

JUDGMENT OF THE COURT (Third Chamber)

30 September 2010*

In Case C-132/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 6 April 2009,

European Commission, represented by J.-P. Keppenne and B. Eggers, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by J.-C. Halleux, acting as Agent,

defendant,

* Language of the case: French.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2010,

gives the following

Judgment

- ¹ By its application, the Commission of the European Communities asks the Court to declare that, by refusing to finance the costs of furniture and teaching equipment for the European Schools, the Kingdom of Belgium has failed to fulfil its obligations under the Establishment Agreement concluded on 12 October 1962 between the

Board of Governors of the European School and the Government of the Kingdom of Belgium ('the Establishment Agreement'), read in conjunction with Article 10 EC.

Legal context

Statute of the European Schools

- 2 When they were first set up, the European Schools were governed by two instruments: the Statute of the European School, signed at Luxembourg on 12 April 1957 (United Nations Treaty Series, Volume 443, p. 129, 'the 1957 Convention'), and the Protocol on the setting-up of European Schools with reference to the Statute of the European School, signed at Luxembourg on 13 April 1962 (United Nations Treaty Series, Volume 752, p. 267, 'the 1962 Protocol'). Those two instruments were concluded by the six founding Member States of the European Communities.

- 3 The Board of Governors of the European School ('the Board of Governors'), established under Article 7 of the 1957 Convention, is composed, under Article 8 thereof, of the competent Minister or Ministers of each of the Contracting Parties. Under Article 9 of that convention, the Board of Governors is to be responsible for the application of the convention and, for that purpose, is to have the necessary powers in educational, financial and administrative matters. It is to adopt the General Regulations of the School by common agreement. Article 28 of the convention provides that the Board of Governors may negotiate with the government of the country in which

the headquarters of the school are situated any further agreements for the purpose of ensuring that the school operates in the best possible material and moral conditions.

- 4 The 1957 Convention and the 1962 Protocol were cancelled and replaced by the Convention defining the Statute of the European Schools, concluded in Luxembourg on 21 June 1994 (OJ 1994 L 212, p. 3, 'the 1994 Convention'), as laid down in Article 34 of that convention, which is currently in force. The 1994 Convention was concluded by the Member States and the European Communities, the latter empowered to do so under Council Decision 94/557/EC, Euratom of 17 June 1994 authorising the European Community and the European Atomic Energy Community to sign and conclude the Convention defining the Statute of the European Schools (OJ 1994 L 212, p. 1).

- 5 In accordance with Article 34, fourth paragraph, of the 1994 Convention, references in the acts prior to the adoption of the convention which concern the schools are to be understood as relating to the corresponding articles thereof.

- 6 The schools listed in Annex I to the 1994 Convention, which include the Brussels I, Brussels II and Brussels III European Schools as well as the European School in Mol (Belgium), fall within the scope of that convention.

- 7 Under Article 2(3) of the 1994 Convention, before a new school may be opened in the territory of a Member State, an agreement must be concluded between the Board of Governors and the host Member State concerning the free provision and maintenance of suitable premises for the new school.

- 8 The second paragraph of Article 6 of the 1994 Convention provides that, as far as their rights and obligations are concerned, the schools are to be treated in each Member State, subject to the specific provisions of the convention, as educational establishments governed by public law.
- 9 Pursuant to Article 10, first paragraph, of the 1994 Convention, the Board of Governors – which is composed, in particular, of a representative at ministerial level of each of the Member States and of a member of the Commission – is to supervise the implementation of the convention and, for this purpose, is to have the necessary decision-making powers in educational, budgetary and administrative matters and those required for the negotiation of the agreements referred to in Articles 28 to 30 of the convention.
- 10 Article 25 of the 1994 Convention provides that the budget of the schools is to be financed, *inter alia*, by contributions from the Member States through the continuing payment of the remuneration for seconded or assigned teaching staff and, where appropriate, a financial contribution, and by the contribution from the European Communities, which is intended to cover the difference between the total amount of expenditure by the schools and the total of other revenue.
- 11 Under Article 26 of the 1994 Convention, the Court of Justice is to have sole jurisdiction in disputes between Contracting Parties relating to the interpretation and application of the convention that have not been resolved by the Board of Governors.
- 12 Under Article 30 of the convention, the Board of Governors may negotiate with the government of a country in which a school is located any additional agreement required to ensure that the school can operate under the best possible conditions.

- 13 Article 33, first and second paragraphs, of the 1994 Convention states, inter alia, that the convention is to be ratified by the Member States as Contracting Parties in accordance with their respective constitutional requirements and that it is to enter into force on the first day of the month following the deposit of all instruments of ratification by the Member States and of the acts notifying conclusion by the European Communities.
- 14 It is common ground that the 1994 Convention entered into force on 1 October 2002.

Establishment Agreement

- 15 The Establishment Agreement, approved by the Belgian Law of 8 November 1975 (*Moniteur belge*, 7 February 1976, p. 1415) was concluded for the purpose of ensuring that the European Schools in Brussels and Mol would operate in the best possible material and moral conditions, as provided for by Article 28 of the 1957 Convention.
- 16 In Chapter I of the Establishment Agreement, which is entitled 'School buildings and equipment', Article 1 reads as follows:

'The Government of the Kingdom of Belgium undertakes to provide the Schools with the buildings that are necessary for their activity and meet the objectives set for themselves by the governments that are signatories to the Protocol on the setting-up of European Schools.

It shall maintain those buildings and insure them in accordance with the rules governing property owned by the Belgian State.

It undertakes to provide those Schools with furniture and teaching equipment in accordance with the criteria applied to its own establishments.’

Pre-litigation procedure

- ¹⁷ In a letter of formal notice dated 17 October 2007, the Commission alleged that the Kingdom of Belgium had failed to observe the provisions of the Establishment Agreement and of Article 10 EC, first, by refusing since 1995 to finance the initial fitting-out of the European Schools located in its territory with furniture and teaching equipment, and second, by refusing since 1989 to pay an annual operating and equipment grant intended to cover the running costs of the European Schools established in its territory.
- ¹⁸ As it was not satisfied with the reply sent by the Kingdom of Belgium to that letter of formal notice, on 26 June 2008 the Commission issued a reasoned opinion inviting that Member State to take the necessary measures to comply with that opinion within two months of its receipt.
- ¹⁹ Since the Kingdom of Belgium failed to take the required measures within the prescribed period, the Commission brought the present action.

On the request that the oral procedure be reopened

- 20 In a letter dated 23 June 2010, the Commission requested that the oral procedure be reopened.
- 21 The Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, order reopening of the oral procedure under Article 61 of its Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument that has not been debated between the parties (Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055, paragraph 36 and case-law cited).
- 22 In its application, the Commission claims that the Opinion of the Advocate General is based on arguments that were not debated before the Court. First, the Commission maintains that it had no opportunity, during the procedure, to take a position regarding the ground of lack of jurisdiction raised in the Opinion of the Advocate General, according to which the arbitration clause set out in Article 26 of the 1994 Convention excludes the application of Article 226 EC. Second, it emphasises that the Opinion of the Advocate General proposes a restrictive interpretation of Article 10 EC, regarding which it has not had the opportunity to express its views during the procedure.
- 23 The Court considers that it has all the information necessary to deliberate on the dispute before it and that the dispute should not be examined in the light of arguments that were not debated before the Court.
- 24 Accordingly, it is not appropriate to order reopening of the oral procedure.

Jurisdiction of the Court

Arguments of the parties

- 25 The Kingdom of Belgium disputes the jurisdiction of the Court to hear and determine disputes relating to the Establishment Agreement. It claims that infringement proceedings under Article 226 EC cannot be brought unless the Commission establishes the infringement of a provision of Community law or of an agreement to which the European Community is a party, or the existence of a clause conferring jurisdiction.
- 26 In this case, the Kingdom of Belgium submits that no Community provision has been infringed as there is no infringement of the provisions of the EC Treaty or of its annexes, or of secondary Community law. That Member State maintains that the Establishment Agreement is not an agreement to which the Community is a party and that there is no clause which confers jurisdiction.
- 27 The Kingdom of Belgium claims that the Establishment Agreement is distinct from the 1994 Convention and that only the latter provides a clause conferring jurisdiction, in Article 26 thereof. In its view, the Establishment Agreement cannot be regarded as an act deriving from the 1994 Convention. The fact that the European Coal and Steel Community (ECSC) was a voting member of the Board of Governors, which has an international legal personality that is separate from that of the ECSC, does not mean that the latter was a Contracting Party to the Establishment Agreement concluded between the Board of Governors and the Belgian Government.

28 Furthermore, if, as the Commission claims, the ECSC was a Contracting Party to the Establishment Agreement, as a voting member of the Board of Governors, the same would apply to the Kingdom of Belgium, given that it is a member of the Board. In those circumstances, that Member State would itself be a Contracting Party which, as a general principle of law, is impossible.

29 Moreover, that Member State claims that the act under which it concluded such agreement draws its binding force solely from its own sovereignty.

30 The Commission rejects this interpretation on two grounds.

31 First, it points out that the application does not refer to the Establishment Agreement alone, but also to Article 10 EC, read in conjunction with that agreement.

32 Second, the Commission submits that the Establishment Agreement is undoubtedly part of Community law, independently of Article 10 EC, since it must be regarded as an act 'deriving from' the 1994 Convention, which is itself part of Community law.

33 The Commission states that in accordance with settled case-law, as far as provisions coming within Community competence are concerned, agreements concluded by the Community and its Member States with non-member countries have the same status in the Community legal order as purely Community agreements, and that the 1994 Convention was concluded between the Communities and their Member States.

- 34 The Commission observes that the Establishment Agreement was originally an act deriving from the 1957 Convention and that, as early as 1962, the High Authority of the ECSC was a voting member of the Board of Governors. The Commission therefore considers that the High Authority was a Contracting Party to the Establishment Agreement. The Commission explains that it took the place of the ECSC High Authority on the signature of the Merger Treaty of 8 April 1965 and that the purpose of the 1994 Convention was both to consolidate the *acquis* of the 1957 Convention and to strengthen the role of the Communities as Contracting Parties. The Commission therefore concludes that, in the light of the fact that the Establishment Agreement was adopted on the basis of Article 28 of the 1957 Convention and that provision is likewise made for establishment agreements in the 1994 Convention, the Establishment Agreement forms part of the rights and obligations to which the Communities subscribed in 1994.

Findings of the Court

- 35 It should be emphasised that an action must be considered having regard only to the pleadings contained in the original application (Case C-256/98 *Commission v France* [2000] ECR I-2487, paragraph 31, and Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraph 61).
- 36 It should also be noted that, under Articles 21(1) of the Statute of the Court of Justice of the European Union and 38(1)(c) of the Rules of Procedure thereof, in any application made under Article 226 EC, the Commission must indicate the specific complaints on which the Court is called upon to rule (Cases C-52/90 *Commission v Denmark* [1992] ECR I-2187, paragraph 17, and C-255/04 *Commission v France* [2006], ECR I-5251, paragraph 24).

- 37 These heads of claim must be set out unambiguously, so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (Case C-296/01 *Commission v France* [2003] ECR I-13909, paragraph 121, and Case C-255/04 *Commission v France*, cited above, paragraph 24).
- 38 In this case, the Court finds that the only complaint referred to in the claims at the end of the application initiating proceedings relates to the alleged infringement of the obligations of the Kingdom of Belgium under the Establishment Agreement, read in conjunction with Article 10 EC.
- 39 Admittedly, Article 10 EC is referred to twice in the grounds of the application. The Commission remarks that the conduct of the Belgian authorities interferes with the system adopted for financing the Community and apportioning financial burdens between the Member States, thereby infringing that article, pointing out that the consequences of this conduct are detrimental. The Commission adds that the obligations of the Kingdom of Belgium under the Establishment Agreement must be interpreted in the light of the principle of good faith, which forms an integral part of Article 10 EC and of general international law.
- 40 However, it is apparent from the application initiating the proceedings that the alleged infringement of Article 10 EC by the Kingdom of Belgium is only ancillary to the alleged infringement regarding the Establishment Agreement. Indeed, according to the Commission, it is the Kingdom of Belgium's failure to observe its obligations under the Establishment Agreement that also results in a breach of Article 10 EC.
- 41 Furthermore, in its reply, the Commission expressly states that it has never relied on Article 10 EC per se in this case, that is, independently of the Establishment Agreement.

- 42 In these circumstances, the fact that the Court may lack jurisdiction to determine, on the basis of Article 226 EC, the infringement by the Kingdom of Belgium of its obligations under the Establishment Agreement would necessarily result in the inadmissibility of the application in its entirety.
- 43 In relation to international conventions in general, it should be noted that, according to the case-law of the Court, if the Community is not a Contracting Party to a convention, in principle the Court is not competent to interpret the provisions of that convention in the context of preliminary proceedings (Case 130/73 *Vandeweghe and Others* [1973] ECR 1329, paragraph 2; Order C-162/98 *Hartmann* [1998] ECR I-7083, paragraph 9; Case C-301/08 *Bogiatzi* [2009] ECR I-10185, paragraph 24; and Case C-533/08 *TNT Express Nederland* [2010] ECR I-4107, paragraph 61).
- 44 Specifically in relation to the 1957 Convention, it should be borne in mind that the Court has already held that it lacks jurisdiction to give a ruling on its interpretation, and on the obligations arising under it for the Member States since, despite the fact that that convention was linked to the Community and the functioning of its institutions, it was an international agreement concluded by the Member States which did not form an integral part of Community law (Case 44/84 *Hurd* [1986] ECR 29, paragraphs 20 to 22).
- 45 This assessment, as the Advocate General has pointed out in point 46 of his Opinion, does not have to be restricted to the procedural context in *Hurd*, where the Court was asked to give a preliminary ruling, but likewise applies in the context of the proceedings provided for in Article 226 EC, the subject-matter of which can only be a failure by a Member State to fulfil one of its obligations under the EC Treaty.

- ⁴⁶ It is apparent from the preamble to the Establishment Agreement that it was based on Article 28 of the 1957 Convention, which affords the Board of Governors the power to negotiate with the government of the Member State in which a school is established, any further agreements for the purpose of ensuring that the European Schools operate in the best possible material and moral conditions. The rules in that agreement therefore have to be consistent with those laid down in the 1957 Convention.
- ⁴⁷ The view of the Commission, according to which the ECSC, and then the Community, must be considered to be a Contracting Party to the Establishment Agreement, given that the High Authority of the ECSC was a voting member of the Governing Board and that the Commission took the place of it, does not invalidate the finding set out in the previous paragraph and therefore this submission must be rejected.
- ⁴⁸ Indeed, there is nothing to suggest that the possibility of granting the ECSC High Authority the right to participate in the Governing Body, as a voting member thereof, set out by the Contracting Parties in the 1957 Convention and subsequently exercised by the High Authority, would imply that the parties signing the Establishment Agreement intended to grant the ECSC the status of Contracting Party to that agreement. Furthermore, that is the submission of the Kingdom of Belgium, one of the Contracting Parties to the Establishment Agreement.
- ⁴⁹ Accordingly, it cannot be maintained that the Community is involved as a Contracting Party in the Establishment Agreement and that this agreement would, therefore, establish rights and obligations for the Community.

- 50 With regard to the other submission of the Commission, that the Establishment Agreement forms an integral part of the rights and obligations to which the Communities signed up in 1994, this cannot succeed either. This submission is based on the fact that the 1994 Convention, which was concluded and approved by the Communities, has the purpose of consolidating the *acquis* of the 1957 Convention and the fact that the 1994 Convention provides for establishment agreements.
- 51 In that regard, it should be observed that neither the alleged consolidation of the *acquis* of the 1957 Convention by the 1994 Convention, which, furthermore, only entered into force on 1 October 2002, nor the reference made by the latter to the establishment agreements, can retroactively modify the legal nature of the Establishment Agreement, which is an international agreement concluded between the Governing Body and the government of a single Member State.
- 52 With regard to the applicability or otherwise of the arbitration clause appearing in Article 26 of the 1994 Convention, it should be noted that infringement proceedings, within the meaning of the EC Treaty and of the case-law of the Court, can only be brought on the basis of Article 226 EC, which was indeed the case in this matter.
- 53 In those circumstances, it must be held that the Court lacks jurisdiction to give a ruling on the Commission's action, brought on the basis of Article 226 EC, on the ground that the Kingdom of Belgium has failed to fulfil its obligations under the Establishment Agreement, read in conjunction with Article 10 EC.

Costs

- ⁵⁴ Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Belgium applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

- 1. Declares that the Court of Justice of the European Union does not have jurisdiction to rule on the action of the European Commission, brought on the basis of Article 226 EC, on the ground that the Kingdom of Belgium has failed to fulfil its obligations under the Establishment Agreement concluded on 12 October 1962 between the Board of Governors of the European School and the Government of the Kingdom of Belgium, read in conjunction with Article 10 EC;**
- 2. Orders the European Commission to pay the costs.**

[Signatures]