

OPINION OF ADVOCATE GENERAL
SIR GORDON SLYNN
delivered on 22 May 1985

My Lords,

Accordingly, it was decided that the Member States should be involved.

This case raises important issues relating to the jurisdiction of the Court and as to the application of the EEC Treaty and Community law to the European Schools.

The plaintiff in the main case is the Headmaster of the European School at Culham in Oxfordshire and is a United Kingdom national. He claims to be exempt from United Kingdom tax on the 'European supplement' and allowances which he receives from the European School in addition to the salary paid to him by the United Kingdom Department of Education and Science. The matter came before the Special Commissioners of Income Tax which made the present reference for a preliminary ruling.

In September 1953 an association was founded by ECSC officials with a view to setting up an establishment for the education of their children. The driving force behind this was Mr Van Houtte, the Registrar of the Court, who was President of the Parents' Association. This Association, which was funded by the High Authority, set up a nursery school and a junior school in Luxembourg in the autumn of 1953. By the spring of 1954, the need for a secondary school was felt, but it was clear that the Association by itself was unable to meet this need for financial and other reasons. In particular, the Association was unable to ensure that the examination certificates issued by the school would be recognized by the Member States.

A meeting was therefore convened in Luxembourg on 22 June 1954 at the request of the President of the High Authority. It consisted of two representatives of the ECSC and two representatives of each Member State. The representatives of the ECSC were Mr Paul Finet, a Member of the High Authority, who chaired the meeting, and Mr Van Houtte. A number of decisions which were crucial for the future of the European School were taken at that meeting. In particular, it was decided that the delegates of the Member States would constitute the Board of Governors which was to lay down the principles on which the School was to be run. It was also decided that the Board of Governors would meet at least once a year.

The Board of Governors continued to meet at regular intervals, both before and after 12 October 1954, when the European School was opened at a formal ceremony. A particularly important meeting of the Board of Governors was held from 25 to 27 January 1957. The major achievement of that meeting was to approve the final draft of the treaty constituting the Statute of the European School, which was signed on 12 April 1957. In accordance with Article 32 thereof, the Statute came into force on 22 February 1960, as did the Annex thereto laying down the regulations for the European baccalaureat. Article 8 of the Statute provides that the Board of Governors shall consist of the 'Minister or Ministers of each Contracting Party whose responsibilities include National Education and/or External Cultural Relations', or

their representatives. Article 9 provides that: 'The Board of Governors shall be responsible for implementation of this agreement; for this purpose it shall have the necessary powers in educational, budgetary and administrative matters. It shall by common accord lay down the General Rules of the School'. Article 12, so far as is relevant, reads as follows:

'In administrative matters, the Board of Governors shall:

- (1) ...
- (2) ...
- (3) determine each year, on a proposal from the Board of Inspectors, the staff requirements and settle with the governments any questions concerning the assignment or secondment to the school of teaching staff for the primary and secondary levels and of supervisory staff so that they retain their rights to promotion and retirement pension under their national rules and enjoy the benefits granted to officials of their category abroad;
- (4) lay down unanimously, on a proposal from the Board of Inspectors, and according to harmonized rules, the service rules of the teaching staff of the school.'

At the same meeting, the Board of Governors also adopted the Regulations for Members of the Teaching Staff of the European School (the 'Teaching Staff Regulations'). Those Regulations purported to be based on Article 12 (3) and (4) of the Statute, although of course the Statute was not then in force. The Regulations laid down the salaries and allowances to be paid to the various categories of teacher concerned. Article 16 of the Regulations provided that the European School would only pay the difference between the emoluments received by the teacher from his

national authorities and the salary, allowances and grants provided for in the Regulations themselves. It is this sum which is known as the European supplement.

At its meeting of 25 to 27 January 1957, the Board of Governors, in discussing the draft Regulations, considered the question of whether the European supplement should be tax-free. This discussion culminated in the following being put in the minutes:

'The Board of Governors therefore decided that members of the teaching staff were to pay tax on the salary or part of the salary corresponding to their national salary. On the other hand, supplements resulting from the application of Articles 3, 4, 5 and 9 of the Regulations and allowances paid under Articles 6, 8, 9, 11 and 12 of the Regulations were to be exempt from all tax. Teachers were not in any event to be subject to double taxation on their salaries.'

This is the so-called 'Governors' Decision' on which Mr Hurd's case is founded, the supplements referred to in the second sentence being the European supplement. The Governors' Decision was never incorporated into the Statute of the European School or into the Teaching Staff Regulations. Nor, according to the Commission, was the possibility of doing so ever discussed at a subsequent meeting of the Board of Governors. However, the Governors' Decision is reproduced in an amended form in the Digest of Decisions of the Board of Governors.

The Teaching Staff Regulations have subsequently been amended on several occasions by the Board of Governors. A consolidated version of these Regulations as they stood on 1 June 1979 is set out in the bundle of documents, which is agreed between the parties and which is annexed to the reference. According to the Statement of Facts in the same bundle of documents, it is agreed that this is the version which was in force throughout the years of assessment

1978/79 and 1979/80, the years in issue in this case.

In addition to the articles providing for the various supplements granted to teaching staff, the relevant provisions of that version of the Regulations are Articles 24 and 30. Article 30 provides for the European supplement. Article 24 (2) provides: 'Should the amount levied in taxes be higher than the amount which would be levied on the European salary under Regulations laying down conditions and procedures for applying the tax for the benefit of the European Communities, a "differential" allowance equal to the difference between the two amounts shall be granted.' It is common ground between Mr Hurd, the United Kingdom and the Commission that this provision applies to taxes levied on the European supplement, if that supplement may lawfully be taxed by the Member States. That was also the view taken by the representatives of the Commission and the eight other Member States in 1979 in a report to the Board of Governors by the Board's Administrative and Financial Committee. Nevertheless, this would still mean that a teacher who was subject to national income tax on his European supplement and allowances would suffer some financial loss, because under Article 24 (2) the school would only be liable for the difference between the national tax and the hypothetical Community tax, and he would pay an amount equivalent to the Community tax out of his salary.

If the United Kingdom is entitled to tax his European supplement and allowances, Mr Hurd will therefore receive from the school, pursuant to Article 24 (2) of the Regulations, several thousand pounds in respect of the major part of his liability for tax. Thus indirectly, it is Community funds which will be paid to the United Kingdom authorities. In view of the complex issues of

national tax law involved, the United Kingdom Government has told the Court that it is unable to state the precise amount of money at issue.

Following the entry into force of the Treaty of Rome a European School was set up in Brussels. In subsequent years a number of other European Schools were established. Since the Statute only applied to the school at Luxembourg, it became necessary to extend it to the other schools. This was done only belatedly on 13 April 1962 by the signature of the Protocol applying the Statute to any European Schools for the education of children of staff of the Communities that were or might be established in any Member State. The Protocol did not come into force until 12 June 1970. By virtue of that Protocol the Statute now applies to European Schools in Belgium (Brussels and Mol), Germany (Karlsruhe), Italy (Varese) and the Netherlands (Bergen) and the United Kingdom (Culham) as well as Luxembourg. (A further Protocol providing for the establishment of a European School at Munich for the education of the children of staff of the European Patent Office was signed in 1975. Such a school was in fact set up in 1977. It is run and financed on somewhat different lines from the other schools and is not relevant to the present case.)

According to Mr Hurd the Commission contributed 65.99% of the budget of the school at Culham in 1983. Similarly, at point 28 of its Resolution of 7 July 1983 on the European Schools (Official Journal 1983, C 242, p. 81) the European Parliament stated that the Community provides two thirds of the financial resources of the European Schools. These assertions have not been contested in these proceedings. The remainder of the schools' budget comes from contributions from a variety of other sources such as the proceeds of the sale of publications.

With the possible exception of Italy, all the Member States with European Schools on their territory abide by the Governors' Decision, although it is not clear whether they regard themselves as legally bound to do so. Belgium has undertaken not to tax the European supplement and allowances in the agreement which it has concluded with the Board of Governors 'to ensure that the school can operate in a favourable atmosphere under the best possible physical conditions' in accordance with Article 28 of the Statute. Luxembourg has done likewise. The German Government has by statutory instrument exempted from tax the 'two allowances' paid to the teaching staff at Karlsruhe under the Teaching Staff Regulations. The Dutch Government has concluded an agreement with the Board of Governors under Article 28 of the Statute, but it contains no provision concerning exemption from income tax. In reply to a written question put by the Court, the Dutch Government has explained that for reasons of principle it is unwilling to grant an exemption from income tax to Dutch nationals teaching at the European School at Bergen with respect to remuneration paid by the school. However, the tax levied on that remuneration is not borne by the teachers concerned but by the Ministry of Education and Science.

The position as regards Italy is somewhat unclear. As originally worded the agreement of 5 September 1963 between the Italian Government and the Board of Governors does not refer to this issue at all. However, by a Protocol of 14 May 1971 a new Article 7 was inserted into the agreement, whereby teachers at the school at Varese were exempted from tax on the remuneration paid by the school. This exemption was expressed to apply only to those teachers 'who are not of Italian nationality and have not habitually resided in Italy prior to the establishment of the school'. In view of this restriction doubts were voiced at a meeting of the Board of Governors of 1 and 2

December 1970 as to whether the Board should conclude the draft protocol. The Italian delegation nevertheless explained that there would be no problem in practice because such remuneration had never been taxed in Italy. This assurance led the Board of Governors to decide to conclude the protocol, while reserving the right to raise the matter again should the practice of the Italian authorities change. With a view to clarifying the present position, the Court sent a written question to Italy on the matter in the course of the present proceedings. In a very short telex the Italian authorities replied that emoluments of teachers of Italian nationality at the European School at Varese are subject to income tax. Unfortunately, this reply does not distinguish between that part of the teacher's salary which is paid by the Italian authorities and which is subject to income tax in any event, and the European supplement. It is possible that both parts are liable to tax, but whether it is collected is not clear.

The United Kingdom does not consider itself bound to exempt, and does not in fact exempt, its nationals who are teachers at Culham from income tax on the European supplement and the various allowances paid by the school. Hence the present proceedings. This does not concern Mr Hurd alone because, the Court was told by his counsel at the hearing, there are at present 19 United Kingdom nationals teaching at Culham.

On the other hand, teachers at Culham of other nationalities are not taxed by the United Kingdom Government on such remuneration. The legal basis in English law for this exemption for non-British teachers is a matter of some controversy. Mr Hurd claimed that the United Kingdom has been

inconsistent on this point: at one time it is said to have relied on double tax treaties concluded with the various Member States, whereas now it relies on s. 373 of the Income and Corporation Taxes Act 1970 relating to consuls and other official agents. He argues that there is in fact no basis in English law for the exemption for non-British teachers. In his submission this exemption is therefore evidence that even the United Kingdom felt itself legally bound by the Governors' Decision, despite protests to the contrary by the United Kingdom itself. However, to appreciate the force of this argument, one would first have to decide complex questions of English law, which it is not for this Court to decide. Accordingly, it is not possible for the Court to attach any evidential value to this particular matter.

The European School at Culham was founded in 1978 for the children of the staff of the Joint European Torus project set up under the Euratom Treaty. Mr Hurd was appointed Headmaster of this school for a nine-year period commencing on 1 September 1978. Subsequently he was assessed to income tax by Her Majesty's Inspector of Taxes for the tax years ending 5 April 1979 and 5 April 1980 on all his remuneration, including the European supplement and allowances. He does not dispute that he is liable to pay United Kingdom tax on that part of his salary which is paid by the Department of Education and Science. On the other hand, he claims that the European supplement together with the allowances payable under the Teaching Staff Regulations is exempt from tax.

This matter has given rise to lengthy correspondence between the European School and the United Kingdom and has been discussed on a number of occasions by the Board of Governors. It was also the subject of the 1979 report already referred to which was submitted to the Board by the latter's Administrative and Financial Committee.

Ultimately the matter came before the Special Commissioners of Income Tax who have referred a number of questions to be decided by the Court under Article 177 of the Treaty.

Question 1

This question asks:

- (a) Whether, in interpreting the provisions of Article 3 of the Act annexed to the Treaty of Accession to the European Economic Communities, of 22 January 1972, the Court of Justice has jurisdiction to give a preliminary ruling on the question whether a particular matter falls within the meaning of the words "all other agreements concluded by the original Member States relating to the functioning of the Communities or connected with their activities" (in paragraph 1 of that Article) and the words "declarations or resolutions... or other positions... concerning the European Communities adopted by common agreement of the Member States" (in paragraph 3 thereof).
- (b) If so, whether the United Kingdom is, by virtue of the said Article 3, under an obligation as a matter of Community law to give effect in its national law to a particular decision taken at a meeting in January 1957 that teaching staff of the European School should be exempt from all tax on their salaries and allowances (other than the part of their salaries corresponding to their national salaries), in the light of the circumstances in which that decision was taken, its subsequent history, the instruments governing the European Schools and their governing body and the responses of the six original Member States to that decision preceding the date on which the aforementioned Treaty of Accession came into force (1 January 1973).'

Article 177 of the EEC Treaty confers upon the Court jurisdiction to give rulings only in respect of (a) the interpretation of that Treaty; (b) the validity and interpretation of acts of the institutions of the Community; and (c) the interpretation of the statutes of bodies established by the acts of the Council where those statutes so provide. It does not give to the Court under the procedure for preliminary rulings a general power to interpret what may be called 'Community documents' if there is a dispute as to their meaning.

Article 1 (3) of the Treaty of Accession provides that the powers and jurisdiction of the institutions of the Communities as set out in the EEC Treaty shall apply in respect of the Treaty of Accession. Article 1 (2) of the Treaty of Accession stipulates that the provisions of the Act of Accession concerning the European Economic Community shall form an integral part of that Treaty. It follows that the Court has jurisdiction under Article 177 to give preliminary rulings as to the interpretation of the Act of Accession. It clearly, therefore, has power to interpret the words 'all other agreements concluded by the original Member States relating to the functioning of the Communities or connected with their activities' in paragraph 1 of Article 3, and the words 'declarations or resolutions of, or other positions taken up by, the Council ... and those concerning the European Communities adopted by common agreement of the Member States' in Article 3 (3).

On the other hand, it is, in my view, clear that (a) a European School is not an 'institution' of the Community, since the only institutions under the EEC Treaty, falling within Article 177, are those specified in Article 4 of that Treaty; and (b) that even if a school could be treated as a body

'established by act of the Council' (which in my view it cannot be so treated) there is nothing in the Statute of the school which provides for the Court of Justice to give preliminary rulings as to the interpretation of its Statute.

Nor is there anything in the Treaty of Accession or the Treaty establishing the Statute of the school to provide that the latter is an integral part of the EEC Treaty or the Treaty of Accession, or to provide that the EEC Treaty provisions on the jurisdiction of the Court apply equally to the Statute (as was done under Article 1 (3) of the Treaty of Accession), or to set up a special procedure for preliminary rulings as was done in the Protocol to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Official Journal 1978, L 304, p. 50).

To hold that the Statute of the European School could be interpreted by the Court under Article 177 would in my view also run counter to the reasoning in the Order of the President of the Court in Case 80/83 *Habourdin International v Italocrema* [1983] ECR 3639, where a purported reference for a preliminary ruling on the Brussels Convention was held inadmissible because the referring Court was not one of the courts empowered by the Protocol to the Convention to make such a reference. The power to make a reference is derived exclusively from the Protocol; there is no residual power under Article 177 to make such a reference even in respect of a treaty which, in Article 220 of the EEC Treaty, it was expressly contemplated would be entered into by the Member States. There is even less justification for holding that there exists a power to give a preliminary ruling in respect of a treaty or negotiations which are not mentioned in the EEC Treaty at all.

In my view the judgment in Cases 267-269/81 *Amministrazione della Finanze dello Stato v Società Petrolifera Italiana* [1983] ECR 801, relied on by Mr Hurd, does not justify the contrary conclusion. The basis of the reasoning in that case was that as from 1 July 1968 the Community had been substituted for the Member States under the GATT so that, in effect, it was deemed to be an agreement concluded by the Community and thereby an act of the Community institutions. That reasoning cannot apply in this case.

If this is right as to the Statute, then *a fortiori* the Teaching Staff Regulations and the Governors' Decision do not, as such, fall within Article 177.

It is then said (a) that the Statute of the school and the Governors' Decision are within those 'agreements' and 'positions ... concerning the European Communities adopted by common agreement of the Member States' within the meaning of Article 3 of the Act of Accession and (b) accordingly that the Court has jurisdiction to interpret them pursuant to Article 177.

It is clear that the Court may on an application under Article 177 interpret these words so as to say what is capable of constituting an 'agreement' or a 'position concerning the European Communities adopted by Member States'. It may thus in particular define the ambit of the latter words. It does not, however, follow that the Court has jurisdiction under Article 177, whatever may be the position on an application under Article 169, to interpret such an agreement or to say what is the effect, or what are the obligations, if any, resulting from a position so adopted.

In this regard it is to be observed that Article 3 (2) of the Treaty of Accession clearly obliges the new Member States to 'accede to the conventions provided for in Article 220 of the EEC Treaty signed by the original Member States and to this end ... to enter into negotiations with the original Member States in order to make the necessary adjustments thereto'. Yet, as indicated, the President has already held that the Court has no jurisdiction under Article 177 of the EEC Treaty to interpret that convention. I respectfully agree with that ruling. Thus, the mere fact that an instrument is covered by Article 3 of the Act of Accession, and is specifically contemplated by the EEC Treaty, does not bring it within the class of acts or measures subject to interpretation by the Court under Article 177. This ruling must apply with at least equal force to the 'other agreements' referred to in Article 3 (1), and to declarations, resolutions and positions adopted within the meaning of Article 3 (3) of the Act of Accession.

In these circumstances the Court does not have jurisdiction to answer question 1 (b) insofar as it involves a consideration of the effect of the school's Statute, the Teaching Staff Regulations, the Governors' Decision and the conduct of the Member States subsequent to that decision.

If I had come to the conclusion that the Court had a wider jurisdiction under Article 177, and that it could on a preliminary reference rule whether an agreement was made or a position adopted, I would accept, as does indeed the United Kingdom Government, that the Treaty establishing the Statute of the school falls within Article 3 (1). The preamble to the Statute indicates that it is necessary to provide the children of Community officials with schooling in their mother tongues. It is obviously essential that officials of the Community who do not live

in their own country should be able to have their children with them and that those children should be educated at appropriate levels. The school thus plays a vital role in enabling officials to be recruited and to work, quite apart from the merits in European terms of the syllabus adopted in the schools. The Treaty is thus plainly an agreement concluded by the original Member States 'relating to the functions of the Communities' or 'connected with their activities' within the meaning of Article 3 (1). The United Kingdom complied with its obligation to accede to that agreement.

Whether the Governors' Decision, which is at the heart of the problem in this case, falls within Article 3 and if so whether it is binding on the United Kingdom, in the way Mr Hurd contends, raises different and difficult questions, which it is impossible to decide without to some extent interpreting the Decision.

The Governors' Decision, like the Statute, seems to me to be related to the functioning of the Communities or to be connected with their activities within the meaning of Article 3 (1) of the Act of Accession, since it relates to an important aspect of the terms of service of the teachers at the school. Was it, however, an agreement 'concluded' by the original Member States to which the new Member States undertook to 'accede'? It is possible to read the words 'accede' and 'concluded' broadly so as to refer to any kind of agreement however informal, in the sense of 'adopt' or 'made'. In my view the better reading is that it is concerned with formal agreements to which a Member State can in the usual sense be said to 'accede'. This interpretation seems to me to be supported by the terms of Article 3 (3) which are capable of including less formal agreements. The Governors' Decision is thus not included as such in Article 3 (1).

Even assuming that it were correct to interpret the Statute and the Governors' Decision, which I think it is not, I would not in any event accept the Commission's argument that the Decision is to be deemed to have been included in the Statute, itself a formal agreement, for the purposes of Article 3 (1).

Whether the Governors' Decision is 'a position concerning the European Communities adopted by common agreement of the Member States' raises more difficult questions. I would accept that these words should be interpreted broadly. They are intended to cover a residual class of acts or measures not falling within any other of the categories referred to in Article 3.

I have no doubt that the Governors' Decision should be read as 'concerning the European Communities' for the reasons already given in respect of Article 3 (1). I would also accept that the method of arriving at the Decision was such that it can be regarded as having been adopted by the Member States, if their representatives were authorized to make it. It seems to me artificial to say that, because they were at this stage described as governors they could not take up a position on behalf of the Member States, particularly as they were not then acting as governors under the Statute since the Statute had not been adopted.

Whether the representatives of the original Member States were authorized to reach such a decision, it seems to me quite impossible to decide on this reference under Article 177, when there is no contemporary evidence save that which can be gleaned from the minutes, as to the existence or not of such authority on the part of the original Member States. On the face of it, in

meeting to discuss the Teaching Staff Regulations, they purported to be acting on behalf of their respective Member States. At first glance, however, whatever authority they may have had to deal with other aspects of the Regulations, it is, to say the least, surprising that such a decision as to the taxing powers of Member States should be taken in this informal way and that representatives should have been authorized to take it, not least since the Decision was never incorporated either in the Statute or in the Regulations.

It is, however, not impossible for them to have been so authorized. If the representatives were authorized then (a) it does not seem to me that it is right to interpret it as being a 'provisional agreement' or one which should be read merely as meaning that each representative must go back and seek to persuade his government or legislature to implement it; (b) nor would I read it as merely establishing a position which the Board would adopt in negotiating agreements with Member States under Article 28 of the draft Statute.

If the representatives were authorized, and this is correctly to be read as being a decision that tax would not be charged by the various Member States, then in my view it is to be treated as reached by common agreement within the meaning of Article 3 (3). I would regard that phrase as not requiring unanimity but a majority decision of the Member States. In this case, despite misgivings expressed by two delegations, and the request of the Netherlands representative that the matter be reviewed if the Decision led to disparities, no reservation or dissent is recorded in the actual decision and it can be accepted to have been reached by common agreement.

Alternatively, the plaintiff argues that even if the 'Governors' Decision' might not be regarded as having initially been binding, it acquired the force of a binding obligation before 1973 through being implemented and

acted upon by the Member States over a period of many years. He claims that the two conditions required for such a process to occur in international law, namely State practice and *opinio juris* showing that the practice is observed out of a sense of legal obligation, are fulfilled. However, to my mind, apart from the fact that the practice of the Italian authorities is unclear, and that the way in which the Decision has been implemented in the other Member States varies considerably (even if in the result no tax is collected on the European supplement) there does not seem to be any cogent evidence to show that the States have acted out of a sense of obligation arising from that 'Decision'. Moreover, I am not convinced that the concept of a non-binding instrument acquiring binding force with the passage of time through the customs and practices of the Member States forms part of Community law. I have already expressed doubts on this matter in Case 208/80 *Lord Bruce of Donington v Aspden* [1981] ECR 2205, pp. 2225-2226 and, since no new authority on the point has been cited in the course of the present proceedings, these doubts have not been allayed. Whether the Governors' Decision has crystallized into customary international law does not seem to me to arise on this reference.

If on the other hand the Decision was otherwise binding at the time it was taken on the original Member States in respect of the Luxembourg School, it would seem to me that by conduct it has been adopted as applying to the other European Schools.

The only aspect of the matter which appears clear is that the new Member States are to be 'in the same situation as the original Member States' in respect of the matters specified. If a declaration, resolution or position taken up by the old Member States were not legally binding on the original Member States, it will not be binding on the new Member States. The obligation in Article 3 (3) to observe the principles and guidelines deriving from the declaration,

resolution or other position and to take such measures as may be necessary to ensure their implementation must be read accordingly.

The difficulties inherent in answering Question 1 (b) on an Article 177 reference in so far as it deals with the effect of the Statute, the Regulations, the Governors' Decision and the conduct of the Member States seem to me to give weight to the conclusion that this is not a question which in these respects falls within Article 177. If an answer had to be given I would take the view that it had not been shown on this reference that the representatives were authorized by Member States to take a final decision exempting the European supplement from tax under the different national systems and that, accordingly, neither that decision nor subsequent practice has been shown to constitute a position concerning the European Communities adopted by common agreement of the original Member States. It is accordingly not binding as such on the United Kingdom.

Question 2

This question asks:

'Alternatively, whether the United Kingdom is, by virtue of Article 5 or Article 7 of the EEC Treaty (and the aforementioned Treaty of Accession), or of any other provision of Community law (apart from Article 3 of the Act annexed to the Treaty of Accession) under an obligation as a matter of Community law to give effect in its national law to the said decision.'

The plaintiff contends that the United Kingdom is prohibited by Articles 5 and 7 of the Treaty of Rome and various general

principles of law from taxing his European supplement and allowances. In its written submissions, the Commission found it unnecessary to discuss question 2, because it took the view that the Governors' Decision was binding on the United Kingdom in any case by virtue of Article 3 (1) of the Act of Accession. However, at the hearing the agent for the Commission made it clear that it fully endorsed Mr Hurd's arguments with respect to Articles 5 and 7. Denmark and the United Kingdom take the opposite view.

Mr Hurd submits firstly that the obligation in question is binding on the United Kingdom by virtue of Article 5 of the EEC Treaty, whether or not any other provision makes it binding. He claims that by taxing the sums concerned the United Kingdom has infringed Article 5 because this is detrimental to the European School.

In this connection he relies on the other two cases concerning the imposition of national income tax on Community emoluments and allowances, namely Cases 6/60 *Humblot v Belgium* [1960] ECR 559 and 208/80 *Lord Bruce of Donington* [1981] ECR 2205.

In *Humblot* it was held that, by virtue of the Protocol on the Privileges and Immunities of the ECSC, the plaintiff's remuneration as an official of the High Authority could not be taken into account by the Belgian tax authorities for the purposes of assessing his wife's liability to income tax. The case turned solely on the wording and spirit of that Protocol. Nevertheless there is one passage of the judgment which sheds light on the duties of the Member States under Article 5. In this passage the Court explained why this tax exemption is in the interests of the Community, as Article 13 of the Protocol provided that: 'Privileges, immunities and facilities shall be accorded ... to officials of the institutions of the Community solely in the interests of

the Community'. The Court gave three reasons for saying that this exemption was in the interests of the Community: (i) the exemption reinforced the independence of the administrative departments of the Community from the national authorities; (ii) the difference in net remuneration could make the recruitment of officials from certain Member States more difficult, thus creating discrimination in respect of the real opportunities of access to Community service for nationals of each Member State; and (iii) if officials were compensated by the Community for tax charged, these sums would have to be met from the Community budget.

In *Lord Bruce of Donington* the Court was asked whether it was lawful for a Member State to impose income tax on a lump-sum travel allowance granted by the European Parliament to its members. The Court replied that such taxation was contrary to Article 5 EEC read with other provisions such as Article 8 of the Protocol of Privileges and Immunities, unless it could be shown in accordance with Community law that such lump-sum reimbursement constituted in part remuneration. As to Article 5, the Court held that the obligation arising from that provision 'includes the duty not to take measures which are likely to interfere with the internal functioning of the institutions of the Community' (p. 2219).

The latter point was reiterated in different words in Case 231/81 *Luxembourg v Parliament* [1983] ECR 255, p. 287, on which Mr Hurd also relies. It was said there that, in view of their duty of sincere cooperation embodied in particular in Article 5, the Member States must refrain from 'impeding the due functioning of the Parliament'.

I would agree with the plaintiff's assertion that taxing the European supplement and allowances has prejudicial consequences for the European School. As he has pointed out, it means that the Headmaster or Deputy Headmaster of the European School at Culham, when a United Kingdom national, receives a lower net salary than some of the assistant staff for whom he is responsible. Quite apart from the element of discrimination on the grounds of nationality, this is harmful to staff unity and goodwill.

For my part, important though it is to the school, I would, however, not accept that these consequences in themselves justify a finding that in taxing the European supplement the United Kingdom was in breach of its obligations to facilitate the achievement of the Community's task or that it had taken a measure jeopardizing the attainment of the objectives of the Treaty.

Of more weight, however, is the argument that a Member State which taxes the European supplement is failing to facilitate the achievements of the Community's tasks, or is jeopardizing the attainment of the objectives of the Treaty, in that the school is bound to make good to teachers sums paid to the national authorities by way of tax on the European supplement. In the result most of the tax paid by Mr Hurd to the United Kingdom comes from Community funds.

That this is the position under Article 24 (2) of the Teaching Staff Regulations is common ground between the parties and I accept it as such, so that it is unnecessary to interpret the Regulation and thereby to

depart from my view that the Court has no jurisdiction to do so.

It is clear that this case is not on all fours with the cases relied on by Mr Hurd since in those the Court was able to link the general obligation in Article 5 to specific provisions of a Protocol to the Treaty. I would, however, regard the establishment and the proper running of the European Schools as being an important ancillary aspect of the provision of staff necessary to carry out the Community's tasks referred to in Article 5 of the Treaty. The Teaching Staff Regulations were made under the Statute, itself established by a Treaty between the Member States made in the context of the European Coal and Steel Community Treaty, the only Community Treaty at that stage in existence.

This is not a trivial matter since the amount of tax over the years for the number of United Kingdom teachers involved is substantial. If one or some of the other Member States were to follow the United Kingdom the drain on Community funds through the schools budget would be considerable. Even in respect of the individual it is arithmetically possible that the total amount received back in tax (since reimbursed tax will be taxed, thereby requiring a further reimbursement, itself taxable) by the Member State would exceed the amount paid to the individual by way of salary.

For a Member State to tax the European supplement, particularly when other Member States parties to the Statute do not in practice tax it, with the knowledge that the amount of the tax (in so far as it exceeds the level of Community tax) will be reimbursed by the Community out of

Community funds, is in my view a failure to facilitate the achievement of the Community's tasks within the meaning of Article 5.

Support for this conclusion is to be found in the last of the three grounds on which the Court found in *Humblet* that the exemption for Community officials was justified in the interests of the Community. The relevant passage reads as follows:

'As officials are concerned not with their *gross* but the *net* remuneration, it would be necessary, if the tax exemption of Community remuneration were not ensured, to take account of fiscal charges in fixing the emoluments of officials. That charge would thus finally fall on the budget of the Community. Further, the assessment to tax of the remuneration in question by the Member States might adversely affect the principle of equality between Member States. It could produce the result that in certain Member States the undertakings which make relatively high contributions to the Community would be indirectly financing certain other States whose fiscal legislation may impose particularly heavy taxation' (pp. 577-578).

What is more, it is no answer for the United Kingdom to say that it has repeatedly sought to have Article 24 (2) of the Teaching Staff Regulations amended so that the school would no longer be required to make good to British teachers at Culham sums paid to the United Kingdom authorities by way of income tax on the European supplement and allowances. The Regulations must be applied as they stand at present. Despite the declared wish of the United Kingdom that the school should not

bear these sums, the fact remains that at present the school does meet such expenditure and that the United Kingdom receives it.

Next, Mr Hurd relies on Article 7 of the Treaty.

Since the United Kingdom grants the tax exemption concerned to teachers at Culham of other nationalities, it is evident that it discriminates between teachers on the basis of nationality. However, this is reverse discrimination as the only teachers who do not enjoy the exemption are United Kingdom nationals.

If a Member State were to grant a tax exemption to national teachers without extending it to nationals of other Member States working as teachers on its territory, it would, as I see it at present, infringe Article 48 of the Treaty. Alternatively, it might infringe Article 7 (2) of Council Regulation No 1612/68 on freedom of movement for workers within the Community (Official Journal 1968, L 257, p. 2) which states of the migrant worker that 'he shall enjoy the same social and tax advantages as national workers'. However, Article 48 does not apply to discrimination practised by a Member State against its own nationals where there is no inter-State element: in Case 175/78 *R. v Saunders* [1979] ECR 1129, it was held that the Treaty provisions on the free movement of workers cannot be applied to 'situations which are wholly internal to a Member State, in other words where there is no factor connecting them to any of the situations envisaged by Community law'. Given that in Cases 35 and 36/82 *Morson and Jhanjan v Netherlands* [1982] ECR 3723 this principle was held to extend to Article 10 of Regulation No 1612/68, the same must hold

good for Article 7 (2) of the Regulation. In any case, the word 'he' at the beginning of this paragraph refers back to Article 7 (1) which begins: 'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers...'

This problem may not be circumvented by having recourse to Article 7 of the Treaty even if that provision may by itself constitute the source of rights and obligations, as the judgments in Case 152/82 *Forcheri v Belgian State* [1983] ECR 2323 and particularly in Case 293/83 *Gravier v City of Liège* [1985] ECR 606, indicate. This is because the prohibition contained in Article 7 is expressed to apply 'within the scope of application of this Treaty, and without prejudice to any special provision contained therein'. In both *Saunders* and *Morson* the Court specifically referred to Article 7 and found that reverse discrimination in this field fell outside the Treaty provisions concerned.

I do not consider that this difficulty is overcome, as Mr Hurd seeks to overcome it, by pointing to the close links between the European Schools and the Community. Nor is this a case where a principle of equality applicable to Community employees is being relied on by an employee against the Community itself.

Mr Hurd further argues that, since the reference in Article 7 to the EEC Treaty extends to the Act of Accession, the prohibition in that provision covers obligations arising under Article 3 of that Act. This argument cannot be accepted either. The mere fact that Article 3 applies to the Statute of the European School does not in itself make the school a creature of Community law.

Finally, the plaintiff relies on the general principles of legitimate expectation, good faith, estoppel and Community solidarity. The United Kingdom candidates for a teaching post must be taken to know that the United Kingdom does tax the supplement and they cannot in my view rely on any breach of the principle of legitimate expectation. The other grounds, not argued in depth, do not seem to me to add to the conclusion reached in respect of Article 5.

Question 3

This question asks:

'If the United Kingdom is under such an obligation as is mentioned in Question 1 (b) or Question 2 above, whether (in the absence of the implementation of the said decision in the national law of the United Kingdom) a member of the teaching staff of the European School established in the United Kingdom is entitled as a matter of Community law to rely on the said decision in the courts and tribunals of the United Kingdom.'

For the reasons which I have already set out in considering question 1, national courts are not bound as a matter of Community law to give effect to the Governors' Decision. Nevertheless, to enable the Special Commissioners to decide this case, it is essential for the Court to rule on whether the same applies to Article 5 of the Treaty, read with Article 24 (2) of the Teaching Staff Regulations.

As I understand it Article 5 taken by itself cannot be relied on before national courts.

It is too general in its terms. Thus, in Case 78/70 *Deutsche Grammophon v Metro* [1971] ECR 487, at p. 499, the Court held that: 'This provision lays down a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme'. As Advocate General Reischl said in Case 155/73 *Sacchi* [1974] ECR 409, at p. 435, this ruling necessarily implies that Article 5 is not directly applicable. Again, in Case 9/73 *Schlüter v Hauptzollamt Lörrach* [1973] ECR 1135, at p. 1161, the Court stated that 'Articles 5 and 107 allow Member States, despite the duty imposed on each of them to regard its policy on rates of exchange as a matter of common concern, such freedom of decision that the obligation contained in these Articles 5 and 7 cannot confer on interested parties rights which the national courts would be bound to protect'. Finally, in Case 141/78 *France v United Kingdom* [1979] ECR 2923, at p. 2942, it was held that Annex VI to The Hague Resolution on fisheries 'makes specific the duties of cooperation which the Member States assumed under Article 5 of the EEC Treaty when they acceded to the Community'. It seems to follow that taken by itself Article 5 is not specific and therefore lacks the clarity necessary to be directly effective.

If Article 5 can be read with another provision of Community law which itself is directly applicable it may well be that obligations under Article 5 can be enforced directly in national courts. However, Article 24 (2) of the Teaching Staff Regulations is in my view not directly applicable in Community law. So, although Article 5 read with Article 24 (2) of those Regulations prohibits a Member State from taxing the European supplement and allowances at the Community's expense, that prohibition cannot be relied on by the teaching staff of the European School before national courts.

Accordingly, national courts are not bound as a matter of Community law to give effect to this prohibition.

That is not to say that the obligation to refrain from taxing such sums is not legally enforceable at all. Even those Member States which intervened in Case 26/62 *Van*

Gend en Loos v Nederlandse Administratie der belastingen [1963] ECR 1 to contest the claim that Article 12 of the Treaty had direct effect accepted that breach of that provision could give rise to proceedings under Articles 169 and 170. Whether that is so in the present case it is unnecessary to decide.

In the light of these considerations I take the view that the questions should be answered on the lines:

1. (a) The Court of Justice has jurisdiction under Article 177 of the EEC Treaty to give preliminary rulings as to the interpretation of Article 3 of the Act annexed to the Treaty of Accession dated 22 January 1972 and in particular as to the meaning of the words 'all other agreements concluded by the original Member States relating to the functioning of the Communities or connected with their activities' (in paragraph 1 of that Article) and the words 'declarations or resolutions . . . or other positions concerning the European Communities adopted by common agreement of the Member States' (in paragraph 3 thereof). The Court of Justice does not have jurisdiction under Article 177 to decide whether such other agreements, declarations, resolutions or other positions were made or taken or to interpret the same.
- (b) (i) By the second sentence of Article 3 (1) of the Act of Accession the new Member States were bound to accede to formal agreements concluded by the original Member States relating to the functioning of the Communities or connected with their activities. The Statute of the European School, which it is agreed by all parties was established by a treaty concluded between the original Member States, was such an agreement. The Governors' Decision taken in January 1957 was not capable of being such an agreement.
- (ii) The words 'position concerning the European Community' adopted by common agreement of the Member States in Article 3 (3) of the Act of Accession are to be read as including any instrument, act, measure, decision or expression of intention which relates to the operation of the European School and which was taken or adopted before the coming into force of the Treaty of Accession by the original Member States through their duly authorized representatives as a group, even if by a majority.

- (iii) Article 3 (3) does not impose any greater obligation on the new Member States than that which lay upon the original Member States who adopted such a position. Accordingly, any position adopted by the original Member States which was not legally binding, or was conditional, will not be legally binding on the new Member States or will be subject to fulfillment of the same conditions.
2. Article 5 of the Treaty of Rome, read with Article 24 (2) of the Regulations for Members of the Teaching Staff of the European School, prohibits Member States from taxing the remuneration and allowances paid by the European School to its teachers in accordance with those Regulations which require that the whole or part of such tax will be reimbursed to those teachers by the European School out of its funds. However, as a matter of Community law, such teachers are not entitled to rely on this prohibition before national courts.
3. It is not contrary to Article 7 of the Treaty of Rome for a Member State to withhold an exemption from income tax from its nationals who are teachers at a European School situated on its territory, even if this exemption is granted to teachers of other nationalities at the same school.

The costs of the parties in the national proceedings fall to be decided by the Special Commissioners. The other parties which have intervened should bear their own costs.