the Conditions of Employment of Other Servants except in the case of a misuse of procedure established by the fact that the terms of his employment have been determined, not in the light of the needs of the service, but with a view to avoiding the application of the said Conditions of Employment.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 7 March 1985 *

Mr President,
Members of the Court,

1. The relevant facts

The applicant, Steffen Klein, who was born in Berlin in 1905, was authorized to practise medicine in Belgium in 1948. Since 1958 he has undertaken medical duties for the Commission, as from 1966 on the Commission's premises. On 17 July 1974 a contract, a copy of which is among the documents before the Court, was concluded between him and the Commission. Under the 'contrat de prestation de services' [contract for services], as it was termed, the applicant agreed to perform for 16 hours a week medical duties including consultations by the Commission's staff, preventive medical examinations and the tasks of duty medical officer. A rate of BFR 900 per hour was originally agreed, which was adjusted by subsequent amendments to the contract, termed 'avenants au contrat de prestation de services'.

By a letter dated 21 December 1982 the competent director-general notified the applicant that, with effect from 30 June 1983 at the latest, the Commission no longer wished to avail itself of his services as medical officer in view of his advanced age. By letter dated 11 May 1983 the applicant stated that his position *vis-à-vis* the Commission was governed by Community law, as a result of which he should be entitled to a pension. In the alternative he contended that, in the event that Belgian law should be applicable, his dismissal on account of his age was unlawful. By a letter of 29 June 1983 the competent director-general gave the applicant a further six months' notice as from 4 July 1983. On 21 November 1983 the applicant lodged a complaint under Article 90 (2) of the Staff Regulations, in which he again claimed entitlement to a pension. The complaint was rejected on 2 April 1984, whereupon the applicant brought an action before the Court.

2. The object and admissibility of the application

In his application the applicant claims that the Court should declare that the duties performed by him were carried out in the context of an employment relationship governed by Community law and that the Commission should be ordered to accept the financial consequences thereof, in particular

* Translated from the Dutch.

by granting him a retirement pension or similar benefit as from 1 February 1984, together with interest thereon at the rate of 12%. The Commission contends that the application should be held to be inadmissible in so far as it is made pursuant to Article 91 of the Staff Regulations; for the rest, it should be dismissed.

Article 3 of the contract concluded between the Commission and the applicant confers exclusive jurisdiction on this Court. Since the applicant's principal claim is not expressly based on the relevant provision of the Staff Regulations, it may, in my view, be taken that the application is based on that contractual provision. In that case there is no problem of admissibility, as the Commission itself acknowledges on page 7 of the defence. Admissibility remains important at the most as regards the applicant's subsidiary claim that the decision rejecting his complaint lodged under Article 90 (2) of the Staff Regulations be annulled. However, in view of the fact that the scope of that claim is precisely determined by the applicant's principal claims which are not, or not exclusively, based on the Staff Regulations, I consider that it is not necessary to discuss that aspect separately.

3. Questions of law

As can be seen from the Report for the Hearing, the applicant's claim against the Commission for a pension or similar benefit is based on three separate propositions, each of which incorporates a question of law. First, the applicant claims to have performed his duties in the context of an employment relationship with the Commission, in which subordination featured as the most important element. Furthermore — and this is the second limb of his argument — he contends that Community law applies to that employment relationship despite the fact that in the contract of 17 July 1974 it is stated that Belgian law is applicable. Finally, since pension rights must also have a basis in Community law, the applicant is of the view that the Conditions of Employment of Other Servants of the European Communities must be applied in his case. Apart from the legal problems raised by each of those propositions, in one respect the construction of the applicant's argument poses a separate legal problem. At the hearing the Judge-Rapporteur rightly raised the question whether it is not inconsistent to categorize the contractual relationship between the Commission and the applicant as an employment relationship under Belgian law and subsequently to maintain that Community law alone is applicable. If the contractual relationship between the applicant and the Commission is to be regarded as one of employment under Belgian law the question arises in fact whether pension rights ought to be assessed in accordance with Belgian law, in particular as regards the applicable compulsory social insurance and the payment of the relevant contributions. Pension rights under Community law are conditional on the existence of an employment relationship under Community law, the existence of which can only be determined by applying Community law criteria. At the hearing the applicant endeavoured to resolve this fourth legal problem by arguing that the contract was unlawful in so far as it conflicted with the Staff Regulations. Consequently that fourth legal problem need only be considered if, in fact, in applying the Staff Regulations or the Conditions of Employment of Other Servants of the European Communities, which in important respects refer to the Staff Regulations, it appears that in this case there must be said to be an employment relationship covered by the said Staff Regulations or Conditions of Employment.

4. The provision of services as starting point

Before I examine the first proposition more closely I consider that I should say something about the choice of a starting point. First, the contract concluded on 17 July 1974 is headed by the words 'contrat de prestation de services' [contract for services]. That description, which is repeated in each of the four paragraphs of Article 1 of the contract, clearly points to a contractual relationship between the Commission and the applicant which is based on the supply of services. It does not appear that the applicant ever objected to that. That the extent of the services to be provided is limited to 16 hours a week (Article 1 (1) of the contract) is an indication that for the rest of his working hours the applicant worked as a private practitioner. Moreover, the papers before the Court include a communication from the Vice-President of the Commission at that time concerning the organization of the institution's medical branch. In the organization plan relating to the medical branch which forms part of that communication distinction is made between 'médecins-fonctionnaires' [doctors who are officials] and '[deux] médecins payés à la prestation' [(two) doctors paid on the basis of services rendered]. The applicant's name appears in the second category. According to the appended extract from the Commission's minutes, COM (68) PV 61, of 18 December 1983, it appears that the Commission approved the organization plan in question. Thus it was that the organization of the Commission's medical branch was established and the applicant — he must at least have been informed of that fact — was included in the organization plan as a doctor paid on the basis of services rendered. In that case too, there is no evidence of the applicant's having made an objection. In addition, the papers before the Court include two memoranda from the head of the medical branch, Dr Semiller, to the Director-General for Personnel and Administration concerning fees paid to 'médecins payés à la prestation'. From those too it appears that the head of the branch concerned regarded the applicant as a doctor paid on the basis of services rendered. In view of the above I consider it to be likely that the applicant knew or at least was in a position to know that, for its part, the Commission viewed his relationship with it as a contract for services and not as a contract of employment. As the Commission explained at the hearing, it regularly concludes contracts for services also with, amongst others, lawyers, teachers of modern languages and craftsmen. In my view, such a practice appears in principle to be a normal, even unavoidable one for Community institutions to adopt. I consider that in answering the individual questions it is also right to assume in principle that there was an agreement for the supply of services and to take this as a starting point.

5. The existence of a subordinate employment relationship

Therefore I shall now examine whether the applicant has adduced arguments capable of raising well-founded doubts as to the correctness of the aforementioned assumption in his particular case. The applicant argues — with the aid of numerous references to Belgian law — that the existence of a contract of employment is primarily manifested by the existence of a relationship of subordination *vis-à-vis* the Commission. Apart from that, he also observes that even the Commission does not dispute that a doctor may practise under a contract of employment. On page 15 of the reply the applicant puts forward seven arguments which, he contends, show that there was such a relationship in his case. The first is that he was contractually bound to undertake certain tasks specified by the Commission. That is perfectly correct but

gives no indication as to whether those tasks must be categorized as employment or as services. Secondly, that relationship is said to emerge from the fact that the head of the medical branch 'pouvait *imposer* l'accomplissement d'autres services' ('could *require* other services to be performed'). However, since the contract states that the Commission 'peut demander' ('may ask') for other services to be performed and further provides that the applicant cannot be required to provide services for more than 16 hours a week, that provision cannot be construed as constituting evidence of subordination in the sense of employment. The third argument is unclear in so far as it concerns the periods during which the applicant was required to carry out his activities. In that connection the contract speaks of a 'commun accord' ('mutual agreement'). Comparison with Article 55 of the Staff Regulations shows that this formulation is anything but indicative of a relationship of subordination. By way of a fourth argument reference is made to the fact that the applicant performed his contractual duties on the Commission's premises. That argument, too, must fail, since it is not apparent why the supply of services should be able to take place only outside the premises. The fifth indication of subordination is said to be that the Commission could give the applicant administrative instructions. However, that possibility, which, moreover, is not stated in the contract, relates to the submission of medical findings and therefore does not constitute the essence of the contractual relationship. The sixth argument, to the effect that the applicant was not to seek to recruit patients from among the officials whom he examined, is, as the Commission was right to show, not indicative of a relationship of subordination but a matter of professional ethics. That reinforces the view that the applicant was regarded primarily as a doctor working in an independent capacity. The applicant's seventh argument fares no better: in itself the fact that the contract was concluded for an indefinite period is not conclusive for the purpose of settling the question whether the applicant was providing services or was working as an employee.

In conclusion, it can therefore be stated that the applicant has not succeeded in showing that a contract of employment would exist under Belgian law and consequently the assumption which I used as a starting point and which is described above, namely that an agreement for the supply of services is involved, has not been disproved.

6. The application of the law relating to the Community public service

The remaining question is whether an employment relationship under Community law is involved, which signifies in this case the existence of a relationship of the kind provided for in the Conditions of Employment of Other Servants of the European Communities. That is a matter which I think can be dealt with briefly. I shall start by stating that the examination undertaken by the applicant concerning the staff category in which he falls assumes as proven precisely that which he had to prove, that is to say that he is a member of staff for the purposes of Article 1 of the said Conditions of Employment. Furthermore, none of the categories provided for in that article — temporary staff, auxiliary staff, local staff, special advisers — fits the applicant. He cannot be regarded as a member of the temporary staff within the meaning of Article 2 (a), (b) or (d), since in each case a post provided for in the budget is involved. The category covered by Article 2 (c) is manifestly inapplicable — contrary to the applicant's contention — on the ground that, as far as the Commission is concerned, that category plainly relates solely to staff employed in the private offices of Members of the Commission. No more may the applicant be classed as a member of the auxiliary staff, since such a position may last for no more than one year. On the other hand, he cannot come

within the category of local staff in view of the type of duties involved. The same comment applies to the possibility of classifying him as a special adviser. Apart from the question whether the applicant possesses the requisite special qualifications, a further requirement as regards that category of staff is that the person concerned must be paid from the total appropriations for that purpose under the budget. In addition, it must be added that that status does not entail any social security cover whatever for the persons concerned and therefore cannot assist the applicant in his aim, namely the receipt of a pension. Moreover, as has already been observed, the applicant himself does not consider that he falls within that category.

7. Conclusion

In view of the above I consider that the applicant cannot prove or even establish a *prima facie* case for the existence of a contract of employment between himself and the Commission; on the other hand, it has been shown, neither does the law relating to the Community public service apply in his case. As a result, there is also no basis whatever for a possible entitlement to a pension from the Commission. I therefore propose that the application be dismissed. I further propose, in accordance with the request formulated in the Commission's defence, that the applicant should be ordered to pay all the costs, since, in view of my findings in this case, Article 70 of the Rules of Procedure cannot be held to apply.