OPINION OF ADVOCATE GENERAL ALBER

delivered on 25 January 2001 [1]

I — Introduction

1. This dispute concerns the reimbursement of an advance paid by the Commission as part of the Thermie Programme. [2] Reimbursement is demanded because the construction project of the joint and several defendants, subsidised by the Commission, was not implemented, as the land in question could not be acquired.

II — Facts and legal background

A — *The contract between the parties*

2. On 15 September 1992 the European Community, represented by the Commission, concluded Contract No BU/1048/91 as part of the THERMIE programme with Oder-Plan Architektur GmbH, a company under German law (hereinafter: 'Defendant 1'), NCC Siab Bau GmbH, a company under German law (hereinafter: 'Defendant 2'), and Esbensen Consulting Engineers, a company under Danish law (hereinafter: 'Defendant 3'). Under the preamble to the contract, the three contractors [3] are jointly and severally liable. In addition, Defendant 1 assumed the role of 'coordinator' under Article 1.4 of the contract.

3. The contract provisions relevant to these proceedings read as follows:

'Article 1 — Subject of the contract

1.1 The contractors undertake to execute the work described in Annex I, titled

1 — Original language: German.

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

3 — This refers to the three defendant companies Oder-Plan, Siab and Esbensen under the contract.

ODERHAUS — PASSIVE SOLAR ENERGY IN AN INNOVATIVE OFFICE BUILDING (hereinafter referred to as "the project").

...

1.4 The coordinator shall assume overall responsibility on behalf of the contractors for submitting all written documents to the Commission and for communications between the contractors and the Commission. All general communications from the Commission to the contractors, and vice versa, shall pass through the coordinator.

Article 2 — Duration

2.1 The project shall have a duration of 47 months, starting on 01/06/1992 (hereinafter referred to as the "work commencement date") and ending on 30/04/1996 (hereinafter referred to as the "work completion date"), in accordance with the schedule set out in Table 1 of Annex I.

2.2 The Commission shall be informed immediately of any delays in implementing the project. The contractors or the Commission may terminate the contract, subject to the conditions set out in Article 8 of Annex II.

Article 3 — Financial contribution by the Community

...

3.2 The Commission shall contribute

— 30% of the allowable costs (exclusive of VAT) of the project in accordance with Articles 8 and 19 to 28 of Annex II, subject to a limit of ECU 233 100.

...

Article 4 — Payments by the Commission

4.1 The Commission shall make its payments in ECU as follows:

— one advance of ECU 69 930 (European Currency Unit), corresponding to 30% of the sum specified in Article 3.2 of the contract;

...

4.3 The Commission shall make all payments to the coordinator, who shall be responsible for forwarding the appropriate amounts to the other contractors without delay. The Commission shall not be held liable for any irregularities on the part of the coordinator in this connection.

Article 5 — Reports

5.1 The contractors shall submit to the Commission, through their coordinator, the following documents (separately) at regular intervals:

1 TECHNICAL REPORTS (see Article 6.1(a)1 of Annex II)

2 FINANCIAL REPORTS (see Article 6.1(a)2 of Annex II)

...

Article 9 — Applicable law, and entry into force of the contract

9.1 This contract shall be subject to GERMAN law.

...

Article 10 — Annexes

The following annexes shall constitute integral parts of the contract:

Annex I Schedule of work

Annex II General conditions.'

4. Part B of Annex 1 to the contract consists essentially of the timetable for execution of the work, detailed technical information on the planned project, a breakdown of the estimated costs for each implementation phase, and a detailed description of the project location. Some

of its individual provisions giving a specific description of the project are:

'Annex 1 — Part B

B.1 Aim of the project

The aim of the project is to implement a low-energy design office building. The building has a volume of 6 200 m^2 and 20 000 m^3 and is situated near the river Oder.

...

B.5 Detailed description of the project

This office building is designed around an integrated atrium. The building is situated near to the river Oder, the eastern border of Germany towards Poland, see Appendices 2 and 3.

The gross floor area of the building is 6 200 m^2, and it has a volume of 20 200 m^3. For the energy calculations, a net floor area of 5 200 m^2 has been used.

...'

5. Under Section B.7(a) of Annex I to the contract, the project is divided into five phases. The first phase is referred to as 'preliminary design' and its duration is given as 1 June 1992 to 30 November 1992. The second phase, 'detailed design', was planned to last from 1 November 1992 to 30 April 1993. The subsequent phases are not relevant for the present case.

6. Table 2 on page 18 of Annex I to the contract shows the estimated costs, exclusive of tax, for the various phases of the project. Preliminary design is quoted as DEM 96 600, while DEM 64 400 is stated for detailed design.

7. Pages 19 to 25 of Annex I to the contract contain plans showing the site and the dimensions of the 'Oderhaus' building.

8. The provisions relevant to these proceedings of the General Conditions con-

tained in Annex II to the contract, divided into Parts A to F, read as follows:

'Part A

Execution of the work

Article 1 — Progress of the work

1.1 The contractors shall provide the personnel, facilities, equipment and materials necessary for the proper performance of the work under the contract.

...

1.3 The contractors shall be responsible for taking the necessary steps to obtain any permit or licence required for the performance of the work under the contract by law and regulations in force in the place or places where the work is to be carried out. Contractors shall inform the Commission immediately if they are unable to obtain any such permit or licence. The contracting parties shall jointly review the effect of this situation on the performance of the contract and shall, if necessary, take appropriate measures by common agreement.

1.4 The contractors shall notify the Commission, through the coordinator, of the commencement of the work under the contract and shall inform the Commission without delay of the completion or the cessation of the work, or of any event or circumstances liable to significantly affect the performance of the contract.

...

Article 2 — Joint and several liability

Where the contract is to be carried out by more than one contractor the contractors shall be jointly and severally liable to the Commission for any failure on the part of any of them to discharge their responsibilities. The contractors shall discharge the responsibilities of defaulting or withdrawing contractors to such extent as is reasonable in all the circumstances through the completion of the work under this contract by themselves or with the assistance of third parties in accordance with Articles 3 and 8 of this Annex, unless the contract is terminated in accordance with Article 8 of this Annex. A contractor shall not be liable in respect of a defaulting contractor:

...

(c) to make any reimbursement under Article 8.4 of this Annex if it can show to the reasonable satisfaction of the Commission that it has not contributed to the default and has complied with Article 1.4 of this Annex.

...

Article 4 — Agreements between contractors

Nothing contained in any agreement between the contractors themselves or between the contractors and third parties shall affect the obligations of the contractors to the Commission under the present contract.

...

Article 6 — Reports

Submission of reports

6.1 Contractors shall, from the Contract Signature Date, submit the following reports in a single consignment (in separate documents), in 4 copies covering exactly the same period and in the two languages stipulated in Article 5.4 of the contract, to the Commission for approval:

(a) *Intermediate* reports:

1. An intermediate report ("HALF-YEARLY TECHNICAL REPORT") setting out the progress of the work (from the Work Commencement Date), resources employed, the results obtained, economic aspects, deviations from the original work plan during the report period and the levels of cooperation in respect of work under the contract.

2. A statement of expenditure ("HALF-YEARLY FINANCIAL REPORT") during the reporting period....

6.2 Contractors shall submit promptly to the Commission, through the coordinator, any information it may require regarding performance of the work programme specified in the contract.

...

8.4 Subject to... , if the contract is terminated pursuant to Article 8.2... (d) the Commission may require the reimbursement of all or part of its financial contribution.

Article 8 — Termination of contract

...

Interest may be added from the date on which payments were received by the contractor at the rate applied by the European Monetary Cooperation Fund for its operations in ECU increased by 2 percentage points, such rate being published in the *Official Journal of the European Communities* on the first working day of each month.

8.2 The Commission may terminate the contract:

...

8.5 Where the contract is being performed by more than one contractor the Commission may determine not to terminate the contract under Article 8.2, but only the participation of the contractor to which the aforesaid termination provisions apply, upon such terms and conditions for such contractor as the Commission considers to be reasonable. Unless there are reasonable grounds for not proceeding with the contract, the Commission shall terminate only the participation of such defaulting contractor.

(d) in the event of non-performance by one or more of the contractors, except for reasonable and justifiable technical or economic reasons, of any of their obligations after giving notice in writing by recorded delivery or registered post to the contractors requiring performance of the obligations and the contractors are still in breach of their obligations one month after the receipt thereof;

...

...

Article 12 — Competent court

The Court of Justice of the European Communities shall have sole jurisdiction in respect of any dispute concerning the contract.

...

Article 17 — Payment of Commission contribution

...

17.2 The financial contribution of the Commission shall be paid in instalments as follows unless otherwise specified in the contract:

(a) a single sum specified in Article 4 of the contract shall be paid by the Commission as an advance payment within two months of the signature by all parties of the contract. This advance shall be used for the purpose of this contract.

...

Article 19 — Allowable costs

Without prejudice to Article 23, allowable costs shall include only actual costs borne by each of the contractors after the Work Commencement Date and which are expressly necessary for the performance of the work under the contract. Allowable costs may include all or any of the following category of costs:

— labour

— overheads

— travel and subsistence

— durable equipment

— consumables

— data processing

— external services

— other costs in accordance with Article 27 of this Annex.

...

Article 25 — External services

...

Subject to Article 3 of this Annex costs of associated contracts, subcontracts and services shall be allowable costs as external services.

Article 27 — Other costs

Any other additional costs not falling within any of the aforesaid categories may be charged to the contract only with the consent of the Commission.

...'

B — *Joint and several liability under German law*

9. Joint and several liability is governed in German law by Paragraphs 421 et seq. of the Bürgerliches Gesetzbuch (BGB) (German Civil Code). [4]

Paragraph 421 of the BGB (Joint and several debtors) provides:

'Where performance is owed by a number of persons, such that each person under-

4 — Law of 18 August 1896 (RGBL. p. 195, BGBl. III p. 400-2), as last amended on 27 June 2000.

takes to effect performance in full but the creditor may only demand performance once (joint and several debtors), the creditor may, at his discretion, demand performance from each creditor in whole or in part. All the creditors remain liable until performance has been effected in full.'

Paragraph 425 of the BGB (Effect of other events) provides:

'(1) Events other than those set out in Paragraphs 422 to 424 shall only operate for and against that joint and several debtor whom they affect, unless the contractual relationship provides otherwise.

(2) This shall apply in particular to termination, default, fault, impossibility of performance affecting a joint and several debtor, prescription and its interruption and suspension, unification of the claim with the debt, and final judgments.'

C — *The conduct of the contracting parties, in particular the correspondence conducted with the Commission*

10. The Commission was aware when the contract was concluded that the site for the project had not yet been acquired by the defendants. In November 1992 it paid an advance of ECU 69 930 to Defendant 1 in its capacity as coordinator.

11. On 29 July 1994 the Commission sent a questionnaire to Defendant 1, enquiring about the status of work on the 'Oderhaus' project. Defendant 1 filled in this questionnaire and returned it to the Commission on 28 September 1994.

12. As the defendants subsequently failed to submit any of the half-yearly reports which should have been produced under Article 5 of the contract, in conjunction with Article 6 of Annex II to the contract, the Commission notified them by registered post of 20 January 1995 with acknowledgement of receipt that they were in default as regards the submission of reports under Article 2 of the contract and Article 8 of Annex II to the contract, demanding that the contractors comply with this contractual obligation within two months of receipt of the letter. Failing this, the Commission would terminate the contract

and demand reimbursement of the financial subsidy plus interest. The letter was addressed to each of the three contractors.

13. By letter of 27 March 1995, Defendant 1 informed the Commission that the project could no longer by implemented for economic reasons, as it had not proved possible to acquire either the land originally envisaged for the Oderhaus or an alternative plot, and stated that a breakdown of the costs incurred so far would be sent shortly.

14. None of the contractors submitted the reports in respect of which the default notice had been issued in January 1995. The Commission therefore terminated the contract on 17 October 1995 by registered post with acknowledgement of receipt, sent to each of the three contractors. As grounds it cited the failure to submit the reports in respect of which the default notice had been issued, and the final non-implementation of the project. The Commission also stated that the advance paid was to be reimbursed in full, plus interest as yet undetermined.

15. By letter of 24 October 1995, Defendant 1 sent the Commission a report on the history and costs of the project until its final cancellation at the end of 1993. This revealed that because the intended site could not be acquired, the project was abandoned immediately after the Commission had upheld the application for a subsidy under the Thermie programme. The consequent efforts on the part of the contractors to investigate alternative locations to the land originally envisaged and to revise the project in the light of this were described. In particular, these efforts necessitated negotiations with the respective owners and with the authorities involved, studies regarding the acquisition of the land and its suitability for building, and fundamental revisions of the energy engineering and the design of the project. The report disclosed total costs amounting to DEM 282 790. According to the breakdown, these costs were incurred as part of the revision of the original design concept and the redesign work caused by the planned change of location.

16. By registered post of 12 February 1996 with acknowledgement of receipt, again addressed to all three contractors, the Commission stated that it was only prepared to recognise the sum of DEM 96 600 (corresponding to ECU 51 401) as allowable costs, corresponding to the maximum subsidisable estimate for 'preliminary design' in Table 2 of Annex I to the contract. It declared the subsidy granted to be ECU 15 420 (corresponding to 30% of the allowable ECU 51 401), and demanded that the contractors repay the sum of ECU 54 510 (the difference between the advance of ECU 69 930 paid and the subsidy granted of ECU 15 420), plus interest of ECU 11 175.

17. Despite numerous demands by the Commission accountants, no payment has been made by the defendants.

III — Procedure and forms of order sought

18. By application of 2 March 1999, registered at the Court of Justice on 3 March 1999, the Commission brought an action, asking the Court to

(1) order the defendants jointly and severally to pay the European Commission EUR 54 510 plus interest in the sum of EUR 20 798.70 for the period from 1 January 1993 to 15 January 1999;

(2) order the defendants jointly and severally to pay the European Commission interest on the principal of EUR 54 510 at the rate used by the European Monetary Cooperation Fund for its euro transactions plus two per cent as from 16 January 1999; and

(3) order the defendants jointly and severally to pay the costs of the action.

19. Defendants 2 and 3 ask the Court to

(1) dismiss the action;

(2) order the applicant to pay the costs of the action.

20. Defendant 1 has not entered an appearance. The application was sent to it by registered post with acknowledgement of receipt on 9 March 1999, and the acknowledgement form shows that the application was delivered to the defendants on 25 March 1999. However, on 7 April 1999 the registered letter with the application was returned to the Registry, with the unopened envelope inscribed in handwriting 'Please return to sender — Oder-Plan Architektur GmbH was dissolved on 15 November 1996 — there is no longer any director named Christian Schlote.'

21. At the request of the Registrar, the Commission submitted its observations by letter of 20 April 1999 regarding the matter of service of the application. It stated that Defendant 1 was in liquidation, the previous managing director having been appointed liquidator. It was still entered in the Commercial Register at the address given in the application.

22. By written application of 15 June 1999 the Commission asked the Court to give judgment by default against Defendant 1, and:

(1) order Defendant 1 to pay the European Commission EUR 54 510 plus interest

amounting to EUR 20 798.70 for the period from 1 January 1993 to 15 January 1999;

(2) order Defendant 1 to pay the European Commission interest on the principal of EUR 54 510 at the rate used by the European Monetary Cooperation Fund for its euro transactions plus 2 percentage points, as from 16 January 1999;

(3) order Defendant 1 to pay the costs of the proceedings.

23. This application was sent to Defendant 1 on 21 July 1999. The registered letter was returned to the Court Registry, however, marked 'Addressee moved, address not known'.

IV — The arguments of the parties

A — *Judgment by default against Defendant 1*

24. The Commission is of the view that the conditions of Article 94(1) and (2) of the Rules of Procedure of the Court of Justice (Rules of Procedure) for giving judgment by default have been met.

25. In particular, Defendant 1, as a company which has only been dissolved but not yet been removed from the Commercial Register, can still be sued. It is still domiciled at the same address, as a company in liquidation, and is represented by its former managing director as liquidator under Paragraphs 66 and 67 of the GmbHG [Law on limited liability companies]. [5]

26. In the oral proceedings the Commission argued that these conditions still obtained.

27. The application is also well founded, on grounds analogous to those relied on with regard to Defendants 2 and 3.

B — *The merits of the claim against Defendants 2 and 3*

28. Both the defendants and the applicant understand the termination regulated in

5 — Law of 20 April 1892 (RGBl. p. 477) as amended by notice of 20 May 1898 (RGBl. p. 846, BGBl. III/FNA 4123-1); last amended on 22 June 1998.

Article 8.2 of Annex II to the contract as a contractually-agreed right of termination within the meaning of Paragraph 346 et seq. of the BGB (the German Civil Code). [6]

(1) Proper notice of termination

29. The Commission is of the opinion that its letter of 17 October 1995 brought the contract to an end, especially as Defendants 2 and 3 also received the notice of 17 October 1995.

30. Defendants 2 and 3 deny that the contract was ended by the letter of 17 October 1995, claiming that the Commission has not furnished sufficient proof that they received the notice of 17 October 1995. The acknowledgement of receipt relating to Defendant 2 submitted by the Commission was not signed by the recipient, and there was no acknowledgement of receipt at all as regards Defendant 3. The notice of termination of the contract to Defendants 2 and 3 was invalid under Paragraph 130(1) of the BGB, as it had not been received. Moreover, under the rule in Paragraph 425 of the BGB, notice of termination to all joint and several debtors is only effective if made to each one individually.

(2) Grounds for termination

31. The Commission relies in particular on non-performance by the contractors of the following contractual obligations set out in Article 8.2 of Annex II to the contract:

— non-implementation of the project, contrary to Article 1.1 of the contract, and

— non-fulfilment of the obligation to submit reports under Article 5 of the contract, in conjunction with Article 6 of Annex II to the contract.

32. As a defence to non-fulfilment of the obligation to submit reports as grounds for termination, Defendants 2 and 3 plead that Defendant 1 in its role as coordinator was solely responsible for meeting this obligation, inasmuch as Article 1.4 of the contract represents a special rule, derogating from the joint and several liability of the contractors laid down in Article 2 of Annex II to the contract. The breach of contractual obligations by Defendant 1 cannot therefore be imputed to Defendants 2 and 3.

6 — The first sentence of Paragraph 346 (Effects of termination) reads as follows:
'If one party to a contract has reserved the right of termination, upon termination each party is obliged to return any performance or consideration received.'
The remaining statutory provisions regarding termination are not relevant to the present case.

33. In this connection, Defendants 2 and 3 also claim that under Article 8.5 of Annex II to the contract, the Commission should have considered terminating only the participation of the defaulting contractor, instead of terminating the contract for all contractors.

34. In relation to non-implementation of the project constituting grounds for termination, in the view of Defendants 2 and 3 the conditions laid down in Article 8.2(d) of Annex II to the contract have not been met. Under these, before terminating the contract the Commission must call upon the contractors to fulfil their contractual obligations. In its letter of 20 January 1995, however, the Commission merely demanded fulfilment of the contractual obligation to report. Since there was no prior reminder regarding non-implementation of the project, termination cannot be effectively based on this breach of contract.

35. Defendant 2 also claimed in the oral proceedings that under the division of work set out in Table B.4 of Annex I to the contract, its contractual obligations only applied to the 'Construction 1' and 'Erection' phases of the project. Defendant 2 cannot therefore be held liable for the non-implementation of the project in the prior 'Engineering/design' phase.

(3) Obligation to reimburse

36. The Commission is of the view that the contractors are under an obligation to reimburse the advance as joint and several debtors. Defendants 2 and 3 cannot plead the exclusion of their joint and several liability by Article 2(c) of Annex II to the contract. They have neither shown that they have not contributed to the presence of the grounds for termination, nor complied with their duty of information towards the Commission under Article 1.4 of Annex II to the contract.

37. Further, Defendants 2 and 3 cannot avoid their obligation to reimburse by pleading the defence of loss of the enrichment under Paragraph 818(3) of the BGB. Paragraph 812 et seq. of the BGB, in particular the defence of loss of the enrichment, do not apply to termination of a contract and its subsequent discharge. [7]

38. Defendants 2 and 3 are of the view that they are not jointly and severally liable under Article 2(c) of Annex II to the con-

7 — The first sentence of Paragraph 812 (Principle) (1) of the BGB reads as follows:
'A person who obtains something from another person by way of performance or in some other way at their expense, without legal basis therefor, is bound to restore it to that person.'
Paragraph 818(3) (Extent of the enrichment claim) reads:
'The obligation to restore or make restitution of the value does not apply if the recipient is no longer enriched'.

tract. They are neither to blame for the failure to comply with the obligation to report, nor were they properly informed by Defendant 1 as to the progress of the project. Moreover, payments were only made to Defendant 1.

39. Any liability that may exist at all arises in their view only under the provisions of Paragraph 812 et seq. of the BGB regarding unjustified enrichment. Consequently, in the absence of permanent enrichment they are in accordance with Paragraph 818(3) of the BGB under no obligation to reimburse. The limitation of the claim for reimbursement to that of permanent enrichment is due in the present case to the fact that the payment received was intended from the outset to be passed on to a third party, namely a subcontractor, under Article 25 of Annex II to the contract. Defendant 2 merely received DEM 20 000 of the advance paid to Defendant 1, which was insufficient even to cover the costs of the outside services it bought in; accordingly, it has been impoverished to that extent. Defendant 3 never received any payment at all from Defendant 1, and accordingly had at no time been enriched by the advance paid to Defendant 1.

(4) The calculation of the allowable costs

40. The Commission is of the view that the allowable costs of the project amounted to DEM 96 600, or EUR 51 401. The project never advanced beyond the initial planning phase, described in Table 2 of Annex I to the contract as 'Preliminary Design'. The costs shown in the breakdown in the report by Defendant 1 of 24 October 1995 are therefore also only allowable up the maximum amount of DEM 96 600, as stipulated in Table 2 of Annex I. Further costs are not allowable, because they relate to a 'completely new design concept' that no longer had anything to do with the original project in respect of which the Commission had concluded the contract. In the view of the applicant, problems and questions connected with the acquisition of the land fall entirely within the area of risk borne by the defendants. Consequently, the amount to be repaid by the defendants under Article 3.2 and the first indent of Article 4.1 of the contract amounts to EUR 54 510 (the difference between the advance paid of EUR 69 930 and the allowable sum of 30% of EUR 51 401, namely EUR 15 420).

41. Defendants 2 and 3, on the other hand, are of the view that the Commission has calculated the allowable costs incorrectly. Costs were incurred in respect of not only the 'preliminary design', but also the 'detailed design'. The maximum amount of allowable costs under Table 2 of Annex I to the contract is therefore DEM 161 000 (DEM 96 600 plus DEM 64 400).

42. Moreover, the Commission was aware at the time it concluded the contract that the land originally envisaged for the project

had not yet been acquired by the defendants. In the view of Defendants 2 and 3, the resulting problems fall therefore not only within their area of risk, but also within that of the Commission. Since it paid the advance despite knowing of the status of the planning, it must have expected to have had to finance the costs of any redesign of the project.

43. Consequently, Defendants 2 and 3 are claiming an additional grant of EUR 25 129.50 and therefore a matching reduction in the applicant's claim.

(5) Contributory fault on the part of the Commission

44. The applicant is of the opinion that Defendants 2 and 3 cannot plead contributory fault on the part of the Commission. Since Defendants 2 and 3 both failed to discharge their own contractual obligations, their argument that the Commission tolerated non-fulfilment of the obligation to submit reports for too long is in breach of good faith and thus immaterial.

45. Defendants 2 and 3 are of the view that the Commission must bear a large portion of the blame as regards both the amount of the interest accrued, and the intervening insolvency of Defendant 1. Under the contract, the first report should have been submitted in January 1993, whereas the first time the applicant drew attention to the failure to fulfil the obligation to report was in January 1995. If Defendants 2 and 3 had known earlier of the failure by the coordinator to fulfil its duties under the contract, they would have exerted influence on it and could have disclosed the failure of the project in 1993; and had the Commission reacted earlier, the advance paid would not have been completely used up. By waiting two years the Commission had failed to monitor the subsidy and thereby breached its duty of care towards Defendants 2 and 3.

(6) The interest claimed

46. The Commission is claiming interest on the reclaimed sum as from 1 January 1993, the final amount of which, for the final time period starting on 16 January 1999, still has to be calculated in accordance with Article 8.4(2) of Annex II to the contract.

47. Defendants 2 and 3 plead as a precautionary measure that under Paragraph 197 of the BGB the claim for interest, at least up to and including 1994, has lapsed.

48. In the view of the Commission, the claim for interest has not lapsed. The claim could not made before the reimbursable costs were fixed by letter of 12 February 1996.

49. In the oral proceedings, Defendants 2 and 3 also claimed for the first time that interest could not be claimed, if at all, after 12 February 1996, since the Commission had expressly asked in its letter of 12 February 1996, which finally quantified the reimbursement demanded, that no money be transferred before an appropriate demand was made by the Accounting Officer. No further interest could therefore accrue from that time onwards. A demand for payment had never been made by the Commission's Accounting Officer to Defendants 2 and 3.

50. The Commission regards this defence as too late and therefore to be dismissed. Moreover, Appendices K10 to K12 of the application show that the Commission demanded reimbursement on several occasions after May 1996.

V — Opinion

51. The Court has jurisdiction to decide the case under Article 12 of the contract.

52. Under Article 94(2) of the Rules of Procedure, before giving judgment by default the Court need only check whether the applicant's claims appear to be well founded. Consequently, only a plausibility test need be carried out as regards Defendant 1. As regards Defendants 2 and 3, however, the merits of the action need to be examined in full. Since the Commission's claims in the action are identical in all three instances, it is appropriate to examine the merits of the action against Defendants 2 and 3 before considering the application for judgment by default against Defendant 1.

A — *Merits of the action against Defendants 2 and 3*

(1) The claim for reimbursement

53. The claim for reimbursement presupposes effective termination of the contract by the Commission.

(a) Effective notice of termination

54. The letter from the Commission of 17 October 1995 could constitute delivery

of an effective notice of termination. It did in fact reach Defendant 1, as confirmed by letter of 23 October 1995. Defendants 2 and 3, on the other hand, deny having received this letter.

55. Although the acknowledgement of receipt submitted by the Commission in respect of Defendant 2 bears the postmark of the relevant post office at Fürstenwalde, dated 23 October 1995, the 'Date and Signature of Recipient' field is unsigned. The Commission therefore has not furnished proof of receipt of the letter by Defendant 2. Contrary to the view of Defendant 3, the Commission has in its reply provided an acknowledgement of receipt signed by Defendant 3 on 3 November 1995. Proof of receipt by Defendant 3 of the letter of 17 October 1995 therefore has been furnished.

56. As regards Defendant 2, it remains to be examined whether receipt of the letter by Defendant 1 can be imputed to Defendant 2 under Article 1.4 of the contract. That would reflect its role as coordinator. However, this presupposes that the letter of 17 October 1995 is a 'general communication' for the purposes of Article 1.4 of the contract.

57. In this connection, the arguments of Defendants 2 and 3 that Paragraph 425 of the BGB prevents such an 'overall effect' of receipt by Defendant 1 being valid in respect of all the debtors must first be rejected. The principle of individual effect embodied in Paragraph 425 of the BGB only applies, according to the express wording of the first subparagraph of this provision, 'unless the contractual relationship provides otherwise...'. In the present case Article 1.4 of the contract provides a rule derogating from the individual effect by means of the appointment of a coordinator, which represents a specific individual agreement that takes priority.

58. Furthermore, whether the termination of the contract can still be regarded as a 'general communication' or whether it is a particular communication that has to be received by all the defendants to be effective, can ultimately be left open: if receipt of the letter by Defendant 1 is held to be insufficient, then lodging of the action by the Commission, in which it states that it no longer wishes to be bound by the contract, constitutes notice of termination to Defendant 2. Notice of the application has incontestably been received by Defendant 2.

59. It can therefore be held that the Commission has given effective notice of termination to Defendants 2 and 3.

(b) Existence of grounds for termination

60. The question remains as to whether the Commission was entitled to terminate. It relies on two main grounds for termination, namely non-fulfilment of contractual obligations, and non-implementation of the project.

61. Under Article 8.2(d) of Annex II to the contract, the Commission may terminate the contract if one contractor fails to fulfil its obligations. It is undisputed that the defendants have neither submitted the technical and financial reports due to the Commission under Article 5, nor implemented the project as a whole. Consequently, at least two contractual obligations have been breached.

(i) Non-fulfilment of the obligation to report

62. The assertion by Defendants 2 and 3 that Defendant 1, in its role as coordinator, was the sole and exclusive incumbent of the obligation to report, is irrelevant, as a result of Article 8.2(d) of Annex II. Even if only Defendant 1 was in breach of its obligation to report, the Commission would be entitled to repudiate the contract as against all the contractors. None the less, the defences of Defendants 2 and 3 are examined below as they are of importance in relation to subsequent remarks concerning the joint and several liability of the contractors.

63. The obligation to report of all the defendants arises from the contract, and from Annex II to the contract. Articles 5.1 and 5.4 of the contract, and Article 6.1 of Annex II to the contract, consistently refer to 'the contractors' in connection with the production and submission of reports, and never to one of them, or to the 'coordinator', alone. It follows from Article 1.4 and Article 5 of the contract that the 'coordinator' is only responsible for presenting or forwarding the reports. These are purely organisational provisions that have no effect on the duties to produce reports. In view of this unambiguous wording, the view of Defendants 2 and 3 that the contractual obligation to report was solely the responsibility of Defendant 1 is unconvincing. Rather, the duty to fulfil this obligation was incumbent upon all defendants equally. The breach of the obligation to report can therefore be imputed to Defendants 2 and 3 as their own breach of contract.

64. For these reasons, the defence of Defendants 2 and 3 that the Commission should have terminated only the participation of Defendant 1 in the contract, as opposed to the contract as a whole, is also unsuccessful. Firstly, there are grounds for terminating the contract as regards Defen-

dants 2 and 3 due to their own breaches of contract. Secondly, Article 8.5 of Annex II to the contract places any partial termination of the contract within the discretion of the Commission: 'Unless there are reasonable grounds for not proceeding with the contract...'. In view of the failure at the end of 1993 of the project that was the subject of the contract, reasonable grounds existed for terminating the contract as a whole with regard to all contractors.

(ii) Non-implementation of the project

65. It is also undisputed that the defendants did not implement the 'Oderhaus' project, but abandoned it at the end of 1993. Defendants 2 and 3, however, allege there has been an error of procedure as regards this ground for termination, inasmuch as the Commission did not demand performance from them before terminating the contract.

66. A prior written notice from the Commission to remedy the breach is indeed a basic precondition for exercising the right of termination under Article 8.2(d) of Annex II to the contract. However, in the present case it must be borne in mind that the definitive failure of the project had existed since the end of 1993, whereas the Commission only learned of its abandonment in the letter from Defendant 1 of 27 March 1995. Moreover, at no time did the defendants state that they still intended to implement the 'Oderhaus' project. A notice to implement the project issued between March 1995, the time of becoming aware of the grounds for termination, and October 1995, the time of the notice of termination, would therefore no longer have achieved its objective under the rule in Article 8.2(d) of Annex II to the contract, namely that of enabling the contractors to discharge their contractual obligations and thus avoid the consequences of termination of the contract. A prior notice for fulfilment of the contractual obligations would therefore seem superfluous.

67. The defence pleaded by Defendant 2 in the oral proceedings, that it was not subject at the time of the failure of the project to any contractual obligation non-fulfilment of which could have represented grounds for termination, is not valid. As already discussed, non-fulfilment of the contractual obligation by one of the contractors is sufficient grounds for termination against all the contractors (see point 62 et seq. above). Furthermore, under Article 1.1 of the contract, all the contractors undertook to implement the 'Oderhaus' project. According to Article 2.1 of the contract, the project was commenced on 1 June 1992. Consequently, from that time onwards all three contractors were subject to an obligation to implement the project. Table B.4 of Annex I to the contract gives no grounds for assuming that the obligations of the different contractors were limited in time to the individual phases of the project. If such an internal agreement had been intended, it cannot be cited in opposition to the Commission, as it is not clearly apparent.

68. Accordingly, it must be found that both the non-fulfilment of the obligation to report and the non-implementation of the project entitled the Commission to terminate.

(c) Legal consequences as regards the obligation to reimburse

69. The question thus arises of the obligation to reimburse of Defendants 2 and 3.

(i) Existence of the claim for reimbursement

(aa) Joint and several liability

70. The defence of Defendants 2 and 3 to the claim for reimbursement of the Commission under Article 8.4 of Annex II to the contract is that the obligation to report and the obligation to acquire the land were incumbent solely upon Defendant 1, but not upon them. Reimbursement therefore cannot be claimed from them.

71. After naming the individual contractors, the contract stipulates on page 1 that Defendants 1, 2 and 3 are joint and several debtors, and reference is made to Article 2 of Annex II for the details. Under the first sentence of Article 2 of Annex II to the contract, the defendants are in principle all liable as joint and several debtors for the discharge of all contractual responsibilities. An exception to joint and several liability is provided for in Article 2(c) only when the following cumulative conditions are met:

— the contractor can show to the reasonable satisfaction of the Commission that it has not contributed to the default of the other contractor, and

— the contractor has complied with its notification obligations under Article 1.4 of Annex II to the contract.

72. None of these conditions for exemption from liability appears to be met in the present case. As already stated above, the breaches of contract founding the termination, consisting of non-submission of reports and non-implementation of the project, are the responsibility of all three contractors equally. It is therefore irrelevant whether Defendants 2 and 3 have contributed to the fault of Defendant 1.

73. Moreover, it should be noted that they did not inform the Commission of the final abandonment of the project at the end of 1993. They have therefore also breached their obligation under Article 1.4 of Annex II to the contract, so that the second condition for exemption from liability for Defendants 2 and 3 is not met either. Their defence based on the position of Defendant 1 as 'coordinator' is consequently unsound.

74. They also plead that the Commission made payments to Defendant 1 only, for which reason only the latter should be liable to reimburse.

75. However, this defence is also unsuccessful. Under Article 4.3 of the contract, the Commission cannot be held responsible for irregularities by the coordinator in connection with the forwarding to the other contractors of monies paid. Payment to Defendant 1 does not therefore release Defendants 2 and 3 from their obligation to reimburse.

(bb) Unjust enrichment

76. Defendants 2 and 3 finally plead the defence of loss of the enrichment. Any money that Defendant 2 did receive from Defendant 1 was passed on to subcontractors. From a legal point of view, it should be pointed out here that as a basic principle, the right to claim reimbursement in association with the termination of a contract is not limited to any enrichment still enjoyed, and that Paragraph 818(3) of the BGB is in principle not applicable. [8] Although agreement may be reached that the first sentence of Paragraph 346 of the BGB shall not apply, so that the obligation to reimburse is limited to any permanent enrichment, no such agreement is included in the contract concluded between the Commission and the defendants.

77. Consequently, the most that could exist here is an implied agreement. However, in the present case no such agreement can be inferred from the defendants' having to pass on the advance to third parties (such as subcontractors), as Defendants 2 and 3 claim. The implied consequence, namely that with a rule of this kind the person liable to reimburse should be allowed to avail himself of the defence in Paragraph 818(3) of the BGB, is only admissible in exceptional circumstances. [9]

78. In the present case, the explicit rule in Article 8.4 of Annex II to the contract contradicts any such limitation of the

8 — Cf. Kaiser, in Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch [Commentary on the German Civil Code]*, Vol. II, 13th ed. (Berlin 1995), Paragraph 346, section 22; Heinrichs, in Palandt, *Bürgerliches Gesetzbuch [German Civil Code]*, 58th ed. (Munich 1999), Paragraph 346, section 3.

9 — Cf. Kaiser, in Staudinger, Paragraph 346, section 31; Heinrichs, in Palandt, Paragraph 346, section 5.

obligation to reimburse. It states that reimbursement is unconditional, and above all, independent of the use to which the advance is put. In addition, the costs for services provided by subcontractors are only one of the possible kinds of allowable costs under Article 19 of Annex II to the contract. Accordingly, the payment of subcontractors was neither the only possible use of the money received, nor was it in the foreground of the contract. An exceptional agreement to avoid the rule in the first sentence of Paragraph 346 of the BGB cannot therefore be implied in the present circumstances. Defendants 2 and 3 are consequently liable to reimburse the advance.

(ii) Amount of the reimbursement claim

(aa) Calculation of the allowable costs

79. As regards the amount of the reimbursement claim, firstly the question of the allowable costs is disputed by the parties to the proceedings. Under Article 19 of Annex II to the contract, the only costs allowable are those expressly necessary for the performance of the work under the contract concluded between the parties. This work is designated in Article 1.1 of the contract as the 'Oderhaus — Passive solar energy in an innovative office building' project, and described in detail in Annex I to the contract (see above, point 4, and Annex II, Section B.5). In particular, pages 19 to 25 of Annex I to the contract consist of layout plans specifying both the precise location and the scope of the project construction work. Under Article 27 of Annex II to the contract (see above, point 8), additional costs can only be charged to the project with the consent of the Commission.

80. This shows that the advance was paid by the Commission in respect of a quite specific project and definite costs incurred in connection with it. The contract gives no indication to support the theory of the defendants that the subsidy may be used for other locations without the express consent of the Commission.

81. The fact that when the Commission concluded the contract it knew that the land for the project had not yet been acquired makes no difference to the outcome, since the contract makes no provision for the costs of redesigning the project, or for a new design concept for a different location. Furthermore, under Articles 1.1 and 1.3 of Annex II to the contract, the defendants were responsible for providing the necessary facilities and materials, and for obtaining any permits or licences required for the performance of the work (see above, point 8). Obstacles associated with this fall therefore not within the area of risk of the two sides to the contract, but — contrary to the view put forward by Defendants 2 and 3 — within that of the defendants alone.

82. The letter from Defendant 1 of 24 October 1995 shows that the original project was abandoned immediately after confirmation of the application documents by the Commission, and that the defendants made efforts from then on to find an alternative project location. The breakdown of the costs claimed by the defendants shows likewise that they were incurred in respect of the change of location envisaged, and relate to the revision of the original design concept and the changes in project planning. However, neither the contract nor its annexes makes any provision for such costs, and consequently in the absence of express consent by the Commission, they are not allowable. The defence that the allowable costs have been calculated too low by the Commission is therefore to be rejected.

(bb) Possible contributory fault on the part of the Commission

83. Finally, Defendants 2 and 3 plead a 'predominant contributory fault' on the part of the Commission as a defence to the reimbursement claim. The Commission is claimed to have had a duty of care towards the defendants, in that as early as the beginning of 1993 it should have issued a notice regarding the non-fulfilment of the obligation to report, and demanded reimbursement of the advance at a time when Defendant 1 was still solvent.

84. However, this defence fails already on the facts. The Commission had already discovered the state of the work before the insolvency of Defendant 1 occurred. The letter from Defendant 1 of 27 March 1995 shows that on 29 July 1994 the Commission sent a questionnaire relating to the state of the work to Defendant 1, who returned it to the Commission on 28 September 1994. Defendant 1 was not actually dissolved for reasons of insolvency until 1996.

85. Nor can this defence by Defendants 2 and 3 succeed on legal grounds. The Commission is not under the duty of care towards Defendants 2 and 3 that the latter presume. Firstly, the contract and its annexes do not include any express duty of care or supervision on the part of the Commission. There is merely a obligation on the defendants under Article 5 of the contract, and Article 6 of Annex II to the contract to produce the appropriate reports and send them to the Commission, without any corresponding duty of control or to issue notices on the part of the Commission.

86. Any breach of a duty of care on the part of the Commission would therefore at the outside have to be founded on provisions of public law, or the fundamental principle of good faith.

87. It is possible that there was a breach of budgetary regulations. The Commission is required under budgetary regulations to

monitor whether subsidies it grants are used properly. However, this duty of the Commission under public law does not give rise to any protective effect for the defendants. The purpose of the material regulations is not to protect recipients of subsidies, such as Defendants 2 and 3, against their partners in a contract who receive the subsidies on their behalf, such as Defendant 1. Instead, the budgetary regulations serve the general interest in proper employment of public funds. As observance of those regulations was in no way made a part of the contract concluded between the parties those public-law duties of the Commission cannot found any duty of care towards Defendants 2 and 3.

88. Finally, the exercise of a right may be inadmissible under the principle of good faith if in so doing the beneficiary of that right infringes duties of cooperation, clarification and/or protection ancillary to the contract. Under this principle, both the debtor and the creditor in a contractual relationship are required jointly to create the preconditions for performance of the contract and remove impediments to performance, and to inform each other, without being so requested, of any circumstances of significance. [10]

89. Even if in the present case one were to consider that there was negligence on the part of the Commission in tolerating non-fulfilment of the obligation to report for two years, the defence of Defendants 2 and 3 that this amounts to failure by the Commission to comply with its unwritten duties of care and protection towards them, must be rejected. The argument represents unacceptable and inconsistent conduct on the part of the defendants. A party in flagrant breach of contract cannot assert that the other party should have acted in good faith and solicitously towards it. The debtor cannot rely on the fundamental principle of good faith as a defence against a claim directed against it, if it has itself not acted in good faith and has thereby caused the claim against it to be raised late. [11]

90. The lateness in raising the claim for reimbursement is due primarily to the fact that the Commission only became aware of the non-implementation of the project in March 1995. To that extent the defendants breached their obligation, under Article 1.4 of Annex II to the contract, to inform the Commission without delay of the abandonment of the project. The defence of Defendants 2 and 3 that they were unaware of the breach by Defendant 1 and consequently had no possibility of exerting any influence is again immaterial here, as the obligation to report is an individual obligation incumbent upon Defendants 2 and 3, as stated above.

91. Informed by the same considerations, the argument that the exercise of this right by the Commission is in bad faith due to

10 — Cf. Heinrichs, in Palandt, Paragraph 242, section 23 et seq.

11 — Cf. BGHZ 25, 47, 52 et seq.

forfeiture of the rights by waiting too long is also to be dismissed. A right becomes forfeit if the beneficiary does not exercise it for a prolonged period of time, and the party liable may rely, and indeed has relied, upon the inference, drawn from the overall conduct of the beneficiary, that the latter will not exercise the right in future either. However, a 'confident expectation' of this nature may not arise if the debtor has himself not acted in good faith. [12] In this instance, Defendants 2 and 3 were in breach of their own obligations to report.

92. The outcome is therefore that the Commission is entitled to a reimbursement claim in the sum of EUR 54 510 against Defendants 2 and 3 as joint and several debtors.

(2) The claim for interest

93. As well as reimbursement, the Commission is also claiming interest.

94. The calculation of the amount of interest depends on the time from when interest is payable, and for how long. Under Article 8.4(2) of Annex II to the contract, the Commission may claim interest from the time the defendants received the payment. It is not disputed that the advance was paid by the Commission in 1992, and the Commission is asking for interest only as from 1 January 1993. The claim is therefore in accordance in that respect with the contract concluded between the parties and is therefore well founded.

95. As regards the question until when the interest accrues, Defendants 2 and 3 have argued in the oral proceedings that interest can only be claimed from them, if at all, until 12 February 1996. However, this is not convincing. Under Article 8.4(2) of Annex II to the contract, in the event of a claim for reimbursement interest may be claimed from the time of receipt of the payment. There are no other provisions regarding a claim for interest. The interest claimed here is precisely not interest for late payment, which ceases to accrue when payment is made, and it is therefore immaterial as regards the period in respect of which interest can be claimed that the Commission initially asked in its letter of 12 February 1996 that no payments be made then. Besides, it was open to Defendants 2 and 3 to repay the sum owed, despite the Commission's letter of 12 February 1996. The request by the Commission not to transfer anything for the time being was made for purely internal administrative reasons. It did not prevent the defendants from making repayment, and

12 — Cf. BGHZ 25, 47, 52 et seq.

the Commission was not in default as regards the acceptance of payment.

96. Finally, it must be pointed out that the Commission has asked the defendants for payment on several occasions since May 1996. Although these letters were addressed only to Defendant 1, Defendants 2 and 3 cannot prevent receipt of the claims being imputed to them, as they were addressed to the coordinator.

97. The amount of interest for the individual periods of time is not disputed by Defendants 2 and 3.

98. However, the defendants also plead the defence of prescription. Interest claims are subject to a prescription period of four years under Paragraph 197 of the BGB. Under the first sentence of Paragraph 201 of the BGB and the first sentence of Paragraph 198 of the BGB, the prescription period starts to run at the end of the year in which the claim arose, that is to say, the time when the claim was raised for the first time and could be enforced by means of an action. This in turn is governed by the time when performance was due, i.e. the time when the creditor could demand payment. [13] On the other hand, it is not necessary for the claim to have been quantifiable then. The start of the prescription period is therefore independent of the issuing of an invoice, even if the latter specifies the sum involved for the first time. [14]

99. Under Article 8.4 of Annex II to the contract, the Commission may demand not only reimbursement of the subsidy, but also interest from the time when the prescription period starts to run, namely that of termination of the contract. The disputed claim for interest could therefore in the present case have been raised at the time of termination of the contract. This was effected, as has already been discussed, by the letter from the Commission of 17 October 1995, which was received by Defendant 1 on 23 October 1995, and by Defendant 3. Whether 3 November 1995 or a later date, namely the bringing of the action on 3 March 1999, is to be taken as the relevant time in relation to Defendant 2, can be disregarded here. The only consequence of this would be that the prescription period would have started to run even later. It can therefore be assumed that the earliest time when the claim for interest could have been raised was 17 October 1995. The prescription period therefore began on 31 December 1995 and under Paragraph 209(1) of the BGB was effectively interrupted by the bringing of the action on 3 March 1999, in other words before the end of the prescription period on 31 December 1999. The defence of prescription against the claims for interest cannot therefore succeed. The interest claimed by the Commission is due in full.

13 — Cf. BGHZ 55, 340, 341.

14 — Cf. BGHZ 79, 176, 178.

B — *Application for judgment by default against Defendant 1*

100. By application of 15 June 1999, the Commission asked for judgment by default against Defendant 1. Under Article 94(1) of the Rules of Procedure the application is well founded if the Commission's action has been properly raised. Doubts may exist in this regard inasmuch as service on Defendant 1 of the application is questionable.

101. The application was notified to Defendant 1 by registered post with acknowledgement of receipt, in accordance with the first sentence of Article 39 and Article 79(1) of the Rules of Procedure. Doubts as to whether proper service was effected exist inasmuch as the envelope containing the application was returned to the Registry bearing the inscription '... Oder-Plan Architektur GmbH was dissolved on 15 November 1996 there is no longer any director named Christian Schlote.' The question of the capacity of Defendant 1 to be a party to an action therefore arises.

(1) Capacity of Defendant 1 to be a party to an action

102. According to Article 9.1 of the contract, the contract is subject to German law, and the question of the capacity of Defendant 1 to be a party to an action must therefore be decided under German law, according to which Oder-Plan GmbH is capable of being a party to an action unless it has ceased to exist as a legal person. A company ceases to exist when liquidation is complete and its cessation has been entered in the Commercial Register. A company which has merely been dissolved, however, continues to be capable of being a party to an action and an action can therefore be brought against it. [15]

103. The notarially-authenticated extract of 4 June 1999 from the Commercial Register of the Charlottenburg District Court submitted by the Commission shows that Oder-Plan GmbH was dissolved by decision of the District Court on 14 November 1996, in accordance with Paragraph 1 of the Löschgesetz (Cancellation Act) of 9 October 1934. [16] The com-

15 — Cf. Lutter, Hommelhoff, *GmbH-Gesetz*, 15th ed. (Cologne 2000), paragraph 60, section 9, paragraph 74, sections 17, 6.

16 — This was repealed with effect from 1 January 1999. Its regulatory content is now contained in the newly-introduced subparagraphs 5 and 7 of Paragraph 60 of the GmbHG in conjunction with Paragraph 141a of the FGG. Cf. for the legal position after the Löschgesetz e.g. Rasner, in Rowedder, Fuhrmann et al., *GmbH-Kommentar* (Munich 1985), the appendix on Paragraph 60.

pany has not yet ceased to exist, however. Accordingly, Defendant 1 is capable of being party to an action.

(2) Further conditions for the procedure for judgment by default

104. The application was notified to Defendant 1 in accordance with the first sentence of Article 39 and Article 79(1) of the Rules of Procedure, by registered post with acknowledgement of receipt. This was properly effected at the address stated by the Commission. In the absence of indications to the contrary in the Commercial Register, it must be assumed that Defendant 1, as a company in liquidation, remains domiciled at the same address and is represented by its former director as liquidator under Paragraphs 66 and 67 of the GmbHG. The acknowledgement of receipt shows that the application was received on 25 March 1999 and was thus properly served. The fact that Defendant 1 returned the envelope containing the application to the Court Registry a few days later cannot invalidate service once effected. On balance, it must therefore be concluded that the application was properly served and the action was thus properly initiated.

105. In the absence of the appointment of any person authorised to accept service at the place where the Court has its seat, the application for judgment by default was also properly served under Articles 79, 40(1), 39, and 38(2) of the Rules of Procedure by being lodged at the post office on 23 July 1999. By letter of 26 October 1999 the date of the oral proceedings was set as 6 December 2000. This letter was also effectively served on Defendant 1 by being lodged at the post office.

106. Judgment by default may be granted under Article 94(1) and (2) of the Rules of Procedure if no defence is lodged in the proper form within the time prescribed and the applicant's claims appear to be well founded. The first condition is met: the defendant has not entered an appearance as regards either the original application or the application for judgment by default.

107. As regards whether the Commission's application is well founded, reference may be made to the discussion above. The claim against Defendant 1 is as well founded as the claims against Defendants 2 and 3. The

application for judgment by default should therefore be granted.

108. However, Defendant 1 may apply for the judgment by default to be set aside under Article 94(4) of the Rules of Procedure, in which case the Court would then have to decide on the matter.

VI — Costs

109. Under the first sentence of Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Defendants 1, 2 and 3 have been unsuccessful and the Commission has applied for costs, the defendants should be ordered to pay costs.

VII — Conclusion

110. On the basis of the above discussion, it is suggested that the Court rule as follows:

A — *Judgment by default against Defendant 1*

(1) Defendant 1 is ordered, as joint and several debtor with Defendants 2 and 3, to pay the European Commission EUR 54 510, plus interest in the sum of EUR 20 798.70 for the period from 1 January 1993 to 15 January 1999.

(2) Defendant 1 is ordered, as joint and several debtor with Defendants 2 and 3, to pay the European Commission interest on the principal of EUR 54 510 as

from 16 January 1999, at the rate charged by the European Monetary Cooperation Fund for its euro transactions plus 2 percentage points.

B — *Judgment against Defendants 2 and 3*

(1) Defendants 2 and 3 are ordered with Defendant 1, as joint and several debtors, to pay the European Commission EUR 54 510, plus interest in the sum of EUR 20 798.70 for the period from 1 January 1993 to 15 January 1999.

(2) Defendants 2 and 3 are ordered with Defendant 1, as joint and several debtors, to pay the European Commission interest on the principal of EUR 54 510 as from 16 January 1999, at the rate charged by the European Monetary Cooperation Fund for its euro transactions plus 2 percentage points.

C — *Costs*

The defendants shall bear the costs of the action jointly and severally.