OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 15 June 2000 [1]

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

I — The contract

2. On 12 and 21 December 1989, the Commission and the defendant signed Contract No BREU-0114-I(A) as part of the Technological Research and Development Programme in the sectors of industrial manufacturing technology and the application of advanced materials (BRITE/EURAM). [2] The contract was for a research project, entitled: 'Design of structures in composite materials with CAD-CAM technique; achievement of a prototype of a fully automated equipment of production in filament-winding.'

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

— The duration of the project was to be 36 months from the month following signature of the contract (from 1 January 1990 to 31 December 1992) and any delay was to be notified to the Commission (Article 2). TVR was required to submit a progress report to the Commission every six months, a mid-term report in the fifteenth month and, upon termination of the project, a final report detailing the results obtained (Article 6.1). The six-monthly and mid-term reports were to be submitted within one month of the end of the relevant reporting period (Article 6.1(b) of Annex II — General Conditions).

— TVR was entitled to enter into associated contracts with third parties for the purpose of carrying out part of the project (Article 1.3). However, in

1 — Original language: Spanish.

2 — Council Decision 89/237/EEC of 14 March 1989 (OJ 1989 L 98, p. 18).

doing so, TVR would continue to be liable to the Commission for proper performance of the contract (Article 3.2 of Annex II). The contract itself stated that TVR would collaborate with Imperial College of Science and Technology ('ICST') and DSM Limburg BU ('DSM') (Article 10.2).

— The Commission's financial contribution (up to a ceiling of ECU 1 161 150) was divided into an initial advance of ECU 460 000, followed by subsequent periodic payments to be made in respect of the cost statements (Article 4.1).

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

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

II — Facts

6. On the day on which the contract was signed, the Commission transferred the advance payment of ECU 460 000 to the defendant, pursuant to Article 6.1 of the contract.

7. According to the information before the Court, TVR commenced work on 1 January 1990 and DSM on 30 March of the same year. However, ICST was unable to hire the staff it needed to begin its share of the work until it signed an agreement with TVR on 21 May 1990.

8. Other than this initial delay in performance of the contract, the first year of the project passed by without difficulties. For that reason, on 22 July 1991, the Commission transferred ECU 128 418.20 to TVR, in accordance with the cost statement submitted by the defendant.

9. On 13 November 1991, TVR produced a report for the period 1 January to 31 October 1991. By letter dated 2 December 1991, the Commission reminded TVR that each report was supposed to cover a period of six months, while at the same time drawing attention to the importance of the mid-term report.

10. On 20 January 1992, the Commission requested the defendant to send the mid-term report, which should have been completed by April 1991 and in respect of which the Commission had already allowed an extension until September 1991.

11. Three days later, on 23 January 1992, the Commission sent another letter to TVR in which, with reference to the delay in submitting the periodic reports, it reminded the defendant that, under the General Conditions, the Commission was entitled to terminate the contract in the event of non-performance by the contractor of any of its obligations and to require reimbursement of the sums it had paid.

12. Finally, on 30 January 1992, TVR sent the Commission a series of documents, including the mid-term report. The Commission then instructed an independent expert to assess the work carried out to date. In his report, the expert gave a negative assessment of that work.

13. On 25 March 1992, the Commission gave the defendant notice that it intended to terminate the contract under Articles 8.2(a) and 8.2(d) of Annex II. The Commission stated that the letter marked the commencement of the one month's notice required before termination of the contract.

14. On 15 April 1992, only days before the end of the notice period, TVR replied to the Commission's letter, stating that the objectives and the work which had been agreed with the Commission, and which were set out in the research contract, had been carried out within the agreed timetable. The Commission asserts that this reply was submitted to the expert again but that, once more, he gave a negative report on the progress of the project.

15. On 4 May 1992, the Commission sent a letter to the defendant in which it criticised very strongly the work carried out by DSM and the manner in which TVR had performed its role as project coordinator.

16. The Commission wrote to the defendant again on 10 June 1992. After reminding TVR of its decision of 25 March 1992 to terminate the contract between them, the Commission made a formal demand for submission of the cost statements prepared by the three associated contractors for 1991 and for the period 1 January to 31 May 1992.

17. TVR submitted the cost statements on 2 July 1992 and these were initially accepted by the Commission. However, on 23 March 1993, the Commission sent

the defendant a final statement of costs which significantly reduced the figures for 1992. TVR rejected that statement in a letter dated 29 March 1993, but the Commission none the less demanded repayment of ECU 109 444.80, representing the difference between the sums already paid to the defendant and the approved costs.

18. On 13 August 1993, the Commission instructed Ernst & Young to carry out an audit of TVR's accounts relating to the contract.

19. After receiving the results of this audit, the Commission notified TVR, on 6 June 1995, that it had decided to reduce the sum it required the defendant to repay to ECU 77 558.80.

20. In letters dated 14 July and 2 November 1995, TVR disputed the repayment demanded by the Commission. In particular, it contended that, in addition to the financial audit carried out by Ernst & Young, which essentially approved the cost statements it had submitted, the Commission should also have commissioned a technical audit of the project.

21. In view of TVR's refusal to repay the amount claimed, the Commission brought the present action before the Court of Justice.

III — The parties' claims

22. The Commission claims that the Court should order the defendant:

— To repay ECU 77 558.80, together with interest from 1 February 1990 until payment is made in full;

— To pay ECU 7 700, or such other amount as the Court may deem equitable, by way of compensation for damage;

— To pay the costs of the proceedings.

23. TVR contends that the Court should:

— Declare the action inadmissible owing to the prior failure to terminate the contract;

— In the alternative, dismiss the claim for repayment of sums, since the contract was not validly terminated and there is no proof of the alleged debt TVR owes to the Commission;

— Further in the alternative, dismiss the claim for compensation for damage;

— Uphold the counterclaim and declare that the Commission must perform the contract and, accordingly, pay the remainder of the financial contribution provided for therein;

— Order the Commission to pay the costs.

IV — Admissibility of the action

24. TVR claims that the action should be declared inadmissible because, as Italian law is applicable, the duty to make restitution contained in Article 1458 [3] of the Civil Code only takes effect where termination of the contract, on the ground of a breach by one of the parties, has been declared by a court. Since the Commission has not requested the Court of Justice to terminate the contract for breach by the defendant, it cannot claim reimbursement of the sums paid under the contract. Moreover, the defendant asserts that the Commission cannot be deemed to have terminated the contract unilaterally because there is no formal act of termination.

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

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

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

which, although different in purpose, contain an implied application for termination. [4] The Commission states that the Corte Suprema di Cassazione has held, in particular, that the intention to terminate a contract may be contained by implication in an action whereby one of the parties to the contract seeks an order that the other party, who is in default, is to reimburse the sums he was paid when the contract was signed. [5]

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

With regard to the second ground of inadmissibility put forward by the defendant, the Commission states that the correspondence which took place following termination of the contract merely confirms that it had been terminated owing to the breaches committed by TVR.

26. In *Commission* v *SNUA*, [6] to which I shall refer later, the Court dismissed a similar plea of inadmissibility after confirming the validity of the Commission's unilateral termination of a contract. [7] In the light of that case-law, it is appropriate to examine whether, in the present case, the contract between the Commission and TVR was automatically terminated on the ground of non-performance by the defendant.

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

A. *Validity of the contractual termination clause*

28. Termination clauses are governed by Article 1456 of the Italian Civil Code, [8] which allows the contracting parties to agree expressly that the contract will be automatically terminated should there be a

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

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

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

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

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

breach *of a specified obligation*. According to the case-law of the Corte Suprema di Cassazione, two conditions must be satisfied in order for one party to be entitled to terminate the contract unilaterally by relying upon a termination clause: the clause in question must be valid and responsibility for the breach must be attributable to the other party.

29. With regard to the first requirement, the Corte Suprema di Cassazione has interpreted Article 1456 of the Italian Civil Code as meaning that, in order to be valid, a termination clause must refer to specified obligations arising under the contract, and that clauses referring generally to non-performance of all the obligations contained in the contract are to be regarded as 'stylistic clauses' and, as such, inoperative. [9] Those stylistic clauses do not allow the parties to terminate the contract unilaterally; they must apply to the courts instead.

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

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

32. In *Commission* v *SNUA*, cited above, the termination clause in the contract between the Commission and the defendant, which was also governed by Italian law, was drafted in different terms and provided that 'the Commission may unilaterally terminate the contract in the event of the contractor's non-performance of any of its obligations thereunder, *in particular if it fails to comply with the stipulations made in Clause 4.3 thereof...*' [10] The latter condition led the Court of Justice to take the view that the termination clause satisfied the requirement laid down by the Corte Suprema di Cassazione that the obligation must be specified in order for Article 1456 of the Italian Civil Code to apply.

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

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

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

mance could not in any event be relied upon as against it.

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

The Court of Justice added: 'Whilst it is true that the case-law of the Corte Suprema di Cassazione requires that, in order to bring express termination clauses which are subject to Article 1456 of the Italian Civil Code into effect, it must be possible to attribute responsibility for non-performance to the contractor in default, the fact remains that, under Article 1322 of the Code, the parties' right freely to determine the terms of the Contract within the limits set by the law is recognised as forming part of the principle of freedom of contract. It does not therefore preclude the parties to a contract from deciding to insert therein a termination clause which is not subject to the condition that the contractor must be responsible for non-performance, by way of derogation from the usual format of contracts under Italian law.' [11]

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

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

37. Therefore, it can be deemed that, by availing themselves of the principle of freedom of contract recognised in Article 1322 of the Italian Civil Code, and having regard to the particular nature of the relations between the Commission and the undertaking to which it makes a financial contribution, [12] the parties freely

11 — *Commission* v *SNUA*, cited in footnote 6 above, paragraph 23.

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

agreed in the contract that *any* breach by TVR of its contractual obligations would entitle the Commission to terminate the contract unilaterally, regardless of the applicable provisions of Italian law. The clarity and precision with which the contract lays down the procedure for and the consequences of unilateral termination by the Commission in the event of non-performance by TVR support that view, particularly when the principle of contractual good faith to which the Commission refers in its reply is taken into account. [13]

38. It is now necessary to verify whether the Commission complied with the procedure laid down in the termination clause and whether the breach attributed to the defendant actually took place.

13 — In my Opinion in Case C-40/98 (ECR 2001, I-307, I-308) in which the Commission and TVR dispute the way in which another research contract was carried out, I stated that unilateral termination of that contract by the Commission could also be deemed to be valid under Article 1454 of the Italian Civil Code (see footnote 14 of my opinion). However, in the present case there is no evidence that the requisite conditions have been satisfied.
In particular, pursuant to the case-law of the Corte Suprema di Cassazione on Article 1454, the period within which the defaulting party is to remedy the breach must be *reasonable* and must not in any event be less than fifteen days. As the Commission itself acknowledges, it would have been impossible for TVR to remedy the breaches it was accused of — namely, delay in submitting the periodic reports and mismanagement of the project — within the one-month period specified by the applicant.
Therefore, I conclude that in the present case unilateral termination of the contract could only have taken place under the termination clause contained therein.

B. *Delivery of notice under the termination clause*

39. The first point disputed by the parties involves determining when exactly the Commission gave notice to the defendant pursuant to Article 8.2 (b) of Annexe II to the contract. In its application, the Commission contends that the notice was contained in its letter to TVR of 23 January 1992 and that termination was effected by a letter sent by recorded delivery on 25 March 1992. However, it admitted at the hearing that the wording of the second letter does not permit the assertion that the contract was thereby terminated.

40. It cannot be inferred from a literal reading of the letter of 23 January 1992 that the Commission was invoking the termination clause. To my mind, this letter serves more as a warning to the defendant that the contract might be terminated owning to its undeniable delay in submitting the periodic reports. The wide power which the Commission enjoys to terminate the contract unilaterally carries with it the obligation to state clearly that it intends to exercise that power.

41. I therefore agree with the defendant's view [14] that notice of termination was given in the Commission's letter dated 25 March 1992.

42. Now that the date on which the notice was given has been determined, it is necessary to analyse what breach the defendant was alleged to have committed.

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

43. The applicant opened its letter of notice by stating that 'the Commission, according to Article 8, and more specifically paragraphs 8.2(a) and 8.2(b) of the model contract, [does] intend to terminate your contract after the Mid-Term Assessment meeting,' from which it may be inferred that the ground for terminating the contract was not merely the fact that the defendant had breached one of its obligations (paragraph (d)) but also the fact that the Commission felt that no further purpose would be served by continuing the project, for technical reasons or a change in the exploitation potential of the results of the contract (paragraph (a)).

The Commission then listed the specific reasons why it intended to terminate the contract. [15]

Finally, the Commission stated: 'This letter should be interpreted as being the one month's notice required before termination on the grounds of Articles 8.2(b), 8.2(e), 8.2(f) and 8.2(g)'.

The latter reference is rather odd, since in omitting paragraph (a) (which specifies a notice period of two months) and including paragraphs (e), (f) and (g), which govern other grounds for terminating the contract, it does not refer to the same contractual

14 — In its defence, TVR expressly accepts that the Commission's letter of 25 March 1992 amounted to the notice required in the termination clause. However, the defendant goes back on that in the rejoinder, where it states that the letter does not meet the minimum requirements which Article 1454 of the Italian Civil Code lays down for a notice specifying a breach of contract: namely, that the notice must invite the other party to carry out a specified activity within a given period, failing which the contract will be terminated. Aside from the question of the admissibility of that allegation, which was made in the rejoinder and contradicts what was stated in the defence, suffice it to say that it is Article 1456 of the Italian Civil Code — dealing with express termination clauses — that applies to the present case, and not Article 1454 (see footnote 13 above).

15 — The reasons were as follows: complete lack of coordination among the partners; objectives still unclear; unjustified delays in completing activities; prime contractor's lack of ability to manage industrial research activities; the activities carried out to date (after two years of work) were mainly concentrated on literature research and product development (full scale winding machine), the use of which was still unclear (of no relevance in the current research nor industrial use in the future); complete lack of plans for exploitation, even in a preliminary form; complete misunderstanding of scope, objectives and rules of the Brite-EuRam programme; no results presented during the mid-term assessment meeting.

clauses as the first paragraph of the letter. [16]

44. In the application, the Commission attempts to clarify the question of the breach attributed to TVR, stating that it consisted, first, in the defendant's delay in submitting the periodic reports and, second, in its mismanagement of the project.

45. That the defendant failed to comply with the deadlines specified in the contract for preparation of the periodic reports is indisputable. The report for the first half of 1991, which should have been submitted within one month of the end of that period, was not submitted until 13 November 1991, so that it was more than three months late. The mid-term report, which should have been submitted in April 1991 (although the Commission allowed an extension until 30 September 1991), was sent on 30 January 1992, after the Commission had requested it twice.

46. In an attempt to justify this, TVR explains in the defence that there was a delay of several months in starting the project due to the fact that the agreement between it and DSM could not be signed until 30 May 1990 and that the other partner, ICST, did not sign the agreement until 'several months later', because it had not been able to appoint a researcher.

47. After reiterating that it was TVR's responsibility to ensure that the contract was adhered to, the Commission states in the reply that ICST's delay in starting work was attributable to TVR, since ICST could not hire a researcher until it had signed the associated contract with TVR.

48. In the rejoinder, TVR refers to the case-law of the Corte Suprema di Cassazione on the termination of contracts for failure to comply with time-limits, according to which, in order for a time-limit to be of the essence — and for failure to comply with it to justify termination of the contract — expiry of that time-limit must have the effect that the other party no longer has an interest in the performance of the contract. TVR states that in the present case the Commission's interest in the completion of the project did not cease to exist

16 — Paragraph (e) deals with the situation where the contractor, in order to obtain the financial contribution from the Commission, makes false or incomplete statements; paragraph (f) with the situation where the contractor fails to start the work on the date specified in the contract and the Commission does not accept the revised date proposed; and paragraph (g) with the situation where *force majeure* lasts for more than four months.

as a result of the delay in submitting the periodic reports. [17]

49. It is clear from the minutes (lodged by the defendant) of a meeting between the representatives of the three associate undertakings and the Commission, which was held at TVR's premises in Rome on 5 April 1990, that the reason why ICST started work five months late was that it had no authority to hire the staff it needed until it had signed the associated contract with TVR and DSM, the negotiations for which had lasted several months.

50. From that aspect, TVR cannot claim to be completely free from blame for the delay in the commencement of ICST's work. It should be recalled that the contract between the Commission and TVR was entered into on the basis of a plan submitted by the three partner organisations, which, however, were unable to reach an agreement on how the project was to be implemented until several months after the start date.

51. The argument that TVR was liable for that delay is strengthened by the fact that, under Article 1.4 of the contract and Article 3.2 of Annex II thereto, TVR continued to be fully liable to the Commission for compliance with the contract even if it entered into associated contracts with third parties in order to carry out the project. Therefore, DSM's and ICST's delay in starting the project cannot serve to excuse the defendant for late submission of the periodic reports.

52. The requirement which, according to the case-law of the Corte Suprema di Cassazione, must be met in order for failure to comply with a time-limit to be deemed a ground for termination [18] should be assessed within the general context of the contract. Failure to comply with time-limits in contracts becomes more serious when the contract is not being performed in the manner agreed by the parties. In that regard, the Commission alleges that TVR was mismanaging the project, which forms its second complaint against the defendant.

53. The Commission bases its conclusion on two reports made by an independent external expert, Professor Goedel of the University of Aachen. In the first of his reports, dated 4 February 1992, Professor Goedel states: 'The results which were presented had a great delay (approximately nine months). The parties should practise more interactive work. The reports present what was planned to do, present the

17 — Likewise, TVR included in the rejoinder a letter from the Commission to the independent expert, dated 6 January 1992 and copied to the defendant, informing him that the mid-term assessment meeting had been scheduled for 4 February 1992. In TVR's view, that letter, which conflicts with the ones of 20 and 23 January 1992 in which it was required to comply with a time-limit which the Commission had already agreed to extend, proves that the delays had been overcome and accepted. To my mind, aside from the fact that the submission of that document with the rejoinder was out of time, the letter does not in any way justify the defendant's delay. First, when it informed the expert that '... the meeting for this project has been postponed and the revised date is 4 February 1992,' the Commission was not accepting TVR's delay but was merely adjusting to it. Second, I can find no inconsistency between that letter and the letters of 20 and 23 January, since they deal with different matters. The first letter deals with the mid-term assessment meeting, while the other two deal with the mid-term report which TVR was required to submit.

18 — This requirement is discussed in point 48 of this opinion.

circumstances about the delays and some results of literature research, but less information about the results based on their own research work in detail.' Professor Goedel, who described the results achieved to date as 'bad,' concluded by emphasising the need for a 'strong co-ordinator'. The Commission states that TVR's reply to the written notice of termination of 25 March 1992 was subsequently the subject of a second negative report by Professor Goedel. [19]

54. The applicant's written notice of termination, dated 25 March 1992, reflected these findings, which were later confirmed in a letter to the defendant on 4 May 1992.

55. TVR states in its defence that Professor Goedel drafted his first report without studying any documentation [20] or visiting the defendant's site at Pontinia, where the project was being carried out.

As regards the second negative report, the defendant, after questioning whether that report actually exists, in view of the fact that the Commission has not lodged it at the Court, surmises that, if it does exist, it is not relevant to this case, since it refers to the very utility of the project approved by the Commission.

56. In its reply, the applicant states that the expert, a university professor of international standing, had exercised the utmost care in analysing the material already submitted by TVR to the Commission and that, during the period preceding the preparation of his report, he concentrated solely on studying the most recent documents received. Furthermore, Professor Goedel was present at the mid-term assessment meeting and asked the participating undertakings numerous questions.

The Commission maintains that the second negative report was delivered verbally during the course of various meetings with its officials.

57. In my view, it is not only permissible but also desirable that, in research programmes like the one at issue in the present

19 — There does not appear to be a written record of this second report.

20 — According to TVR, this is clear from the fact that it submitted the documents on 30 January 1992 and the mid-term assessment meeting took place on 2 February 1992, which means it would, in TVR's opinion, have been impossible for the expert to produce a negative, six-line, hand-written report dealing with documents several hundred pages long.

case, the Commission should base itself on the opinions of acknowledged experts in order to assess the quality of the work carried out. However, it is also my view that the Commission cannot base itself on the contents of the second negative report allegedly made by Professor Goedel when, rather surprisingly, there is no written record of its contents.

58. In his first report, Professor Goedel's assessment of the work carried out to date by TVR and its partners is clearly negative. Under the heading 'Need for New Partners,' the expert wrote 'Need for a "strong" coordinator,' calling into question TVR's work as project coordinator.

59. In the light of that report, and of the delays in submitting the periodic reports, I consider that the Commission was entitled to take the view that the project had lost its *raison d'être* and that it was therefore necessary to suspend Community funding.

60. It must also be emphasised that, in any event, under Article 4 of Annexe I to the contract (Technical Provisions), the Commission was entitled to terminate the contract unilaterally, based on its own assessment of the results submitted at the mid-term assessment meeting.

61. For those reasons, I conclude that the Commission was entitled to terminate the contract under Article 8.2 (d) of Annex II thereto.

62. The defendant states that in its letter of 15 April 1992 it rebutted point for point the allegations made in the Commission's notice of termination. Since no response was received, the Commission must be regarded as having accepted the defendant's explanations.

63. In its reply, the Commission states that its aim in sending the notice was for the contract to be performed, in other words, for the activities provided for therein to be carried out. Clearly, those activities could only have been carried out in the short period of one month if they had already been at an advanced stage at the time the notice was sent, which was not the case in view of the lengthy delay which TVR had built up. The Commission believes that the response sent by the defendant on 15 April 1992 is merely an attempt at an excuse and has nothing whatever to do with the performance of the contract which it had requested.

64. It would, perhaps, have been desirable for the Commission to reply to the defendant's letter of 15 April 1992, using as a basis for its arguments the points made by the expert in his second negative report, of which there is no written record. However, it should also be acknowledged that TVR did not remedy its breach following that letter. I agree with the Commission that it would have been impossible for the defendant to have dealt with the criticisms it had received within one month.

65. The defendant goes on to assert that the Commission's conduct after it had sent the notice of termination proves that the contract had not been terminated. It bases that assertion on the fact that the Commission expressed satisfaction at the appointment of a new project director and that it made no formal declaration that the contract had been terminated.

66. The Commission rejects the defendant's contention. The appointment of a new project director in February 1992, even though the latter was a well-known, highly-qualified individual, could not rectify a situation which, by that time, had been irreparably impaired. With regard to the failure to terminate the contract formally, the Commission points out that, under Articles 1454 and 1456 of the Italian Civil Code, termination took place automatically and there was therefore no need for a declaration to that effect by the courts.

67. To my mind, TVR's plea in that regard should also be dismissed. First, the fact that the defendant decided to replace the project director in February 1992, following the criticisms it had received, did not preclude the Commission from terminating the contract in accordance with the termination clause. Second, neither that clause nor the relevant provisions of Italian law imposed a duty on the Commission to confirm that the contract had been terminated after the one-month time-limit had expired. In any event, such confirmation was, in my understanding, contained in the letter which the Commission sent to TVR on 10 June 1992 and in which, after reminding the defendant of its decision to terminate the contract, notice of which was given on 25 March 1992, it requested the defendant to submit the consolidated cost statement within one month. In response to that letter, TVR submitted the statement on 2 July 1992, from which it must be inferred that the defendant was fully aware that the contract had been terminated.

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

V — Substance of the claim

A. *Reimbursement of part of the advance payment*

69. The Commission seeks reimbursement of ECU 77 558.80, being the difference between the defendant's actual costs (in other words, those arising from work actually carried out in performance of the contract) and the sums it received from the Commission, namely ECU 460 000 on 21 December 1989, by way of an advance, and ECU 128 418.20 on 21 July 1991, in respect of the first project year.

70. The defendant submitted the consolidated cost statement on 2 July 1992. That statement was initially accepted by the Commission. However, on 23 March 1993, the Commission sent a letter to the defendant in which it rejected the consolidated cost statement and claimed reimbursement of ECU 109 444.80.

71. Since the defendant challenged that final settlement, the Commission instructed Ernst & Young to carry out an audit of the project. In their report, dated 8 September 1994, Ernst & Young stated that, in their opinion, with the exception of certain accounting errors,[21] the costs submitted were in accordance with the ones contained in TVR's books and with the contract terms.

72. On 6 June 1995, the Commission sent another letter to the defendant, reducing the amount of the reimbursement claimed to ECU 77 558.80.

73. TVR claims that the Commission acted inconsistently by accepting the consolidated cost statement and then later claiming repayment of ECU 109 444.80. Furthermore, it considers that, pursuant to Ernst & Young's audit, the only sum which the Commission can claim from it is ITL 22 000 000.

21 — The auditors found the following errors:
'— Valuation of labour costs has been based on the actual hourly rates of the year previous to the one in which the time was spent; as a consequence, costs charged should be lower than the actual costs incurred.
— The Contractor charged as "consumables" the full purchase cost [of] approximately ITL 64 586 000 of a CAD system which, in our opinion, should be considered "durable equipment."
— Costs originally charged as "durable equipment" were increased by the Contractor to ITL 47 253 997 to take into consideration the use of a CAD system indicated in point (2) above. However, such amount includes the utilisation cost of materials and the internal manpower for which the Contractor has no supporting documentation of the original purchase cost of ITL 28 153 779.
— Even if we considered the costs described at point (3) above acceptable, our recalculation of the utilisation cost for durable equipment showed an amount lower than the one charged by the Contractor by approximately ITL 22 000 000.
— An invoice of ITL 8 100 000 for external assistance by a consultant has not yet been paid by the Contractor.
— Due to a clerical mistake, the Contractor charged a lower amount for overheads by approximately ITL 9 635 000.'

74. The Commission denies that there is any such inconsistency. In that regard, it cites Article 21.4 of Annex II to the contract, which provides: 'Subject to Article 39 of this Annex, periodic payments made against cost statements shall be considered as advances until acceptance, in accordance with the procedure specified in Annex I, of the appropriate deliverable specified in Annex I, or, if no deliverables are specified, until acceptance of the final report.' In the Commission's view, that provision authorises it to claim reimbursement of sums already paid if an audit performed in accordance with Article 39 of Annex II to the contract reveals serious breaches.

The Commission states that it assessed TVR's work on two levels: financial (Ernst & Young) and technical (Professor Goedel). It points out that the firm of auditors was only qualified to conduct a financial audit, which is not the same as a technical review. In other words, the auditors can evaluate the cost per person of an hour's work but they are not capable of establishing whether it is technically reasonable to devote ten hours to an activity that only requires two hours. Thus the financial review needed to be accompanied by a technical review which, in this case, was carried out by Professor Goedel, whose findings were negative.

75. In its rejoinder, TVR points out that the Commission has adduced no evidence whatsoever that the actual working time was 'exaggerated.' With reference to the technical review, TVR states that Professor Goedel did not deal with the question of working time.

76. To begin with, TVR's claim, founded on an alleged inconsistency by the Commission in initially accepting, and then later rejecting, the consolidated cost statement, should be dismissed. Article 39 of Annex II to the contract stipulates that cost statements may be subject to verification even after the Commission has reimbursed costs. Therefore, the defendant ought to have been aware that the Commission could, as indeed it did, carry out financial and technical audits and, where appropriate, require reimbursement of sums which did not correspond to costs actually incurred.

77. The Commission does not accept the following costs: [22]

— Labour costs. According to TVR, these amounted to ITL 333 272 000, while the Commission only accepts ITL 115 530 000.

22 — These all relate to 1992, apart from the costs of durable equipment, which relate to 1991.

— Durable equipment. Based on the auditors' findings, the Commission reduced the amount claimed by the defendant to ITL 22 000 000.

— External assistance. Of ITL 26 481 050 claimed by TVR, the Commission rejects ITL 8 100 000, for which the auditors found no justification, and ITL 13 770 000 which, in the Commission's view, cannot be accepted under this heading.

— Overheads. The Commission accepts them in an amount equivalent to 25% of the labour costs (at the suggestion of the auditors). Since, in the Commission's view, the labour costs amount to ITL 115 530 000, the overheads come to ITL 22 882 500 (and not ITL 73 683 000, as declared by TVR).

78. Taking those reduction into account, the Commission concludes that the allowable costs for 1992 amount to ECU 115 689.45, which, added to the costs for 1990 (ECU 128 418.20) and 1991 (ECU 266 744.75), makes a total of ECU 510 852.40. Since the payments already made to the defendant amount to ECU 588 418.20, TVR must repay the difference, ECU 77 565.80. [23]

79. The Commission's claim gives rise to the difficulty of the burden of proof. Is the Commission freely entitled to reduce the amount of the costs claimed by TVR; and, if so, within what limits?

80. In the light of the provisions of Annex II to the contract, the answer to the first question should be in the affirmative. In that regard, the first paragraph of Article 8.4 provides that '... the Commission may require the reimbursement of all or part of its financial contribution and shall have regard, to such extent as may be fair and reasonable, to the nature and results of the work undertaken and its use, within the framework of a Community RTD programme, to the Commission.' Article 21.4, cited above, confirms that the Commission has that power.

81. Neither the provisions referred to nor the rules of equity permit the view that the Commission's power in that regard is completely unrestricted. To my mind, both parties to the contract are under an obligation to give an adequate justification of

23 — Due to an arithmetical error, the Commission states that the allowable costs amount to ECU 510 862.40 and that the difference between this sum and the payments already made amounts to ECU 77 558.80.

their cost calculations, with the difference, however, that if the undertaking does not provide sufficient information the Commission should be allowed a wider discretion to adjust the figures submitted.

82. Following that line of reasoning, the first matter to look at, based on the documents filed in the proceedings, is whether the defendant justified its costs sufficiently.

83. The following correspondence deals with the costs incurred during the period 1 January to 31 May 1992:

— In its reply to the Commission's notice of termination (letter of 15 April 1992), TVR enclosed a detailed work schedule for the six-month period from 1 April to 9 October 1992, giving details of the related expenditure. It is, however, only a work schedule and there is no record that it was actually carried out.

— It appears that TVR attached its cost statement for the period at issue in these proceedings to the letter it sent to the Commission on 2 July 1992. The defendant, however, has not deemed it necessary to lodge that statement with the Court.

— The Commission's letter dated 14 September 1992 contains an analytical 'statement of account,' detailing the costs declared by the defendant. However, first, the Commission subsequently rejected the figures in the statement and, second, there is a complete lack of information regarding the work undertaken.

— Finally, in TVR's letter dated 29 March 1993, in which it contests the Commission's closing financial statement, the number of hours worked and the costs incurred are set out under a series of headings, but once again there is no information about the work undertaken. Furthermore, as the Commission points out, one of these headings is in any event unacceptable, since it refers to work which, according to Annex I to the contract, was to be undertaken by ICST.

84. The conclusion must be drawn that there is no proof that the defendant justified its costs calculations sufficiently and that, under the terms of the contract, the Commission was entitled to reduce the total balance in accordance with its own technical assessment.

85. Therefore, I propose that the Court should allow the Commission's claim for

reimbursement of the sums it paid and order the defendant to repay ECU 77 565.80.[24]

B. *Interest*

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

87. Therefore, the Commission claims interest at the rate of 11.75% from the date on which the defendant received the advance (1 February 1990), which comes to ECU 24.97 per day.[25] The defendant submits no claim in that regard, but merely states that the primary obligation to make reimbursement is not enforceable.

88. Since TVR must repay ECU 77 565.80 to the Commission, by way of a primary obligation, it follows that the secondary obligation to pay the corresponding interest — which was expressly agreed — also applies.[26]

C. *Compensation for damage*

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

— A number of its officials spent a large number of hours monitoring the defen-

24 — Pursuant to Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), as regards the amount of the principal sum and the interest, all references to the ECU must be replaced by a reference to the euro at a rate of one euro to one ECU.

25 — The Commission calculates that TVR received the advance two months and nine days after the payment order (which is dated 21 December 1989).

26 — In response to a question I asked during the hearing, the defendant's representative indicated its agreement with the Commission's interpretation that the second paragraph of Article 8.4 of Annex II to the contract provides for a *fixed* rate of interest in the event of termination of the contract. Since the parties are in agreement on this point, there is no need to analyse this question in any more detail, although I believe that the wording of this clause could, perhaps, allow a different interpretation.

dant's activities and requesting it to comply with the time-limits laid down for submitting the periodic reports. [27]

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

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

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

90. The Commission contends that the overall sum to compensate for this damage amounts to ECU 7 700, although the Court may calculate it differently using the option provided in Article 1226 of the Italian Civil Code, which provides that where the exact amount of the loss cannot be proved it is to be determined by the court according to equitable principles.

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

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

27 — The Commission calculates that 37 working hours have been lost in this way. Using the rate of ECU 52 per hour, the total amount works out at ECU 1 924 (although the application cites the incorrect figure of ECU 1 950).

regarded as constituting damage distinct from the burden of costs. [28]

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

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

28 — *Commission* v *Comune di Montorio al Vomano*, cited in footnote 7 above, paragraph 54.

93. By contrast, sufficient evidence has been provided of the expenditure (ECU 6 610) arising from the consultancy contract between the Commission and Ernst & Young to enable the total cost of this contractual relationship to be determined. Nevertheless, due to the fact that in Case C-40/98, in which the same parties are contesting termination of another research contract, I have proposed that the Court order the defendant to reimburse the Commission for the cost of the audit, and since Ernst & Young's invoice refers jointly to the review of both contracts, it follows that in the present case this claim by the Commission should be dismissed so that it does not result in the latter's unjust enrichment.

VI — The counterclaim

94. Since, in my view, the Commission's action should be allowed, the counterclaim brought by TVR must be dismissed.

VI — Costs

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

VII — Conclusion

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

— the sum of EUR 77 565.80, together with interest at the rate of EUR 24.97 per day from 1 February 1990 to the date of full settlement of the debt; and

— the costs of the proceedings.