

OPINION OF ADVOCATE GENERAL  
SHARPSTON  
delivered on 16 December 2010<sup>1</sup>

1. The European Schools are official educational establishments controlled jointly by the governments of the Member States of the European Union ('EU'). Their purpose is to provide a multilingual and multicultural education for nursery, primary and secondary level children of the staff of the EU institutions. There are currently 14 schools with a total of approximately 22 500 pupils on the registers.<sup>2</sup>

2. The European Schools were founded upon two conventions, the Statute of the European School signed at Luxembourg on 12 April 1957<sup>3</sup> and the Protocol of 13 April 1962 on the setting-up of European Schools with reference to the Statute of the European School signed at Luxembourg on 12 April 1957.<sup>4</sup> Both conventions were concluded by the six original Member States. They were replaced on 21 June 1994 by the Convention defining the Statute of the European Schools ('the Convention').<sup>5</sup> It was at this point that the

Community institutions became parties to the international agreements.<sup>6</sup> Currently the EU institutions and all 27 Member States are Contracting Parties to the Convention.<sup>7</sup>

3. The Convention lays down provisions concerning the purpose and organisation of the schools. It covers matters such as pedagogy, the institutional structure of the European Schools system, the organs established to administer it and the settlement of disputes concerning the interpretation and application of the Convention.

4. A further objective of the Convention is to ensure adequate legal protection for persons

1 — Original language: English.

2 — The schools are situated as follows: five in Belgium, three in Germany, one in Italy, two in Luxembourg, one in the Netherlands, one in Spain and one in the United Kingdom.

3 — *United Nations Treaties Series*, volume 443, p. 129.

4 — *United Nations Treaties Series*, volume 752, p. 267.

5 — OJ 1994 L 212, p. 3.

6 — Following the adoption of EC, Euratom: Council Decision 94/557/EC 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). See also 94/558/ECSC: Commission Decision of 17 June 1994 on the conclusion of the Convention defining the Statute of the European Schools (OJ 1994 L 212, p. 15).

7 — The Convention entered into force on 1 October 2002.

who fall within its scope, thus leading to the creation of a Complaints Board.<sup>8</sup>

5. The present proceedings raise an important institutional question. Is the Complaints Board competent to refer questions of EU law to the Court of Justice? If the Court considers that it has jurisdiction to entertain such a reference, the substantive issues raised in the main proceedings will require consideration of the principles of equal treatment and freedom of movement for workers within the EU.

## Legal framework

### *The Convention*

6. The third recital in the preamble to the Convention states that ‘... the European School system is “*sui generis*”; ... it constitutes a form of cooperation between the Member States and the European Communities ...’

7. Article 1 of the Convention provides that the purpose of the Schools is to educate together the children of the staff of the European Communities.

8. Article 3(2) states:

‘Instruction shall be provided by teachers seconded or assigned by the Member States in accordance with decisions taken by the Board of Governors under the procedure laid down in Article 12(4).’

9. Under Article 7 the organs common to all European Schools are the Board of Governors, the Secretary-General, the Boards of Inspectors and the Complaints Board.

10. Article 12 states that the Board of Governors is to:

‘(1) lay down the Service Regulations for the Secretary-General, the Headteachers, the teaching staff

...

(4) (a) determine each year, on a proposal from the Boards of Inspectors, the teaching staff requirements by creating or eliminating posts. It shall ensure a fair allocation of posts among the Member States. It shall settle with the Governments questions relating to the assignment or secondment of the secondary school teachers, primary school teachers and

<sup>8</sup> — See Article 27 of the Convention, at point 13 below.

education counsellors of the School. Staff shall retain promotion and retirement rights guaranteed by their national rules;

...'

11. Article 25 provides:

'The budget of the Schools shall be financed by:

1. contributions from the Member States through the continuing payment of the remuneration for seconded or assigned teaching staff and, where appropriate, a financial contribution decided on by the Board of Governors acting unanimously.'

12. Article 26 states: 'The Court of Justice of the European Communities shall have sole jurisdiction in disputes between Contracting Parties relating to the interpretation and application of this Convention which have not been resolved by the Board of Governors.'

13. Article 27 deals with the Complaints Board. It provides:

- '1. A Complaints Board is hereby established.

2. The Complaints Board shall have sole jurisdiction in the first and final instance, once all administrative channels have been exhausted, in any dispute concerning the application of this Convention to all persons covered by it with the exception of administrative and ancillary staff, and regarding the legality of any act based on the Convention or rules made under it, adversely affecting such persons on the part of the Board of Governors of the Administrative Board of a school in the exercise of their powers as specified by this Convention. When such disputes are of a financial character, the Complaints Board shall have unlimited jurisdiction.

The conditions and the detailed rules relative to these proceedings shall be laid down, as appropriate, by the Service Regulations for the teaching staff or by the conditions of employment for part-time teachers, or by the General Rules of the Schools.

3. The members of the Complaints Board shall be persons whose independence is beyond doubt and who are recognised as being competent in law.

Only persons on a list to be compiled by the Court of Justice of the European Communities shall be eligible for membership of the Complaints Board.

4. The Statute of the Complaints Board shall be adopted by the Board of Governors, acting unanimously.

The Statute of the Complaints Board shall determine the number of members of the Board, the procedure for their appointment by the Board of Governors, the duration of their term of office and the financial arrangements applicable to them. The Statute shall specify the manner in which the Board is to operate.

5. The Complaints Board shall adopt its rules of procedure, which shall contain such provisions as are necessary for applying the Statute.

The rules of procedure shall require the unanimous approval of the Board of Governors.

6. The judgments of the Complaints Board shall be binding on the parties and, should the latter fail to implement them, rendered enforceable by the relevant authorities of the Member States in accordance with their respective national laws.

7. Other disputes to which the Schools are party shall fall within national jurisdiction. In particular, national courts' jurisdiction with regard to matters of civil and criminal liability is not affected by this Article'

*Statute of the Complaints Board*<sup>9</sup>

14. Article 1 of the Statute provides that the Complaints Board is to be composed of six members appointed for a five year period from the list compiled for that purpose by the Court of Justice. In principle their term of office is tacitly renewable.

15. Article 2 states that each member of the Complaints Board must make the following declaration:

'I hereby swear ... that I shall perform my duties honourably, independently and impartially, and that I shall preserve the secrecy of the deliberations.'<sup>10</sup>

16. Article 3 stipulates that members of the Complaints Board may not engage in any political, or administrative activity or any occupation incompatible with their duty to behave independently and impartially.

17. Article 5 provides that a member may be removed from office only if the other

9 — Adopted pursuant to Article 27(4) of the Convention and approved by the Board of Governors by written procedure of 22 April 2004 ('the Statute'), available on the European Schools' website.

10 — See also Article 2 and Annex I, Article 5 of the Statute of the Court of Justice (OJ 2008 C 115, p. 210).

members meeting in plenary decide by a two-thirds majority that he has ceased to fulfil the requisite conditions. Before removal from office the member has the right to be heard by the Complaints Board.

*The Regulations for Members of the Seconded Staff of the European Schools applicable from 1 September 1996*<sup>13</sup>

19. The Staff Regulations lay down the provisions governing the terms and conditions of members of staff seconded to the European Schools.

20. Article 45 provides that the remuneration paid to members of staff is to comprise the basic salary, payment for overtime, family and other allowances.

*The Rules of Procedure for the Complaints Board of the European Schools*<sup>11</sup>

21. Article 47 states:

‘1. A member of staff’s remuneration shall be expressed in euro.

18. The Rules of Procedure contain provisions analogous to those governing the written and oral procedure before this Court and the General Court. Thus, Article 9 provides that all communications with a party must be made in one of the official languages.<sup>12</sup> Articles 11 and 12 make provision for parties who appear before the Complaints Board to be represented by a lawyer. Articles 14 to 19 provide for a written procedure which includes the exchange of an application, a defence, a reply and a rejoinder; and subsequently for an oral procedure to take place.

....

2. It shall be paid to the member of staff at the place and in the currency of the country where he carries out his duties.

Remuneration paid in a currency other than the euro shall be calculated on the basis of the exchange rate applied for the remuneration of officials of the European Communities.

11 — Approved by the Board of Governors at the meetings of 1 and 2 February 2005 (‘the Rules of Procedure’), available on the European Schools’ website.

12 — Namely the languages listed in Annex II to the Convention: Danish, Dutch, English, French, German, Greek, Italian, Portuguese and Spanish.

13 — Approved by the Board of Governors at its meetings of 20 and 21 January 2009 (‘the Staff Regulations’), available on the European Schools’ website.

3. A member of staff's remuneration shall be weighted at a rate above, below or equal to 100%, as laid down and adjusted for officials of the European Communities.'
- (b) The School shall pay the difference between the remuneration provided for in these Regulations and the exchange value of all national emoluments, minus compulsory social security deductions.

22. Article 49 provides:

'1. ... [A] member of staff shall be entitled to the remuneration carried by his post and his step in the salary scale for such a post, as laid down in Annex III to these Regulations.<sup>14</sup>

The exchange value shall be converted into the currency of the country in which the member of staff performs his duties, on the basis of the exchange rates used for the salaries of officials of the European Communities.'

23. At the time the current dispute arose (April 2008), Article 49(2) provided as follows:

24. Article 49(2) was amended with effect from 1 July 2008 to allow the European Schools to make an adjustment, if necessary, to the exchange rates between the euro and other official currencies of the Member States. The following paragraphs were added to the text of that provision:

'(a) The competent national authorities shall pay the national emoluments to the member of staff and shall inform the Director of the amounts paid, specifying all the components taken into account for calculation purposes, including compulsory social security deductions and taxes.

'These exchange rates shall be compared with the monthly exchange rates in force for the implementation of the budget. Should there be a difference of 5% or more in one or more currencies compared with the exchange rates used hitherto, an adjustment shall be made from that month. Should the trigger

<sup>14</sup> — Under the current version of the Staff Regulations, the salary scales are set out in Annex IV. However, at the relevant time the monthly salary scales in euro of the seconded staff of the European schools were contained in Annex III. I have therefore referred to Annex III in this Opinion.'

threshold not be reached, the exchange rates shall be updated after six months at the latest.

Paragraph 2 provides that, before an appeal may be lodged with the Complaints Board, an administrative appeal must be lodged with the Secretary-General under Article 79 and an express or implied decision rejecting it must have been taken.

If the exchange value is higher than the remuneration provided for in these Regulations for a calendar year, the member of staff concerned shall be entitled to the difference between the two sums.'

25. Article 79 of the Staff Regulations provides that an administrative appeal may be lodged with the Secretary-General of the European Schools ('the Secretary-General') against administrative and financial decisions in the administrative and financial areas concerning the legality of an act which adversely affects the person concerned. If the Secretary-General does not reply to an administrative appeal within five months of it having been lodged, that constitutes an implied decision rejecting that administrative appeal. An appeal against such a decision may be brought before the Complaints Board.

Paragraph 5 states: 'Contentious appeals within the meaning of this article shall be examined and judged subject to the conditions laid down by the Rules of Procedure established by the Complaints Board.

26. The relevant provisions of Article 80 are as follows:

'1. The Complaints Board shall have sole jurisdiction in the first and final instance in any dispute between the management organs of the School and members of staff regarding the legality of an act adversely affecting them...'

Appeals lodged with the Complaints Board shall not have suspensory effect. However, the Complaints Board may, if it considers that the circumstances so require, order that application of the contested act be suspended. Judgments of the Complaints Board shall be final and enforceable.'

*The EC Treaty*<sup>15</sup>

27. The first paragraph of Article 12 EC provides:

‘Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’

28. Article 39 EC states:

‘1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

,  
...

29. Article 234 EC states:

‘The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

...

15 — Since the main proceedings arose at a time before the Lisbon Treaty entered into force, I refer to the Treaty provisions as they then stood. The provisions of Article 12 EC are now to be found in Article 18 TFEU; those of Articles 39 and 234 EC in Articles 45 and 267 TFEU respectively. Prior to the entry into force of the Amsterdam Treaty in 1999, the provisions of Article 234 EC were to be found (subject to variation that is not material to the present case) in Article 177 of the EEC Treaty and, subsequently, in Article 177 EC. To assist the reader, I have adjusted such references so that they refer to the Treaty articles by the numbering applicable at the time when the main proceedings arose. References to the Community in older case-law and legislation should obviously now be interpreted as references to the European Union.



Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.'

States and the Schools. Thus, the seconded teacher continues to receive his national salary (subject to compulsory deductions for tax and social security) whilst seconded to the Schools.<sup>17</sup> The national salary is converted into euro applying the exchange rate identified. The exchange value of the national salary is then deducted from the monthly salary set out in Annex III to the Staff Regulations. The difference between the two is known as the 'European supplement' and is paid directly to the seconded teacher by the European Schools, using money provided by the EU budget.<sup>18</sup> The European supplement and the national salary together constitute the teacher's basic salary for the purposes of the Staff Regulations.

## Background, facts and procedure

### *The salary calculation*

30. Article 49(1) of the Staff Regulations provides that all teachers are to receive the monthly salary set out in Annex III, expressed in euro.<sup>16</sup>

31. The salary reflects the structure of the European Schools in so far as responsibility for paying it is shared between the Member

32. On 1 July 2007 EUR 1 was equivalent to GBP 0.67215. However, sterling depreciated significantly against the euro from October 2007 onwards. On 1 December 2007 EUR 1 was equivalent to GBP 0.71475 and on 1 June 2008 to GBP 0.7866. Thus, between 1 July 2007 and 30 June 2008 sterling had lost approximately 7.4% of its value against the euro.

33. The exchange rate applied to calculate the euro exchange value of the teachers' national salaries was set each year on 1 July. Prior to

16 — All references are to Annex III as it was at the material time: see footnote 14 above.

17 — Article 25 of the Convention and Article 49(2)(a) of the Staff Regulations: see respectively points 11 and 23 above.

18 — The arrangements are explained in Case 44/84 *Hurd* [1986] ECR 29, paragraph 5.

their amendment in July 2008, the Staff Regulations made no provision for intermediate adjustments to be made to the rate set on 1 July to take account of variations in the exchange rate during the year. Thus, there was no adjustment mechanism to compensate for the significant depreciation in the value of sterling against the euro between October 2007 and June 2008.

34. Following the amendment to the Staff Regulations from 1 July 2008, intermediate adjustment may now be made where there is a difference of 5% or more in the exchange rate of a currency as compared to the rate previously applied.<sup>19</sup>

2008. The Secretary-General confirmed by letter dated 7 November 2008 that she had rejected the teachers' administrative appeals. On 15 December 2008, the teachers lodged appeals with the Complaints Board against the Secretary-General's decision.

36. One further claimant, Mr Robert Watson MacDonald, lodged his administrative appeal with the Secretary-General on 9 May 2008. On 9 January 2009 he too lodged an appeal with the Complaints Board against the Secretary-General's decision.

37. All of the appeals lodged by the teachers concern the calculation of the European supplement in respect of British teachers who perform their duties at schools in Member States where the euro is the currency used.

### *Facts and procedure*

35. During the period from April 2008 onwards, Mr Miles and 135 other teachers seconded to the European Schools by the United Kingdom brought administrative appeals pursuant to Article 79 of the Staff Regulations before the Secretary-General. In those administrative appeals, they sought an adjustment to the calculation of the European supplement element of their salaries so as to compensate for the depreciation of sterling against the euro during the period October 2007 to June

### *The order seeking to refer questions for a preliminary ruling*

38. In its order seeking to refer questions for a preliminary ruling, the Complaints Board observes that Article 26 of the Convention provides that the Court has sole jurisdiction to rule on the interpretation and application of the Convention in disputes between the Contracting Parties which have not been resolved by the Board of Governors. There is,

<sup>19</sup> — See point 24 above.

however, no express provision under which the Complaints Board is empowered to seek guidance from the Court in relation to an appeal before it.

39. The Complaints Board emphasises that its task is to ensure that the law is applied in a uniform manner to matters that fall within its jurisdiction. Its judgment in an appeal is binding on the parties. If they fail to implement it, the judgment is enforceable by the competent authorities of the Member States. The Complaints Board takes the view that, taking into account this general legal context (in particular its obligation to ensure the uniform application of EU law to matters that fall within its jurisdiction), it would be a paradox if it were considered not to be competent to refer questions to the Court under Article 234 EC.

40. Accordingly, the Complaints Board wishes to refer the following questions to the Court:

‘(1) Is Article 234 EC to be interpreted as meaning that a court or tribunal such as the Complaints Board, which was established by Article 27 of the Convention defining the statute of the European Schools, falls within its scope of application and, since the Complaints Board acts as a tribunal of last instance, is competent to make a reference for a preliminary ruling to the Court of Justice?

(2) If the answer to the first question is in the affirmative, must Articles 12 EC and 39 EC be interpreted as meaning that they

prevent the application of a remuneration system such as the system in force within the European Schools in as much as, although that system expressly refers to the system applying to Community officials, it does not allow for the taking into account, even retrospectively, of currency devaluation which leads to a decline in purchasing power for teachers who are seconded by the authorities of the Member State concerned?

(3) If the answer to the second question is in the affirmative, can a difference in situation such as that established between teachers seconded to the European Schools, whose remuneration is funded both by their national authorities and by the European School in which they teach, on the one hand, and officials of the European Community, whose remuneration is funded by the Community alone, on the other hand, justify a situation in which, in the light of the principles laid down in the articles cited above and although the Regulations for Members of the Seconded Staff of the European Schools expressly refer to the Staff Regulations of Officials of the European Communities, the exchange rates applied in order to maintain an equivalent purchasing power are not the same?’

41. Written observations have been submitted, and oral argument was presented at

the hearing on 9 June 2010, on behalf of the teachers, the European Schools, and the European Commission.

decisions of the European Schools should not be regarded as an integral part of EU law. Therefore, the system which governs the operation of the European Schools falls outside the scope of the category of measures covered by Article 234 EC.

## Assessment

### *The first question*

42. The first question raises a fundamental issue. Does the Court's jurisdiction under Article 234 EC extend to bodies like the Complaints Board? If that question is answered in the negative, there is no need to reply to questions 2 and 3.

Do the questions raised by the Complaints Board concern matters of EU law?

43. It is contended on behalf of the European Schools that those schools are established on the basis of international agreements, and that those agreements, the measures and

44. In *Hurd*<sup>20</sup> the question before the Court required consideration of the remuneration system applied to British teachers within the European Schools who were teaching at the school in Culham, England. The Board of Governors of the first European School had decided (at a meeting of 26 and 27 January 1957) that members of staff should pay tax on the salary (or part thereof) corresponding to their national salary. On the other hand, supplements and allowances paid under the Staff Regulations should be exempt from all tax. In the United Kingdom the European supplement and the differential allowances paid by the European School at Culham to teachers who were not United Kingdom nationals were not subject to income tax. The dispute in the main proceedings in *Hurd* concerned the question whether such payments might, on the other hand, be charged to tax when made to United Kingdom nationals. Mr Hurd claimed that the supplements paid by the European School in Culham to teachers seconded by the United Kingdom should be exempt from national taxation as a matter of Community law. He submitted that since the United Kingdom had acceded to the convention defining the statute of the European School as

<sup>20</sup> — Cited above in footnote 18.

required by Article 3 of the Act of Accession to the European Communities of the United Kingdom of Great Britain and Northern Ireland to the European Communities of 1972, the United Kingdom had accepted the decision of the meeting of 26 and 27 January 1957. The United Kingdom Government contended that although the Court might interpret Article 3 of the Act of Accession, it did however not have jurisdiction to interpret the conventions establishing the European Schools.

46. The Court has recently confirmed its ruling in *Hurd* in *Commission v Belgium*.<sup>22</sup> It follows from the Court's case-law that the Staff Regulations laid down by the Board of Governors of the European Schools pursuant to Article 12(1) of the Convention are therefore *prima facie* measures which fall outside the scope of Article 234 EC.

47. It seems to me, therefore, that, in the context of the present case, the Staff Regulations have the same status as provisions of national law in a reference from a national court. The Court is not competent to interpret them as such, but may give guidance on the way in which EU law applies to them.

45. The Court held that it did not have jurisdiction to interpret Article 3 of the Act of Accession for the purpose of defining the United Kingdom's obligations under the measures and decisions of the organs of the European Schools, because the latter instruments fell outside the scope of the categories of measures covered by Article 234 EC. The fact that such agreements were linked to the Community and the functioning of its institutions did not mean that they were to be regarded as an integral part of Community law. However, the Court considered that – in order to determine the scope of Article 3 of the Act of Accession regarding such instruments – it might be necessary to define the legal status of measures and decisions of organs of the European Schools and therefore to subject them to such scrutiny as was necessary for that purpose.<sup>21</sup>

48. Moreover, the European Schools conceded during the hearing that they apply the Treaty and accepted that the substantive questions referred to the Court by the Complaints Board concern its correct interpretation.

49. It therefore seems to me that since questions 2 and 3 make an explicit request concerning the interpretation of the Treaty, the

21 — *Hurd*, cited in footnote 18 above, paragraphs 20 and 21.

22 — Case C-132/09 [2010] ECR I-8695 (judgment was delivered on 30 September 2010), paragraphs 43 and 44.

Staff Regulations may be examined in so far as it is necessary to answer the issues of EU law that arise.

Is the Complaints Board a court or tribunal of a Member State for the purposes of Article 234 EC?

characteristics of a court or tribunal for the purposes of Article 234 EC. The European Schools accept that the Complaints Board is a court or tribunal, but submit that it is not a court or tribunal *of a Member State* as required by the wording of the second paragraph of Article 234 EC. I shall therefore deal only briefly with the aspects which are not in dispute, in order to concentrate on the latter issue.

50. According to the Court's established case-law, '[i]n order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent'.<sup>23</sup> Additionally, a national court may refer a question to the Court only if there is a case pending before it and it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.<sup>24</sup>

51. The Commission and the teachers contend that the Complaints Board has all the

52. The Complaints Board is formed pursuant to Article 27 of the Convention. It is therefore clearly established by law. Its permanent nature may be inferred from Article 27(1), since it is established without any limit to its duration, with its members serving for a renewable period of five years. Under Article 27(2), the Complaints Board has sole jurisdiction in the disputes concerned and, under Article 27(6) (confirmed by Article 80(5) of the Staff Regulations), its judgments are binding and enforceable; those provisions make it clear that the Complaints Board exercises a judicial function. Article 27(5) empowers the Complaints Board to adopt its rules of procedure in order to apply the Statute, and those which it has adopted provide for an inter partes procedure.

23 — Case C-109/07 *Pilato* [2008] ECR I-3503, paragraph 22 and the case-law cited there; see also Case C-195/06 *Rundfunk* [2000] ECR I-8817, paragraph 19, and Case C-205/08 *Umweltanwalt von Kärnten* [2009] ECR I-11525, point 35 of the Opinion, where Advocate General Ruiz-Jarabo cites Case 61/65 *Vaassen-Goebbels* [1966] ECR 261.

24 — Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14.

53. In addition, it is clear that the Complaints Board possesses the characteristic of independence, which is inherent to the task of adjudication.<sup>25</sup> Its composition is governed by Article 27(3) of the Convention and Articles 1, 2, 3 and 5 of the Statute. Thus its members must be persons whose independence is beyond doubt, chosen from a list compiled by the Court of Justice. They take an oath to act independently and impartially, and may not engage in any activity incompatible with that obligation. A member may be removed from office only if, after he has been heard, a two-thirds majority of all his colleagues considers that he has ceased to fulfil the requisite conditions. In addition, the Complaints Board plainly acts as a third party in relation to the body that adopted the contested decision, as it is a separate and distinct organ from the Secretary-General.

54. Having confirmed that the Complaints Board meets all the criteria for classification as a court or tribunal, I turn, therefore, to consider the fundamental question whether it can be considered a court or tribunal *of a Member State*.

55. The European Schools contend that the second paragraph of Article 234 EC should be

construed literally, as referring to a court or tribunal *of a Member State* – which the Complaints Board plainly is not.

56. The Commission and the teachers submit that the objective of Article 234 EC is to ensure the coherent and uniform application of EU law. Therefore, Article 234 EC should be construed purposively and the words a ‘court or tribunal *of a Member State*’<sup>26</sup> should be given a broad interpretation. In *Rheinmühlen*<sup>27</sup> the Court confirmed that the purpose of the procedure under what was then Article 177 of the EEC Treaty was to ensure that in all circumstances the law is the same throughout the Community’s Member States.

57. I agree with the Commission and the teachers.

58. It is nearly 30 years since the Court first adopted an interpretation of what subsequently became Article 234 EC that was broader than the literal sense of the wording of the second paragraph. In *Broekmeulen*<sup>28</sup> the Court held that, when the appeals committee established by the Royal Netherlands Society for the promotion of medicine (‘the

25 — See in particular Case C-506/04 *Wilson* [2006] ECR I-8613, paragraphs 49 to 53.

26 — My emphasis.

27 — Case 166/73 [1974] ECR 33, paragraph 2. See more recently Case C-458/06 *Gourmet Classic* [2008] ECR I-4207, paragraph 20.

28 — Case 246/80 [1981] ECR 2311, paragraphs 16 and 17.

appeals committee') applied and determined matters of Community law, it must be considered to be a court or tribunal of a Member State. In its judgment the Court observed that there was no right of appeal from the appeals committee's decisions to the ordinary courts.

60. In *Christian Dior*<sup>31</sup> the Court examined whether, in proceedings concerning the interpretation of the trade marks directive<sup>32</sup> the highest national court of the Netherlands or the Benelux Court<sup>33</sup> should be regarded as the court or tribunal against whose decisions there was no judicial remedy, and which was therefore required to make a preliminary reference to the Court under Article 234(3) EC. The Court again adopted a purposive interpretation and, referring to the Benelux Court, it stated: 'There is no good reason why such a court, *common to a number of Member States*, should not be able to submit questions to this Court, in the same way as courts or tribunals of any of those Member States.' In reaching that conclusion, the Court placed weight upon two factors. First, the Benelux Court had the task of ensuring that the legal rules common to the three Benelux countries were applied uniformly; and the procedure before it was a step in proceedings before national courts leading to a definitive interpretation of common Benelux rules. Second, recognising that the Benelux Court was entitled to refer questions to the Court served the purpose of

59. In the present case the Complaints Board, has 'sole jurisdiction in the first and final instance'.<sup>29</sup> Because its remit covers the rights and obligations of teachers many of whom will have exercised rights of free movement as part of accepting secondment to the various European Schools, it will inevitably – as indeed, in the present case – have to apply (and give precedence to) EU law in determining disputes before it. As with the appeals committee in *Broekmeulen*, there is no right of appeal from the Complaints Board's decision to the ordinary courts of any Member State. The analogy with *Broekmeulen* is compelling.<sup>30</sup>

29 — See Article 27(2) of the Convention, set out in point 13 above.

30 — See further point 43 et seq. above, where I have addressed the European Schools' argument that the interpretation of the Staff Regulations is not a matter governed by EU law.

31 — Case C-337/95 [1997] ECR I-6013.

32 — First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

33 — The Benelux Court was established by a treaty signed in Brussels on 31 March 1965 between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands and is composed of judges of the supreme courts of each of those three States; see *Christian Dior*, cited in footnote 31 above, paragraph 15.



Article 234 EC, because it ensured the uniform interpretation of Community law.<sup>34</sup>

61. Advocate General Jacobs considered the issue briefly in his Opinion. He emphasised that ‘the rationale of the Treaty provisions is that a court of a Member State whose decisions are final should not decide a question of Community law in the absence of a ruling from this Court’.

62. The European Schools contend that *Christian Dior* is distinguishable from the present matter, because the issue in the main proceedings in that case initially arose before a national court (the *Rechtbank te Haarlem*; the reference was subsequently made by the Netherlands Supreme Court). In the present instance, there was never an issue before a national court and accordingly, there is no question arising from a national court or tribunal.

63. I disagree. In my view the Court should also adopt a purposive construction of Article 234 EC here, for the following reasons.

64. First, the Member States collectively established the Complaints Board as a judicial body of first and last resort to determine all matters relating to the European Schools that are regulated by the Convention (or by measures, such as the Staff Regulations, adopted thereunder).<sup>35</sup> The Complaints Board has a duty to ensure that the legal rules laid down in the Convention are applied uniformly. Its rulings are final and definitive. The Convention provides that judgments of the Complaints Board are to be enforced by the relevant Member State’s authorities in accordance with their laws.<sup>36</sup>

65. It follows that the Complaints Board should be regarded as a jurisdiction that is ‘common to a number of Member States.’ Indeed, since it is common to all the Member States, it is the ultimate expression of that concept. It would be paradoxical if, when applying EU law, the Complaints Board were unable to refer questions to the Court when the Member States are then obliged, through their national courts, to enforce its decisions.

<sup>34</sup> — See *Christian Dior*, cited in footnote 31 above, paragraph 21, emphasis added; see also paragraphs 22 and 23.

<sup>35</sup> — Article 27 of the Convention. Any matters *not* governed by the Convention fall within the jurisdiction of the national courts: see Article 27(7).

<sup>36</sup> — Article 27(6) of the Convention.

66. In that connection, I note that, under Article 26 of the Convention, this Court has sole jurisdiction in disputes between the Contracting Parties relating to the interpretation and application of the Convention that have not been resolved by the Board of Governors.<sup>37</sup> It would be anomalous if an equivalent question arising in a challenge brought by individuals against a decision taken by the Secretary-General could not also be referred by the Complaints Board to this Court for an authoritative ruling when it raises issues involving the interpretation of EU law.

67. Here it seems to me that a parallel may appropriately be drawn with the normal system under the Treaties, where direct actions are complemented by references for preliminary rulings and where the Court has tended to be generous in its interpretation so as to preserve uniformity of interpretation and guarantee effective protection.

68. In *Zwartveld*,<sup>38</sup> the Court was faced with a 'request for judicial cooperation' emanating from a national court that did not fit neatly into the procedural system established by the Treaties, literally interpreted.

The rechter-commissaris at the Arrondissementsrechtbank Groningen (the Netherlands) was investigating serious irregularities relating to the management of the fish market in Lauwersoog, including allegations of breaches of the national provisions adopted to implement the Community rules on fishing quotas. He regarded it as essential to his investigation to obtain copies of, inter alia, the reports drawn up by EEC fisheries inspectors and indicated that it might also be necessary, after considering those documents, to take evidence from the inspectors concerned. The Commission had refused disclosure, claiming that the documents formed part of a file on legal matters pending at the Commission. The rechter-commissaris therefore applied to the Court and requested assistance on the basis of the Protocol on Privileges and Immunities of the European Communities and the European Convention or conventions on mutual assistance (to which the Community was not a party, but which he regarded as being incorporated in the Community legal order, and therefore, to be regarded as an integral part of Community law).

69. The Court did *not* reject the case as inadmissible. On the contrary: sitting as the full court, it held<sup>39</sup> that, in a Community based on the rule of law, the Community institutions

37 — The Commission lodged the first application under Article 26 of the Convention in late 2009 in Case C-545/09 *Commission v United Kingdom*, currently pending before the Court.

38 — Case 2/88 Imm. [1990] ECR I-3365 and I-4405.

39 — In its first order of 13 July 1990, [1990] ECR I-3365, after receiving observations from eight Member States, the Council, the European Parliament and the Commission.

were required to respect the duty of sincere cooperation (which was of particular importance vis-à-vis judicial authorities responsible for ensuring that Community law was applied and respected). As a necessary corollary, the Court must have the power to review whether that duty had been complied with and, consequently, had jurisdiction to examine whether the Community institutions' refusal to cooperate with the national authorities was justified.<sup>40</sup>

the European Communities has become the European Union and much else has changed; but the central importance of guaranteeing respect for rules laid down by the Treaties and associated instruments and upholding the rule of law remains unaltered.

#### Right to a judicial remedy

70. The Court therefore exercised that jurisdiction and ordered the Commission to produce the necessary documents and authorise its inspectors to be examined as witnesses, unless it presented 'imperative reasons relating to the need to safeguard the interests of the Communities' which justified its refusal to do so.<sup>41</sup>

72. The unimpeachable reason for adopting a teleological interpretation of Article 234 EC is that it is necessary in order to ensure the uniform and consistent interpretation of EU law. Thus, the Complaints Board should be able to refer questions to the Court when it considers that a decision on an issue of EU law is necessary to enable it to give judgment.

71. I respectfully applaud the Court's willingness, in *Zwartveld*, to have regard to the teleology of the Treaties and to insist on its jurisdiction to uphold important principles of Community law, thereby ensuring that the European Communities continued to be a 'Community based on the rule of law'. In the 20 years that have elapsed since *Zwartveld*,

73. The uniformity and coherence of EU law is the prime objective of the reference procedure. It would be bizarre to have a body established by the Member States and the EU institutions that rules definitively on issues of EU law, but that – on a narrow view of the Court's jurisdiction under Article 234 EC – cannot refer questions for a preliminary ruling.

40 — See paragraphs 15 to 24 of the order of 13 July 1990.

41 — See paragraphs 25 and 26 of the order of 13 July 1990. In a second order of 6 December 1990, [1990] ECR I-4405, the Court ordered the Commission to produce four relevant reports and to permit its fisheries inspectors to be examined as witnesses.

74. As Advocate General Ruiz-Jarabo Colomer put it in his Opinion in *Umweltanwalt von Kärnten*:<sup>42</sup>

‘Article 234 EC provides for a dialogue between courts for the purpose of ensuring the uniform application of Community law in all the Member States. The Court has allowed highly disparate bodies to participate in that dialogue... Despite the difficulties referred to above, there is a certain amount of justification for that situation. The judicial system in a Union composed of 27 Member States reflects a wide variety of criteria and objectives. It is difficult to conceive of a blueprint setting out a common description of the judiciary in so many countries, a factor which has led to such a generic and broad interpretation of the criteria laid down in the *Vaassen-Goebbels* judgment.’

75. Furthermore, a narrow interpretation would run counter to the purpose and the ethos of the reference procedure. It would be the antithesis of the spirit of judicial co-operation that the Court has so consistently emphasised in its case-law.<sup>43</sup>

76. In my view, if the Complaints Board is unable to make a reference to the Court to obtain an authoritative ruling on a point of EU law that is pertinent to the appeal before

it, that would undermine the uniformity and coherence of EU law. It would also deprive the applicants in that appeal of their right to a judicial remedy, as the European Schools acknowledged during the hearing.

77. Taking account of all these factors, I am of the view that, on a purposive construction, the Complaints Board falls within the scope of Article 234 EC.

If this reference is declared admissible, could there be an unacceptable increase in the Court’s caseload?

78. It may be objected that, if the Complaints Board of the European Schools is considered to be competent to refer questions of EU law to the Court under Article 234 EC, the Court might be inundated by similar requests from other bodies that would hitherto have been assumed to fall outside the scope of Article 234 EC.

79. The Commission has submitted, first, that in weighing the risk of a potential increase in the number of references against the need to ensure the uniform application of EU law, the latter should take precedence. Second, it has

<sup>42</sup> — Cited in footnote 23 above, point 35 of the Opinion.

<sup>43</sup> — See for example, Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 41 and the case-law cited there.

pointed out that the Complaints Board is a very specific institution. There are unlikely to be many other bodies that display the same characteristics, and that are therefore competent to refer questions under Article 234 EC.

work. Expediency, however seductive, is not a valid legal argument.

80. I agree.

83. Furthermore, it is difficult, if not impossible, to find institutions similar to the Complaints Board elsewhere within the EU system.

81. The argument that admitting references from the Complaints Board to the Court under Article 234 EC would overload the Court is not a position based upon legal principles. If, on a correct view of the law, the Complaints Board ought to be able to refer questions for a preliminary ruling, the fact that there might be some (potential and hypothetical) increase in the Court's workload is not a proper reason for reaching a different conclusion.

84. First, all the Contracting Parties to the Convention establishing the European Schools (the 27 Member States and the EU institutions) are within the EU. The situation thus differs from the agreements on which courts such as the European Court of Human Rights<sup>44</sup> and the WTO panels<sup>45</sup> are founded, or under which the potential new European Patent Court might be established.<sup>46</sup> It is reasonable to take the view that there would need to be a specific provision allowing such international courts to make references to this Court. In contrast, disputes before the Complaints Board arise solely within the EU and concern only parties who are subject to EU law.

82. At the recent major enlargement of the EU in 2004 (from 15 Member States to 25), it would have been unthinkable to suggest that although courts and tribunals in the new Member States were qualified to submit references for a preliminary ruling, it would be expedient and therefore better not to let them do so, lest the Court be overwhelmed with

44 — Both EU Member States and numerous third countries are signatories to the European Convention on Human Rights ('ECHR'). Following the adoption of the Lisbon Treaty, the EU is to accede to the ECHR pursuant to Article 6(2) of the EU Treaty.

45 — The Member States, the EU and third countries are signatories to the WTO Agreements.

46 — The Member States, the EU and certain third countries would be signatories to the proposed Agreement for the new European Patent Court.

85. Second, the members of the Complaints Board are appointed from a list compiled by the Court of Justice and the criteria for their appointment are not dissimilar to those applicable to members of the Civil Service Tribunal. Both elements underline the judicial function of the Complaints Board and its structural links with the EU legal system.

86. The European University Institute ('the EUI') may afford the closest parallel. It was formed pursuant to an international convention ('the EUI convention') in 1972 between the six original Member States. Its staff regulations provide for a complaints procedure, from whose decisions an appeal lies to an Appeals Board. However, that Appeals Board appears to differ from the Complaints Board in that, for example, it is not established by the EUI convention to deal with disputes. It does not therefore necessarily follow that, if the Complaints Board of the European Schools is competent to make a reference under Article 234 EC, the Court would automatically have to accept a reference proposed by the Appeals Board of the EUI.

87. In short, the Complaints Board and the Convention which created it appear to be, if not unique, then part of a rare species within the European Union. It is highly unlikely that the Court would be inundated with references from bodies such as the Complaints Board. Moreover, as I have pointed out,

where the applicable rules do not form part of EU law, the Court's duty is only to provide guidance on the interpretation of EU law in so far as it affects the application of those rules.

88. Accordingly, in my view the answer to the first question should be that the Complaints Board of the European Schools falls within the scope of application of Article 234 EC and, since the Complaints Board acts as a tribunal of last instance, it is both competent to make a reference for a preliminary ruling to the Court of Justice when considering issues of EU law and, in principle, required to do so under the same conditions as any other court or tribunal from whose decision there is no judicial remedy.

#### *Question 2*

89. By its second question, the Complaints Board wishes to know whether Article 12 EC (prohibiting discrimination on grounds of nationality) or Article 39 EC (securing freedom of movement for workers) precluded the remuneration system in force in the European Schools at the material time, in so far as that system did not allow for any adjustment to take account of currency devaluations which could reduce the purchasing power of some seconded teachers. In that regard, the

Complaints Board notes that the system in question ‘expressly refers to the system applying to Community officials’.

90. The question arises because, between 1 July 2007 and 1 July 2008, sterling fell appreciably against the euro. The exchange rate used for the salaries of officials of the European Communities, however, did not change during that period and nor did the value (calculated and expressed in euro as at 1 July 2007) of the European supplement to which any particular teacher was entitled.<sup>47</sup> As a result of those two factors, the national salary of teachers seconded from the United Kingdom to a post in which they were paid in euro fell in value (in euro), so that the value in euro of their entire salary (national portion plus European supplement) fell concomitantly.

91. The teachers submit that the salary system failed to guarantee uniform purchasing power to all seconded teachers. They argue that it discriminated against British teachers in Brussels as compared to (i) teachers seconded to Brussels who received their national salary in a currency other than euro or sterling, (ii) British teachers who taught at the European School in Culham who had not exercised their right to freedom of movement and (iii) teachers who received their national salary in euro.

92. Furthermore, the teachers submit that Article 49(2)(b) of the Staff Regulations was incompatible with Articles 12 EC and 39 EC in that it made no provision for a sterling depreciation to be taken into account in determining the European supplement, thus placing British teachers at a disadvantage. Moreover, in order to conform with the Treaty, the modification of Article 49(2)(b) should have had retroactive effect, allowing an adjustment to the European supplement covering the entire period of the teachers’ claim (October 2007 to June 2008).

47 — See Article 1 of, respectively, Council Regulation (EC, Euratom) No 1558/2007 of 17 December 2007 adjusting with effect from 1 July 2007 the remuneration and pensions of officials and other servants of the European Communities and the correction coefficients applied thereto (OJ 2007 L 340, p. 1) and Council Regulation (EC, Euratom) No 1323/2008 of 18 December 2008 adjusting with effect from 1 July 2008 the remuneration and pensions of officials and other servants of the European Communities and the correction coefficients applied thereto (OJ 2008 L 345, p. 10).

93. The European Schools contend that British teachers were not discriminated against. First, there was no true comparator – the situation of teachers whose national salary was in sterling was different from that of their colleagues whose national salary was in euro.

Second, the salary system did not distinguish on grounds of nationality; it applied objectively, and in the same way, to all teachers whose national salary was in a currency other than euro.

to workers' rights of freedom of movement.<sup>48</sup> Those rights are also protected within the framework of an international organisation, and Articles 12 EC and 39 EC apply specifically to teachers in the European Schools.<sup>49</sup> The Court has also made it clear that provisions which preclude or deter freedom of movement for workers constitute an obstacle even if they apply without regard to the nationality of the workers concerned.<sup>50</sup>

94. The European Schools accept that the version of Article 49(2)(b) which applied until 1 July 2008 could be considered indirectly discriminatory in that it made no provision for a significant depreciation in the exchange rate of a currency other than euro to be taken into account in determining the European supplement. However, they submit that any such discrimination was justified, because the exchange rate was applied by reference to objective criteria.

#### Preliminary remarks

96. I shall therefore examine, first, whether the contested system discriminated on grounds of nationality or otherwise infringed the principle of equal treatment; second, whether it precluded or deterred freedom of movement for any category of teachers; and finally, to the extent necessary, whether the system was nevertheless justified.

95. The prohibition of discrimination on grounds of nationality in Article 12 EC is a specific expression of the general principle of equal treatment, and is itself given concrete form in, inter alia, Article 39 EC with regard

48 — See, for example, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 48, and Case C-55/00 *Gottardo* [2002] ECR I-413, paragraph 21.

49 — See Case C-411/98 *Ferlini* [2000] ECR I-8081, paragraph 42, and *Hurd*, cited in footnote 18 above, paragraphs 54 and 55.

50 — See, for example, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 39, and Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 34.



Did the contested system discriminate on grounds of nationality or otherwise infringe the principle of equal treatment?

in the same way, unless such treatment is objectively justified.<sup>52</sup>

97. The prohibition of discrimination on grounds of nationality covers

99. It is clear from a reading of the Staff Regulations that there was no direct discrimination on grounds of nationality.

‘... not only direct discrimination on grounds of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

100. Nor are the Staff Regulations provisions of national law that are intrinsically liable to affect nationals of ‘other’ Member States more than nationals of the ‘host’ Member State in the classic sense, since they apply to teachers from any Member State seconded to any of the schools in one of the seven host Member States.

Unless objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect nationals of other Member States more than nationals of the host State and there is a consequent risk that it will place the former at a particular disadvantage.’<sup>51</sup>

98. More generally, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated

101. However, two groups of teachers can be distinguished within the system, and it can be seen that they were – at least at the material time – subject to different treatment as regards the way in which the value in euro of their overall salary could evolve over a period of a year. The first group comprised teachers seconded from a Member State in the euro zone, the value of whose national salary did not vary in euro and whose overall salary therefore remained equal throughout the relevant period to the amount specified in Annex III to the Staff Regulations. The second

51 — Case C-73/08 *Bressol and Chaverot and Others* [2010] ECR I-2735, paragraphs 40 and 41.

52 — See, most recently, Case C-149/10 *Chatzi* [2010] ECR I-8489, paragraph 64.

group comprised teachers seconded from a Member State outside the euro zone, the value of whose national salary in euro could – and indeed did – vary to a greater or lesser extent according to exchange rate fluctuations, so that their overall salary (national salary of varying value in euro plus European supplement of constant value in euro) could – and indeed did – diverge from the amount specified in Annex III to the Staff Regulations. I shall refer to those groups, respectively, as ‘group 1’ and ‘group 2’.

also have been an infringement of the specific prohibition of discrimination on grounds of nationality because teachers in group 1 were inherently likely to be nationals of Member States in the euro zone and those in group 2 were inherently likely to be nationals of other Member States.

102. It should be noted that the difference in treatment which I have identified concerns teachers’ entitlement, guaranteed by Article 49(1) of the Staff Regulations, to an overall salary whose value in euro is that specified, for the relevant step in the salary scale, in Annex III to those Regulations. It does not concern the purchasing power of that salary, which is not guaranteed by the Staff Regulations and which will vary according to, inter alia, the extent to which the teacher is able, and wishes, to receive, bank and use part of his remuneration in his Member State of origin in the currency of that State.

104. However, since the two groups which I have identified do not correspond exactly to those which have been proposed as comparators in the course of the proceedings, a brief explanation is necessary.

105. First, are the two groups in comparable situations from the point of view of the principle of equal treatment?

103. It should also be noted that, if the contested arrangements infringed the principle of equal treatment because comparable situations were treated differently, there must

106. It seems to me that the answer must be yes. The Staff Regulations lay down pay scales in euro and provide that staff members are ‘entitled’ to that remuneration. All teachers having the same entitlement are thus in a comparable position. It is true that a certain objective distinction can be drawn between teachers whose places of origin and secondment are in different currency zones and those whose places of origin and secondment are in the same zone, because they will be

subject to different conditions when transferring any part of their remuneration between the two. However, those differences – whose effects will be to a large extent dependent on individual volition – have no bearing on the value in euro of the remuneration to which they are entitled.

does not render the system of remuneration of teachers in the European Schools comparable to that of EU officials.

107. Second, are other comparisons relevant?

108. The Complaints Board and the Commission have invited the Court to compare the teachers' position with that of officials of the European institutions. However, on appointment such officials become employees of their respective institutions and are entirely independent of the authorities of their Member State of origin. By contrast, while they are seconded to the European School system, the teachers remain linked to their national administration, which remains responsible for paying their national salary. It is true that Article 49(2)(b) of the Staff Regulations refers to the 'exchange rates used for the salaries of officials of the European Communities'. However, that does no more than identify the exchange rate which is to be applied to the calculation (namely, the rate used for the implementation of the general EU budget).<sup>53</sup> It

109. The Commission also refers to the position of detached national experts seconded to work with the institutions. Again, however, the situations do not appear comparable. The entire salary of detached national experts is borne by their national administrations, of which they remain a part, while the institutions merely pay a daily and monthly allowance.<sup>54</sup> By contrast, for teachers at the European Schools, the remuneration to which they are entitled is composed of their national salary plus the European supplement. Crucially, therefore, the rules applicable to detached national experts make no attempt to guarantee that those from different Member States will receive the same total payment while on secondment. The Staff Regulations applicable to teachers at the European Schools, in contrast, state that every teacher 'shall be entitled to' the remuneration for the appropriate step in the salary scale specified, in euro, in Annex III.

53 — Article 63 of Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of officials and conditions of employment of other servants of the European Economic Community and the European Atomic Energy Community (OJ, English Special Edition 1968(I), p. 30), as amended.

54 — See Commission Decision of 12 November 2008 laying down rules on the secondment to the Commission of national experts and national experts in professional training (C(2008) 6866 final). Chapter III, in particular Article 17, deals with remuneration.

110. The teachers, for their part, have suggested that those seconded from the United Kingdom to the European Schools in Brussels may be compared with (a) other teachers from the United Kingdom assigned to the European School at Culham, in their home Member State, and/or (b) teachers seconded to Brussels who received their national salary in a currency other than euro or sterling. However, both of those groups in fact fall within my 'group 2', all of whose members received the same treatment in terms of the way in which the value in euro of their overall salary could – and in all cases, to a greater or lesser extent, did – diverge from the amount specified in Annex III to the Staff Regulations. Whether further subgroups could be identified in terms of the effect on purchasing power is, as I have explained, irrelevant.

on exchange rate fluctuations which were entirely objective external factors. What matters is that, for teachers in group 2, there was a tangible risk of receiving less than the guaranteed value of their remuneration in euro, which could have been addressed in the context of the remuneration system laid down in the Staff Regulations, while for those in group 1 there was no such risk.

112. I am therefore of the view that, at the material time, the contested system infringed the principle of equal treatment and thereby discriminated on grounds of nationality, contrary to Article 12 EC.

111. The relevant difference in treatment between teachers in group 1 and those in group 2 is therefore that the former received, throughout the contested period, a salary whose value in euro was exactly that guaranteed by Article 49(1) of, and Annex III to, the Staff Regulations, whereas the latter were necessarily exposed to a risk that their remuneration would diverge from that amount. Whether that risk materialised to the benefit or to the detriment of teachers from a particular Member State does not appear to me to be relevant. Whether British teachers in fact 'lost out' during the relevant period while those from other Member States outside the euro zone may have 'gained' was dependent

Did the contested system preclude or deter freedom of movement?

113. I cannot, however, reach the view that the defect I have identified constitutes any kind of obstacle or deterrent to the exercise of rights of freedom of movement.

114. The system of remuneration for teachers seconded to the European Schools involves continuing receipt of the salary to which they are already entitled, plus a European supplement. It appears therefore that they will in all cases receive a higher remuneration on secondment than they would have received if they had remained in their previous post.

steps each, it will almost certainly never have the slightest effect on a teacher's ability or willingness to exercise his right to freedom of movement by seeking or accepting secondment to a European School in another Member State.

Could the contested system be justified?

115. That prospect seems unlikely to deter any teacher from seeking or accepting secondment, unless the overall salary falls below that which is necessary both to maintain his living standards on secondment and to cover whatever continuing obligations he may have in his Member State of origin and whatever costs may be involved in moving between Member States. No risk of any such situation has been argued in the present case, nor does such a risk seem obviously plausible. The risk of finding that the value in euro of one's actual overall remuneration diverges from that of another teacher on the same step in the salary scale – which is, by contrast, a real, indeed inevitable, risk – is unlikely to be a consideration of any importance whatever in deciding whether to seek or accept secondment. It may, in the event, prove an irritation or a delight depending on the direction of the divergence but, in a system involving teachers from 27 Member States with widely diverging national salaries, classified at different points in a system which has nine salary scales of 12

116. According to established case-law, a difference in treatment which constitutes indirect discrimination on grounds of nationality is prohibited unless it is objectively justified, is appropriate for securing the attainment of the legitimate objective it pursues and does not go beyond what is necessary to attain it.<sup>55</sup>

117. The Commission submits that it is impossible to institute a salary system that provides for exact equality of purchasing power between teachers seconded from 27 national administrations to the European Schools. Moreover, between 1995 and 2008, drops and increases in the value of sterling as against the euro cancelled each other out.

<sup>55</sup> — *Gouvernement de la Communauté française and Gouvernement wallon*, cited in footnote 50 above, paragraph 55.

118. However, as I have pointed out, the point of comparison cannot be purchasing power, but must be confined to the value in euro of the overall salary, which is guaranteed in the Staff Regulations. And it is irrelevant whether exchange rate variations cancelled each other out over a period of years, since the defect in the system concerns the maintenance of a static exchange rate, for the purpose of calculating the amount of the European supplement, over a period of one year.

119. For their part, the European Schools contend that both the system in place at the material time and the modification introduced from 1 July 2008 were justified. First, the salary system must take account of the fact that seconded teachers continue to receive their national salaries from 27 national administrations. Second, the system must not be subject to excessive administrative burdens, but must seek to operate in the general interests of all seconded teachers. Third, although some seconded teachers may bear a disadvantage where their national currency depreciates against the euro, they also benefit if it appreciates, so that the system is roughly even handed.

120. The first point, it seems to me, is not pertinent. If the contested salary system was able to take account of the fact that seconded teachers receive national salaries from 27 administrations when calculating the European

supplement once a year, it could also have done so for each salary payment.

121. As regards the second and third points, the judgment in *Terhoeve* seems relevant. The issue was whether a more onerous contributions burden borne by a worker who transferred his residence from one Member State to another in order to take up employment there was justified. The Court held that it was not. In particular, neither the objective of simplifying and coordinating national rules for levying tax and social security contributions nor considerations of an administrative nature could justify undermining a fundamental freedom.<sup>56</sup>

122. Accordingly, I am of the view that the salary system as laid down in Article 49(2) of the Staff Regulations at the material time was contrary to the principle of equal treatment, in particular as expressed in Article 12 EC, and could not be justified on objective grounds.

### Question 3

123. By its third question, the Complaints Board asks whether, if the second question

<sup>56</sup> — *Terhoeve*, cited in footnote 50 above, paragraphs 44 and 45.

is answered in the affirmative (as I propose it should be, to the extent that there is an infringement of the principle of equal treatment which entails indirect discrimination on grounds of nationality), the difference in situation between teachers seconded to the European Schools and EU officials can justify a situation in which the exchange rates applied in order to maintain an equivalent purchasing power are not the same.

living.<sup>57</sup> Nevertheless, even then the question is puzzling, as Article 47(3) of the Staff Regulations states:

‘A member of staff’s remuneration shall be weighted at a rate above, below or equal to 100%, as laid down and adjusted for officials of the European Communities.’

124. First of all, that question appears to be inadequately framed, inasmuch as the exchange rates used when calculating the European supplement for teachers at the European Schools were, at the material time, exactly the same as those used for the calculation of the payment, in a currency other than euro, of the salaries of EU officials – and were explicitly stated to be so in Article 49(2)(b) of the Staff Regulations.

126. I do not think, therefore, that the Court is in a position to answer the question as it is posed.

125. However, it seems from the content of the order for reference that the intention may have been to refer to the fact that, for EU officials, equality of purchasing power is ensured by weightings for each place of employment, which are fixed each year at the same time as the exchange rates, but can be adjusted in the event of a substantial change in the cost of

127. From a reading of the teachers’ submissions to the Court, it appears plausible that the question which the teachers’ wished the Complaints Board to ask concerned rather the fact that, although the same weightings and adjustments apply to both EU officials and European School teachers, they do not affect the teachers remuneration in the same way as that of the officials because an adjustment to the weighting cannot take account of exchange rate fluctuations. In that case, the intended question might have been whether *treating the different situations* of the officials

<sup>57</sup> — See Articles 64 and 65 of the Staff Regulations of officials of the European Union, in Regulation No 259/68, as amended, cited in footnote 53 above.

and the teachers *in the same way* might not offend against the principle of equal treatment.

128. That is, however, merely a hypothesis, which does not correspond to the wording of the question as referred, and which would require much fuller information as to

the application of the weighting system to teachers' salaries if it were to be addressed. In those circumstances, I do not think that the Court would be justified in answering the hypothetical question. I would merely say that – as I have already indicated<sup>58</sup> – in my view the respective positions of teachers seconded to the European School system and EU officials cannot be considered comparable.

## Conclusion

129. Accordingly, I am of the opinion that the questions referred by the Complaints Board of the European Schools should be answered as follows:

- (1) The Complaints Board of the European Schools falls within the scope of application of Article 234 EC.
- (2) The principle of equal treatment and its expression in the prohibition of discrimination on grounds of nationality in Article 12 EC preclude the application of the system of remuneration prescribed in Articles 45 to 49 of the Regulations for members of the seconded staff of the European Schools.
- (3) The Court is not in a position to answer question 3.

<sup>58</sup> — See point 108 above.