. However, even if, as Balkom claims, on the basis of German legal literature, the conditions for DF's withdrawal remain debatable in view of the nature of the contract, I do not think that it can be inferred from failure to notify DF of the Commission's decision to terminate the contract that that termination was invalid *vis-à-vis* Balkom.

61. In order for Balkom to be able to rely on failure to comply with a formal requirement, it would be necessary for it to be able to show that its rights and interests have been prejudiced. However, the only company which could, if the lawfulness of its withdrawal were challenged, rely on such prejudice, in view of the joint and several liability provided for in the contract, would be DF.

62. It appears, however, that DF stated in the clearest possible manner that it was impossible for it to continue the contractual relationship and it therefore waived its right to be treated by the Commission as a party to the 1990 contract, so it would

certainly not have been in a position to complain to the Commission for not having notified it of the termination.

63. I therefore consider that, in view of the developments in the contractual relationship between 1990 and 1994, the Commission's termination of the contract was lawful from the formal point of view.

Justification for termination of the contract

64. Was that termination justified, however? I think, once again, that Balkom's objections carry little weight. Balkom states that the concept of economic failure referred to in Clause 9 of the contract must be understood in relation to an annex to the contract relating to economic and technical risks.

65. It turns out, however, that the provision in question, Point 4.1 of Annex I, is essentially descriptive. It refers to the amount of investment required for the execution of the project and states the limit of the financial commitment entered into by the three undertakings contracting with the Commission. It could not in any way be regarded as providing a definition of foreseeable economic failure within the meaning of Clause 9 of the contract.

66. Such an interpretation would, moreover, be incompatible with that clause, which gives each of the parties the option to terminate the contract 'where the programme of work set out in Annex I becomes inoperative by reason, in particular, of a foreseeable technical or economic failure or an excessive overrun on the costs of the project in relation to the estimates'. On that basis, the fact of the programme of work becoming inoperative cannot be treated merely as an overrun on the costs in relation to the estimates, as Balkom would have it.

67. Next, once this objection by Balkom has been dismissed, I think there is no need to go into long explanations as to how we might legitimately consider, contrary to Balkom's arguments, which seem to me to be lacking in good faith, that the following constituted foreseeable economic failure: a project which was due to be completed in 1993 was still, in 1994, at a stage where very little had been done; of the three undertakings initially associated, there remained only one which, despite its efforts, had not been able to find new partners and which itself stated that it was unable to continue providing the funding required to carry on with the project; and, in addition, the administrative permission on which progress to the second phase depended had still not been obtained in spite of legal action.

68. It is difficult to envisage more patent failure. It is all the more reason to be amazed, yet again, that the Commission did not terminate the contract sooner or exercise sooner its option to withdraw under Clause 8 of the contract, with much

harsher consequences for the other contracting parties, or, at least, take cognisance sooner of that certain failure, but instead extended time-limits which it had itself previously described as mandatory.

69. In any event, I consider that, when the Commission terminated the contract, that termination was fully justified under the terms of the contract.

The amount of reimbursement sought

70. Is the Commission thereby justified in claiming reimbursement of an overpayment which it fixes at EUR 251 649, the euro having replaced the ecu in the interim? The Commission arrived at that sum by taking as expenditure incurred by the other contracting parties, which entitled them to financial assistance, only the expenditure it accepted when it approved the first financial report.

71. After the first hearing, it had seemed to me that it must be possible for the parties to reach an agreement on whether certain of the expenditure detailed in the second financial report, which was sent by VBS to the Commission in 1992, should be taken into account, so that the amount claimed by the Commission would fall to be reduced.

72. It was not evident from the file that the Commission had clearly adopted a position on the second financial report. In its reply, the Commission had explained that it had taken action on that report ('den 2. Finanzbericht beschieden') by setting for Balkom, by letter of 9 March 1993, a time-limit expiring on 31 December 1993 for obtaining administrative permission and by informing Balkom that the Commission would not make any further payments until that date. However, it is one thing to suspend payments, but quite another to state that nothing more is owed.

73. Furthermore, the Commission had, in an unofficial note of 20 January 1994, planned to acknowledge the 'Engineering' phase at the level of DEM 1 127 800, on condition that the corresponding documentary evidence be available ('falls entsprechende Nachweise vorliegen').

74. At the second hearing, the Commission stated, however, that none of the expenditure referred to in the second financial report could be acknowledged for the following reasons.

75. In so far as that second report mentioned — which was not, however, true — expenditure relating to the second phase of the programme, entitled 'Production and Delivery', such work could have been commenced only at the defendant's own risk because, under Point 2.2 of Annex I to the contract, that phase could be commenced only after completion of the application procedure for permission relating to the construction in question. It appeared expressly from the second progress report that that procedure was held up.

76. Second, the Commission told us during the second hearing that, contrary to the obligation under Clause 4.3.2 of the contract, no documentary evidence was included in the second financial report, nor was such evidence sent subsequently, although the Commission, in its letter of termination of 16 August 1994, stated that it wished to obtain documentary evidence corresponding to the expenditure which might be acknowledged ('The Commission ... would like to receive the corresponding statements').

77. Finally, in a letter of 17 October 1994, appearing as Annex 7 to the application, Balkom's lawyer told the Commission the following:

'My client has always assumed that in the past you received full financial statements from Van Balkom Seeliger .... Of course my client would be willing to assist you in whatever way you require, and to forward to you copies of the financial statements you requested. For reasons made clear to you in the abovementioned, you can understand, however, that this would present considerable problems for my client, as my client has never been in ... possession of these documents.'

78. Since, at the hearing of 21 October 1999, the defendant was not able to prove that the documents in question had been sent, and it merely denied that they had been requested, it may be concluded that the Commission was not given an opportunity properly to take action on the subject of expenditure incurred after the first financial report.

79. It is very clear that the Commission, as accounting officer for public funds, cannot incur expenditure without having at its disposal supporting documentation which may be shown to the supervisory authorities, and in particular to the Court of Auditors.

80. It is Balkom which claims to be entitled to a certain amount, corresponding to a percentage, fixed by the contract, of the expenditure incurred in performing it, and it is thus for Balkom to prove the genuineness of its expenditure.

81. That burden of proof obviously goes beyond simply producing a financial report and includes the production of the financial statements on the basis of which it was drawn up.

82. Since the hearing has shown that there is no point in hoping for the production of those statements, it is no longer necessary to offer the defendant a last chance to prove that its contentions are well founded as regards the sums which are still owed to it and which should be deducted from the amount claimed by the Commission.

83. Consequently, I can only propose that the Court, in order to fix the principal amount owed by Balkom, accept the sum of EUR 251 649 claimed by the Commission.

84. That solution makes superfluous any discussion on a possible right to retention which Balkom might claim.

The date as from which interest becomes payable

85. The two parties also disagree on the date as from which interest should become payable.

86. According to the Commission, that date is clear from the third paragraph of Clause 9 of the contract, which stipulates:

'If an audit reveals that the amounts paid by the Commission are too high, the sum paid in error, plus interest due as from the date of ending (Abschluß) or finishing (Beendigung) the work stipulated in the contract, shall be reimbursed forthwith by the other party to the contract.'

87. According to the Commission, Balkom finished the first phase of the project, as stipulated in the contract, on 30 June 1991. Consequently, it is as from that date, namely 1 July 1991, that interest should be calculated.

88. Balkom contends that the first phase of the project, the engineering, was by no means completed on 30 June 1991. At

present, Balkom is not in a position to determine the date on which the engineering phase was completed. In any event, by letter of 29 October 1992, VBS informed the Commission that that phase was scheduled to end on 30 September 1993.

89. For my part, I think that one may accept that the expression 'finishing the work' (Beendigung), as opposed to 'ending' (Abschluß), refers to the time when the work actually ceased, without the project being completed. The Commission was right to try to determine that date, but it is possible that it is later than 30 June 1991. However, since Balkom itself acknowledges that that date is in any event not later than 30 September 1993, it is that date which I propose the Court should accept. There is, admittedly, an alternative solution, which is to apply Paragraph 284 of the BGB. That provision states that interest is to be calculated as from the time at which the debtor was given formal notice to pay. The recovery order, which was issued by the Commission on 8 February 1995, fixed 30 April 1995 as the date by which Balkom should effect repayment. In that case, interest would be due as from 1 May 1995. It seems to me, however, that that solution should be rejected, since the date as from which interest due in the event of reimbursement is payable is governed by Clause 9 of the contract itself.

90. I would add, finally, for the sake of completeness, that, by relying after the first hearing on limitation as provided for in the BGB, Balkom introduced a new plea in law which must, as the Commission claimed, be dismissed.

Conclusion

91. For all those reasons, I propose that the Court should:

(1) order Van Balkom Non-Ferro Scheiding to pay to the Commission of the European Communities the sum of EUR 251 649, plus interest on that sum as from 1 October 1993 at the percentage rates, published on the first working

day of each month, which the European Monetary Cooperation Fund charges in respect of its euro transactions;

(2) dismiss the application as to the remainder;

(3) order Van Balkom Non-Ferro Scheiding BV to pay the costs.