OPINION OF ADVOCATE GENERAL COSMAS
delivered on 7 February 1995 *

1. By an application received at the Court Registry on 28 May 1993 Ernst R. Bauer, a permanent official of the Commission of the European Communities, is requesting the Court under Article 153 of the EAEC Treaty to determine the dispute which has arisen between himself and the Commission concerning a tenancy agreement entered into between them containing a relevant arbitration clause.

In particular Mr Bauer claims that the Court should:

1. Declare both the termination of the tenancy and the increase of the rental by the Commission to be unlawful and therefore to annul them.

2. Order the Commission to pay compensation for material and non-material damage suffered.

* Original language: Greek.

I — Facts and legal framework

A. *Facts*

2. Mr Bauer, a permanent Commission official assigned to the Joint Research Centre in Ispra, resided from 1 February 1965 until 6 July 1993 in a block of flats in an apartment let to him by the Commission. That apartment was made available to the EAEC by the Italian Government in accordance with the terms of the agreement of 22 July 1959 concerning the establishment of the aforementioned Joint Research Centre. [1]

3. The use of the apartment was founded on successive tenancy agreements of 1 February 1965, 1 June 1968 and 1 June 1969 respectively.

1 — According to the application the building belongs to the Instituto Autonomo per le Case Popolari di Varese (Autonomous Institute for Popular Housing in Varese), the apartment in issue was sublet to the applicant. Nonetheless, the Commission in its defence states that the abovementioned building along with others was made available to the EAEC for 99 years under Article 1 of the agreement of 22 July 1959 and that accordingly the Commission enjoys full rights of disposition over property let by it to its officials. In its reply the applicant does not challenge those submissions by the Commission. However, neither from the wording of the agreement at issue nor from other items in the file may it be inferred that that agreement was a subletting agreement.

4. The last tenancy agreement of 1969 was tacitly renewed from year to year. By letter of 31 January 1992 the Commission sought to terminate the tenancy with effect from 1 June 1990 in order to carry out renovation works in the apartment in the context of the general renovation of the building. Mr Bauer did not give up possession of the rented premises on the abovementioned date. The Commission, therefore, reiterated its request in reminder letters (29 April 1991, 30 July 1992, 28 September 1992 and 3 March 1993) whereby it again sought the surrender of the rented premises. Moreover, both orally and in a letter of 14 January 1993 the Commission offered to make available to Mr Bauer equivalent premises on the basis of a new tenancy agreement for two years from March 1993 at the old rent. It repeated that offer in the abovementioned letter of 3 March 1993.

5. The monthly rent which in 1969 amounted to LIT 29 000 underwent successive upward adjustments until in July 1992 it reached the amount of LIT 62 000. By letter of 5 August 1992 the Commission informed Mr Bauer that with effect from August 1992 the rent would be LIT 327 265.

6. For his part Mr Bauer replied to the abovementioned letters by complaints (of 15 October 1992 as regards the termination of the tenancy and of 29 October 1992 as regards the final increase in the rent payable under the letting) under Article 90 of the Staff Regulations. Mr Bauer considers that those requests were tacitly rejected by the Commission. Moreover, Mr Bauer in his letter of 31 March 1993 did not accept the proposed offer of new premises, taking the view that its terms were unacceptable [2] and claimed by way of counter-proposal the provision of equivalent rented premises until the end of the old tenancy agreement (deemed by him to expire on 31 May 1994, see below) but on the terms of the contested tenancy agreement.

Finally, in the early months of 1993 Mr Bauer proceeded to purchase an apartment. That transaction was completed on 31 May 1993. He then informed the Commission by letter of 30 June 1993 that he intended to surrender the rented property in question. The surrender finally occurred on 6 July 1993.

B. *Legal framework*

7. Law No 392 of 27 July 1978 'on tenancies of residential property' [3] provides in Chapter 1 (tenancies of real estate for residential

2 — The proposed agreement provided that 'it is entered into by the contracting parties solely in order to cover the temporary housing needs of the tenant and the members of his family.' Furthermore, it provided that 'in any event and irrespective of the duties performed by the tenant within the Joint Research Centre at Ispra the present agreement is entered into only for such period as is deemed necessary in order to enable the tenant to resume responsibility for his own housing needs.'

3 — *Official Gazette of the Italian Republic*, General Series, No 211, 29 July 1978.

purposes of Title I (tenancy agreement), *inter alia*, as follows:

'*Article 1.* Duration of the tenancy. The duration of a tenancy of residential property cannot be less than four years. If the contracting parties agreed a shorter period or a tenancy for an indefinite period, the tenancy shall be deemed to have been entered into for a period of four years (...)

Article 2 (...)

Article 3. Tacit renewal. The agreement shall be renewed for a period of four years provided that one of the contracting parties does not inform the other by registered letter at least six months before the end of the agreement that he does not wish to renew it. This provision shall also apply to the end of each subsequent period.'

Articles 12 to 25 lay down the methods for determining the amount of the rent. Article 26 entitled 'Scope' provides, *inter alia*, as follows: 'Articles 12 to 25 shall not apply to tenancies of property situated in communities whose population in accordance with the 1971 census does not exceed 5 000 inhabitants provided that in the five-year period prior to the entry into force of this law and in every succeeding five-year period there has been no recorded increase in the population or, in any event, the percentage increase is lower than the national average in accordance with the information published by ISTAT (National Statistical Service). The community shall ensure public notification of that pre-condition and of the relevant increases.'

Chapter III, entitled 'procedural provisions' provides in Article 43 ('inadmissibility of the request for procedural non-compliance') that the submission of the request for the determination or review of the rent must be preceded by an application for conciliation under the provision of the following article, and that non-compliance with the procedure and the resulting inadmissibility may be taken into consideration *ex officio* at any stage of the procedure and before any tier of jurisdiction. [4] Article 44 entitled 'mandatory conciliation' provides that the request for conciliation concerning the determination of the rent is to be submitted to the competent court.

4 — It should be pointed out that Article 89 of Law No 353 of 26 November 1990 (amending the code of civil procedure), as amended by Article 2 of Law No 477 of 4 December 1992 repealed Article 43 of Law No 392/78. Law No 477 is stipulated as entering into force as from 1 January 1993 (Article 92) and with effect from 2 January 1994 as far as existing tenancies are concerned. The date of entry into force of that law was subsequently altered by successive provisions the last of which (Decree 571 of 7 October 1994 (*Official Gazette of the Italian Republic* No 237 of 1994)) provides that the date of entry into force is to be 16 December 1994. Consequently, at the time of the lodgement of the application at the Court the provisions of Article 43 of Law No 392/78 were fully in force.

8. Italian law contains no single set of legal provisions governing the provision of accommodation for service-related reasons. That question is governed from sector to sector by provisions concerning the provision of accommodation for service-related reasons to officials required to perform their duties in certain places of employment.

The following may be mentioned as the usual characteristics of such provisions:

1. They relate to property in the ownership of legal persons of the public sector and refer to various sectors of the public administration depending on the case or to a specific public body (see for example Decree No 427 of 1924 concerning railway employees and Law No 1570 of 1941 concerning managers of the fire service stationed in the provinces).

2. In each case they form the legal basis of the administrative acts by which the accommodation is provided, establishing between the grantor and the grantee a relationship governed by the principles of administrative law. That relationship stems from a regime governed by public law which however frequently refers to the principles of private law relating to tenancies.

3. They present a great degree of variety given that they sometimes relate to residential premises provided free of charge, at other times to dwellings in respect of which the rent is determined by the same law designating them official accommodation, and at other times to dwellings whose rent is determined under the provisions of Law No 392/78.

The foregoing does not preclude legal persons of the public sector from letting to their officials property forming part of their private assets. In those cases the constitutional court has held [5] that the contracts in question are entirely governed by private law.

C. *The agreement between the two parties*

9. The principal terms of the agreement between the two parties, as reduced to writing on 1 June 1969, are as follows:

'*Article 1*. By this agreement under hand the Commission of the European Communities, represented (...), lets to Ernst Bauer (hereinafter "the tenant"), for himself and for his

5 — Decision No 155 of 11 February 1988 (*Constitutional case-law* 1988, p. 502).

family (...) four rooms with ancillary areas (...) in the building (...) for one year with effect from 1 June 1969 until 31 May 1970 (...).

Article 2. The property let is for the exclusive residential use of the tenant and the members of his family (...)

Article 11. If neither of the parties informs the other of his intention to terminate the contract by registered letter with recorded delivery which must reach the other party three months before the end of the tenancy, the contract is deemed to have been tacitly renewed for a further year on the terms set out therein and subsequently shall be deemed to be renewed from year to year. Such tacit renewal shall not however signify that the agreement is governed by the provisions concerning tenancies for an indefinite period. The tenancy shall be terminated before the end of the term if for any reason the employment relationship between the tenant and the Joint Research Centre at Ispra is terminated or if for whatever reason the operational requirements which dictated the provision by the competent services of the Centre to the tenant in its absolute discretion of the apartment in question no longer subsist. The tenant shall be required to give notice by registered letter to the personnel and administration department within ten days from the date on which he receives notice of termination of the employment relationship with the Centre or of any alteration in the nature of his duties as opposed to the duties which he was performing at the time when the use of the service apartment was granted to him, of the date on which he intends to surrender the premises let together with an indication of the substantive reasons which may exceptionally justify a request for the continuation of the tenancy. The contract is deemed to be terminated on the date indicated by the tenant subject to the proviso, however, that it shall not be later than the date of termination of the employment relationship or not more than ninety days after the date of the change of duties. (...)

Article 16. The Court of Justice of the European Communities shall have sole jurisdiction concerning disputes arising under this agreement. The agreement shall be governed by Italian law.'

II — Forms of order sought by the parties

10. In his application Mr Bauer claims that the Court should:

1. Declare unlawful and invalid and accordingly annul:

   (a) the requests of 30 July 1992 and 28 September 1992 for the surrender of the property let

(b) the Commission's statement of 5 August 1992 concerning an increase in the rent as from 1 August 1992.

2. Order the Commission:

(a) to compensate the applicant for damage suffered owing to his hasty abandonment of the property by the payment of the lump sum amount calculated provisionally at ECU 30 000, subject to further specification during the course of the procedure (see below).

(b) reimburse the difference between on the one hand the amounts of rent demanded by the landlord and on the other the lawful rent for the period between 1 August 1992 and the actual date of surrender of the property let.

3. In any event order the Commission to pay compensation for non-material damage suffered in the amount of ECU 10 000.

4. Order the Commission to pay the applicant's costs.

11. The Commission contends that the Court should:

1. Dismiss the application as inadmissible inasmuch as it is based on the complaint made under Article 90 of the Staff Regulations.

2. Dismiss the remainder of the application as unfounded.

3. Order the applicant to pay the costs in the light of the super-erogatory nature of the application brought by him.

III — Jurisdiction of the Court and admissibility

12. Under Article 153 of the EAEC Treaty 'the Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law.' Moreover, in accordance with Decision 93/350/Euratom, EAEC, EEC [6] the

6 — Decision of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom, establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21).

Court continues to have jurisdiction in respect of matters based on Article 153 of the EAEC Treaty in actions brought by natural or legal persons in connection with agreements entered into before the entry into force of that decision.

In the light of the foregoing there can be no doubt that the Court's jurisdiction to determine the action brought by Mr Bauer flows from the arbitration clause contained in Article 16 of the tenancy agreement in issue (which predated the aforementioned Decision 93/350) in conjunction with the provisions of Article 153 of the EAEC Treaty.

13. However, before bringing the matter before the Court the applicant followed the procedure provided for in Article 90(2) of the Staff Regulations.

In its defence the defendant raised an objection of inadmissibility inasmuch as the application is based on a complaint made under the procedure provided for in Article 90(2) of the Staff Regulations and Mr Bauer did not comply with the time-limits laid down for that administrative procedure.

In order to reject that objection of inadmissibility, suffice it to state that the applicant has the right in any event under Article 153 of the EAEC Treaty in conjunction with Article 16 of the tenancy agreement to bring before the Court any dispute relating to that agreement. Consequently, the admissibility of the application which is brought before the Court under the contractual clause referred to above is not dependent on the observance of the procedural preconditions contained in Article 91 of the Staff Regulations. [7] The application is therefore admissible.

IV — Substance

14. The express terms of Article 16 of the agreement admit of no doubt as to the fact that the solution of the dispute is governed by Italian law. The applicant maintains that the tenancy agreement in question is governed by the special Italian Law No 392 of 27 July 1978 'on tenancies of residential property' on the basis of which he considers that the agreement was maintained in force until 31 May 1994, whilst the Commission contends that, since the agreement concerns the provision of accommodation for reasons connected with Mr Bauer's civil service status by which the two parties are bound, it is not governed by the abovementioned law but by the general provisions of Italian law concerning tenancies.

7 — See in that connection the opinion of Advocate General Capotorti in Case 567/79 *Flamm* v *Commission* [1982] ECR 2371, at pages 2394, 2398 et seq. and the judgments in Joined Cases 4/78, 19/78 and 28/78 *Salerno* v *Commission* [1978] ECR 771 and in Case 109/81 *Porta* v *Commission* [1982] ECR 2469.

The following two questions therefore arise:

1. Was the tenancy agreement in question agreed in relation to the provision of service-related accommodation?

2. If the answer to the first question is in the affirmative is that factor sufficient to preclude the application to the agreement of Law No 392/78?

15. The first of the two questions mentioned above must, I think, be answered in the affirmative.

In fact it may be inferred from the text of the agreement that:

1. It is a tenancy agreement ('by this agreement under hand the Commission of the European Communities (...) lets to E. Bauer (...)').

2. The agreement is in connection with the civil service status of the tenant and the provision of services by him to the Joint Research Centre in Ispra.

3. The tenancy agreement may be terminated early if the employment relationship between the tenant and the Joint Research Centre is terminated or if the operational requirements which dictated the provision by the competent services of the Centre of the accommodation to the tenant in its absolute discretion no longer subsist (Article 11).

16. Do those characteristics suffice to remove the agreement in question outside the scope of Law No 392/78?

In my opinion that would be the case if the agreement fell within the exceptions provided for by the law itself or if its application were precluded by other special provisions.

That appears to be the direction taken by the case-law of the Italian Court of Cassation referred to by the Commission in its defence. In fact, under that case-law, Law No 392/78 does not apply where accommodation is provided in the context of an employ-

ment relationship with the owning body providing the accommodation where '*under specific regulatory provisions* a public body by agreement lets accommodation to a member of its staff' [8] (emphasis added).

17. It is clear that the agreement cannot be brought within any of the categories of agreement excluded from the scope of Law No 392/78 by Article 26 thereof; furthermore, the other provisions of the law provide no indications concerning the exclusion therefrom of tenancy agreements in respect of accommodation on service-related grounds. Finally, there are no other provisions apart from those mentioned in the abovementioned law laying down a special scheme of provisions in respect of tenancy agreements such as the one at issue in this case. [9] The special Community provisions concerning the Commission's powers in relation to its officials contain no specific rules governing the provision of service accommodation by the Commission to its officials. [10]

18. Consequently, the tenancy agreement in question must be deemed to be governed by the provisions of Law No 392/78. [11]

A. *Termination of the agreement*

19. Mr Bauer in his pleadings requests the Court 'to declare unlawful and invalid and on that ground to annul' the requests of 30 July and 28 September 1992 whereby the applicant was required to surrender possession of the rented premises on 31 December 1992. However, from the actual terms of the abovementioned requests, it appears, I consider, in a manner which is not open to dispute that those requests (in the same way as the requests of 19 April 1991 and 3 March 1993 seeking surrender of the rented property on 30 June 1991 and 15 March 1993 respectively) constitute no more than demands for the surrender of the rented property after termination of the agreement effected by the Commission by its letter of 31 January 1990 in accordance with which the agreement was to be deemed terminated as at 31 May 1990. On the basis of those factors it must be accepted on a proper construction of the applicant's pleadings that the latter is in actual fact seeking a declaration of the illegality of the termination as at 31 January 1990; the 'requests' to which the application relates simply constitute the steps taken to enforce termination. Moreover, it

8 — Court of Cassation, Section III, No 1743, 14 March 1984 (Foro Italiano 1984, p. 340).

9 — See footnote 8 for examples of such cases.

10 — The only relevant provision concerns the provision of accommodation to officials performing their duties on the territory of a non-Member State (Annex X to the Staff Regulations added by Council Regulation (Euratom, ECSC, EEC) No 3019/87 of 5 October 1987 laying down special and exceptional provisions applicable to officials serving in a third country (OJ 1987 L 286, p. 3).

11 — The applicant submits that even if the agreement did not fall within the scope of Law No 392/78 the application of that legislative enactment in the specific case must be deemed to be governed by the principles of good faith and the protection of legitimate expectations and the Commission's duty of care for its staff in view particularly of his long residence in the rented property. That idea cannot be substantiated. The mere fact of long residence by the applicant in the property let cannot, in accordance with the principles relied on by the applicant, lead to a different application of the legal regime governing the agreement.

may be inferred from the application that the illegality affecting, according to the applicant, the termination of the tenancy agreement by the Commission resides in the fact that the termination in question is less than six months from the date (31 May 1990) on which the agreement came to an end in accordance with the pattern followed established by the successive renewals of the contract in accordance with Law No 392/78: 1.6.1978 to 31.5.1982, 1.6.1982 to 31.5.1986, 1.6.1986 to 31.5.1990 and 1.6.1990 to 31.5.1994. That allegation is well founded because, as has already been explained, the agreement in question is governed by Law No 392/78 which provides in Article 3 that in order that the tenancy agreement may not be deemed to be tacitly renewed the relevant notice of termination must be served by one of the parties on the other at least six months before the end of the tenancy agreement.

Consequently, the applicant's claim, as deduced interpretatively from his pleadings, must be accepted with the result that the termination on 31 January 1990 by the Commission of the agreement in issue must be declared unlawful.

B. *The increase in the rent*

20. Mr Bauer is also requesting the Court to declare unlawful the increase in rent as from 1 August 1992. As may be directly inferred from all the pleadings submitted by the applicant, the illegalities are constituted in his view by the fact that the increase imposed exceeds that permitted by the provisions of Articles 12 to 25 of Law No 392/78.

In order to refute that allegation, in the terms formulated, it is sufficient to point out that Law No 392/78 provides in Article 26 that the provisions of Articles 12 to 25 in connection with the determination of the review of the rent do not apply to property in communities with a population less than the limits laid down in that article. As the Commission argued (see defence, page 4 of the French translation) and was not contested during the written procedure, Ispra's population is less than the limits laid down in Article 26.

Irrespective, however, of the foregoing, that claim which concerns the determination of the amount of 'lawful' rent was made although the provisions of Articles 43 and 44 of Law No 392/78 were not observed. It should be recalled that under those provisions the submission of a claim for legal protection with regard to determination or adjustment of the rent must, if it is to be admissible, be preceded by the submission to the competent court of a claim for adjustment. [12] Accordingly, the claim in this con-

12 — Those provisions of Italian law are to be taken into consideration in this case because they do not impede or circumscribe the jurisdiction of the Court (which on the basis of the foregoing is founded on Article 153 of the EAEC Treaty in conjunction with Article 16 of the agreement in issue) but simply lay down preconditions for the admissibility of the right of action exercised before it (cases of national law circumscribing the jurisdiction of the Court based on an arbitration clause see the judgment in Case C-209/90 *Commission* v *Feilbauer* [1992] ECR I-2613).

nection which specifically seeks to determine the amount of the rent payable by the applicant must be rejected predominately on the basis that its submission to the Court was inadmissible.

21. Mr Bauer requests the Court to order the Commission to pay to him an amount equal to the difference between the amounts of rent due and paid and the amounts legally payable as from 1 August 1992 (date of increase of the rent) until 6 July 1993 (date of surrender of the rented property).

It has already been stated that it may directly be inferred from all the pleadings submitted by the applicant that in his view the 'lawful' rent must be deemed to be that stemming from the application of Articles 12 to 25 of Law No 392/78. However, it has also been stated that those provisions cannot be applied in the present case. Moreover, the applicant makes no other submissions in law or in fact which would allow the Court to determine the exact amount of the 'lawful' rent payable by him for the period from 1 August 1992 to 6 July 1993 with the result that it is impossible to determine the difference between the rents paid and the 'lawful' rents to which the applicant refers.

Subsequently, the claim for the reimbursement of the abovementioned amount must be rejected primarily because the terms in which it is couched are too vague.

C. *Compensation for material damage*

22. Mr Bauer requests the Court to order the Commission to pay compensation for material damage suffered on account of the early surrender of the rented property.

Mr Bauer considers that the purchase of the property which he completed in the early months of 1993 (see paragraph 6 above) took place under conditions of urgency and immediate need and the price was thus greater than he would have been required to pay under normal purchasing conditions.

In that context Mr Bauer assesses the amount of material damage as follows:

1. An amount equal to the difference between on the one hand rental payments due until the correct termination of the agreement (31 May 1994) according to Mr Bauer and, on the other hand, interest (at 10% per annum) for the same period on the amount paid by Mr Bauer for the acquisition of a property.

2. An amount equal to the cost of transporting his effects to the new residence and the cost of cleaning and the carrying out of complete decoration of that property.

3. The total of the abovementioned amounts together with the amount relating to Mr Bauer's claim in connection with the amount of the rent may be put according to him at LIT 52 million.

23. My opinion concerning the abovementioned claims for compensation is as follows:

1. As regards the costs of cleaning and decorating the new residence and the costs of transporting the applicant's effects there is no apparent reason why Mr Bauer considers that those expenses are the direct and unavoidable consequence of the premature surrender of the rented property.

2. As regards compensation in connection with the purchase of a property there is no elucidation of the reason why the premature departure from the apartment in question made it necessary, as the only means of providing for the accommodation needs of the applicant, to purchase a property. Furthermore, the applicant adduces no evidence in support of his assertion that the price of the property exceeded the price which he would have paid under normal conditions in his view.

Accordingly, both claims must be rejected.

D. *Compensation for non-material damage*

24. Finally, Mr Bauer requests the Court to order the Commission to pay to him the amount of ECU 10 000 as compensation for non-material damage.

In particular, on a proper interpretation of the pleadings, Mr Bauer is seeking financial satisfaction on account of non-material damage in addition to the compensation payable and maintains, without providing particulars, that the termination of the tenancy agreement by the Commission and its insistence on the surrender of the rented property had

a deleterious effect on his mental state. But he adduces no evidence, simply reserving the right 'to produce medical certificates if considered necessary'. In view of the fact that following the express agreement of the parties the oral procedure was dispensed with, that last reservation cannot supply the lack of evidential elements. Thus, that claim must be rejected principally because it is uncertain and, in any event, unproven.

V — Costs

25. Under the first subparagraph of Article 69(3) of the Rules of Procedure the Court may order that the parties bear their own costs if each party succeeds on some and fails on other heads. Since the applicant was unsuccessful in part, the parties should bear their own costs.

VI — Conclusion

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

(1) Declare unlawful the termination of the tenancy agreement by the Commission.

(2) Reject the remainder of the applicant's claims.

(3) Order the parties to bear their own costs.