European Schools: A Subject of International Law Integrated into the European Union

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Abstract
The European Schools were established on the basis of the Statute of the European School of 12 April 1957 and the Protocol of 13 April 1962 on the setting up of the European Schools with reference to the Statute of the European School. The Statute of 12 April 1957 and the Protocol thereto of 13 April 1962 were cancelled and replaced by the Convention of 21 June 1994 defining the Statute of the European Schools. The author describes the application by the courts of these agreements. He further explains the convergence process of the European Schools in the European Union.

Keywords
European Schools; law of the European Union; preliminary ruling jurisdiction of the Court of Justice; German courts

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1. Introduction

Despite their name, the “European Schools” are not a European Union Institution but an independent, autonomous subject of international law. International legal persons governed by public law are rather rare in Europe. For instance, in their standard work on international private law, Kegel and Schurig identify only 14 such subjects of law whose existence is generally known, amongst them the European Schools. Hence, it is worth scrutinising these Institutions more closely. An overview of the history, the mission and tasks and the legal structure of the European Schools are therefore to be found below.

Additionally, as a result of a change to their Statute which entered into force in 2002, the European Schools have converged significantly with the European Communities, making them of a particular interest to European Union law specialists. The dual function, to be simultaneously an institution of international law and also of European Union law, is the origin of a conflict of jurisdiction, which is subject of a preliminary ruling pending at the Court of Justice of the European Communities (CJEC). The Complaints Board of the European Schools questioned the CJCE, if the Complaints Board is competent to make a reference for a preliminary ruling to the CJCE.

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6) The first question referred is worded as follows: “Is Article 234 of the EC Treaty to be interpreted as meaning that a court or tribunal such as the Chambre de recours, 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 Chambre de recours acts as a tribunal
2. History of the European Schools

The actual starting point for the setting-up of the European Schools is the Treaty establishing the European Coal and Steel Community in 1952. The officials of this new institution wished to send their children to a school where they would be educated in their respective mother tongues. The competence of the European Coal and Steel Community did not extend to educational and cultural tasks, therefore it was unable in itself, to take on responsibility for funding and running such a school. Hence, in 1953, the parents set up a non-profit-making association, which was to act as the “organising authority”, the body responsible for running the school. The association, which was subsidised by the European Coal and Steel Community, then rented premises on its own account and recruited German, French, Italian and Dutch language teachers. In May 1953, a nursery school was opened, followed in October 1953 by a primary school, with almost 100 pupils. However, the necessary setting-up of a secondary school could not be managed by the association, for financial reasons amongst others. In addition, with this form of organisation there was no guarantee that the school’s leaving certificates would be recognised by the Member States. At the invitation of the President of the European Coal and Steel Community, representatives of the six Member States met in Luxembourg several times in mid-1954 to discuss the establishment of a secondary school. It was decided that the representatives of the Member States would form the “Board of Governors”, which should take on responsibility for the school and determine the principles of its organisation. Furthermore, it was agreed that the Member States would make teaching staff available to the school and would continue to pay the national salary of seconded teachers.

On 12 October 1954, the European School in Luxembourg was formally opened and the secondary school admitted the first two year groups. As other countries were also interested in having a European School, further
Schools were subsequently set up. In 1958, a School was opened in Brussels (Belgium), in 1960, one in Varese (Italy) and another in Mol (Belgium), in 1962, one in Karlsruhe (Germany), in 1963, one in Bergen (Netherlands), in 1976, a second School in Brussels, in 1977, a School in Munich (Germany), in 1978, one in Culham (UK), in 1999, a third School in Brussels, in 2002, one in Alicante (Spain) and one in Frankfurt am Main (Germany), in 2004, a second School in Luxembourg, and in 2007, a fourth School in Brussels.

Each of these Schools comprises a nursery school, a primary school and a secondary school. In the year 2009 a total of more than 22,000 pupils were being taught by 2,090 seconded and part-time/locally recruited teachers.

If one considers the purpose of the European Schools, which are intended for the children of officials of the European Union, one might be surprised at the German sites: Frankfurt am Main is understandable, as it is the seat of the European Central Bank, but which EU Institutions have their seat in Karlsruhe or Munich? The answer to this question in the case of the European School in Karlsruhe is to be found on the homepage of the European Schools’ website. There it says: “[f]or a European School to be set up, firstly, an EU Institution or body has to have its seat near the future School. The reason is that the role of the European Schools is to cater for the educational needs of the children of the staff of the European institutions. Secondly, the government of the State in which the new School will be situated has to submit a request for its setting up to the Board of Governors of the European Schools. The Board of Governors cannot decide on its own initiative to set up a new School, even where a major European Institution is situated. This accounts for the fact that there is no European School in Strasbourg, for example. As France has never submitted a request for the

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8) See ECJ, supra note 7, 1986 ECR 29, pp. 50 et seq., 73.

9) On the teaching model of the European Schools, since 2004, there has been a “School for Europe” (Scuola per l’Europa) in Parma, which offers a European education to the children of officials of the European Food Safety Authority. However, it is a purely Italian institution, funded solely by Italy.


setting up a European School, the children of the staff of the European Parliament in Strasbourg attend either local schools or the European School, Karlsruhe.”

There was another reason for setting-up a European School in Munich. The School is intended for the children of officials of the European Patent Organisation, who work at the European Patent Office in Munich. Despite its name, the European Patent Organisation is, like the European Schools, not an Institution of the European Union but, on the basis of an international law agreement, an independent, autonomous legal person. It has signed an agreement with the European Schools whereby it contributes to the financing of the European Schools, which therefore admit the children of officials of the European Patent Organisation.

3. Overview of the Legal Basis

Following the setting-up of the first European School in Luxembourg, the government representatives met repeatedly to frame the European Schools’ Statute. In early 1957, a draft was submitted, with the result that on 12 April 1957, the “Statute of the European School” was signed by all the Member

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12) Meanwhile, on 7 September 2007, the French Government (Ministère de l’Education nationale) submitted a request to the Board of Governors of the European Schools, to set up a European School at Strasbourg.

13) See <www.eursc.eu>, under FAQ, visited on October 2006.


States at the time, namely Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands.\textsuperscript{16} In addition, the “European School” is based on 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”.\textsuperscript{17} The linguistic change from “European School” to “European Schools” is due to the fact that originally there was only one School, but further Schools were added over the years. The Statute entered into force on 2 December 1965;\textsuperscript{18} the Protocol entered into force on 12 June 1970.\textsuperscript{19}

This Protocol was subsequently supplemented by the “Supplementary Protocol to the Protocol on the Setting-up of European Schools” of 15 December 1975,\textsuperscript{20} which entered into force on 28 February 1980.\textsuperscript{21} This Supplementary Protocol allowed the setting-up of a European School in Munich for the children of officials of the European Patent Organisation.\textsuperscript{22} Under Article 1 of the Protocol, establishments bearing the name “European Schools” may be set up on the territory of the Contracting Parties not only for the education and instruction together of children of the staff of the European Communities but the supervisory body of the European Schools, namely the Board of Governors, may also conclude any agreement concerning the establishments thus set up with the European Communities and with any other intergovernmental organisations or institutions which are interested in the operation of these establishments.\textsuperscript{23}

The Statute was revised in 1994 and a new version entitled “Convention defining the Statute of the European Schools” of 21 July 1994\textsuperscript{24} was

\textsuperscript{17} UNTS, vol. 752, p. 267; BGBl. 1969-II, p. 1302.
\textsuperscript{18} Announcement of the entry into force of the Statute of the European School of 14 March 1966, BGBl. 1966-II, p. 212.
\textsuperscript{20} BGBl. 1978-II, p. 994.
\textsuperscript{22} Art. 1 of the Supplementary Protocol.
\textsuperscript{23} Art. 4 of the 1962 Protocol.
\textsuperscript{24} BGBl. 1996-II, p. 2559; OJEC No L212 of 17 August 1994, p. 3.
produced. This Convention cancelled and replaced the 1957 Statute and the 1962 Protocol thereto. Following ratification by all the Member States, it entered into force on 1 October 2002.

Pursuant to the new Convention, the European Communities, Euratom and the European Coal and Steel Community were also contracting parties to the agreement (second sentence of Article 33 of the Convention). Apart from the founding members of the European Schools (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) and the European Communities, Austria, Bulgaria, the Czech Republic, Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom have all ratified the agreement on the 1994 Convention.

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26) See BGBl. 2003-II, p. 459. The *Verwaltungsgerichtshof Mannheim* (Mannheim Administrative Court) has a “claim to fame” in this connection – although it is debatable – as the first Administrative Court in Europe to have taken a decision on the basis of the new Convention, Decision of 2 March 2000 – Case 5 S 2597/99, Verwaltungsblätter für Baden-Württemberg 2000, p. 397; Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report 2000, p. 657; Die Öffentliche Verwaltung 2001, p. 832 (guiding principle). In March 2000, in other words 2½ years before the entry into force of the changed Statute/Convention, it already ruled as follows in a decision in litigation concerning a planning permission decision affecting the interests of the European School in Karlsruhe: “The intergovernmental Institution known as ‘European Schools’ is based on the Convention defining the Statute of the European Schools of 21 June 1994, concluded between the European Communities and its Member States, which replaced the Statute of the European School of 12 April 1957 and the Protocol thereto of 13 April 1962 on the Setting-up of European Schools which were agreed by the governments of the Member States – outside the Community legal order.” In doing so, the Court overlooked the fact that the changed Statute/Convention would only become effective after ratification by all contracting states. The second paragraph of Article 33 of the Convention states: “This Convention shall enter into force on the first day of the month following the deposit of all instruments of ratification by the Member States and of the acts notifying conclusion by the European Communities.” The second paragraph of the German endorsement law of 31 October 1996 again contains a reference to the prerequisite for the Convention’s entry into force, as it states: “The day on which the Convention shall enter into force, in accordance with Article 33 thereof, for the Federal Republic of Germany shall be published in the *Bundesgesetzblatt* (Official Gazette of the FRG).” The Administrative Court’s mistake – which admittedly was not relevant to the outcome in terms of the decision taken at the time – shows that in view of the marginal role which international law plays in the training of young law students in Germany, even Administrative Court judges occasionally have problems with the application of international law principles.
4. Organs

According to Article 7 of the Convention, the following organs are common to the Schools: the Board of Governors, the Secretary-General, the Board of Inspectors, the Administrative Board and the Headteacher [Director]. The Board of Governors is expected to ensure implementation of the agreement. It consists of the Minister or Ministers of each of the contracting parties whose portfolio includes national education and/ or educational and cultural relation with abroad, plus a member of the Commission of the European Communities. The Board of Governors meets at least once a year. The Board of Governors has wide-ranging powers. Firstly, in regards to the educational system, it sets guidelines and determines how studies shall be organised. Secondly, it provides a member to the Administrative Board. This representative of the Board of Governors on the Administrative Board represents the School legally and chairs the Administrative Board. Furthermore, the Board of Governors appoints the Director of the School and adopts the forward budget (estimates of revenue and expenditure) drawn up by the Administrative Board. Additionally, it approves the annual closing of the accounts documents submitted by the Administrative Board. Under the Convention, apart from preparation of the forward budget, the Administrative Board is also responsible for performing all other administrative duties as may be entrusted to it by the Board of Governors. Responsibility for monitoring the Schools from the pedagogical angle lies with the Boards of Inspectors.

27) See also concerning the Convention, Heusch, supra note 7, pp. 71, 74 et seq.; Varouxakis, supra note 1, pp. 7 et seq.
28) There was no provision for him/her in the 1957 Statute.
29) See in this connection Heusch, supra note 7, pp. 77 et seq.
30) For the Federal Republic of Germany, the Foreign Minister and the President of the Conference of the Education Ministers (of the various States) are competent; see Oppermann, supra note 7, p. 628; Heusch, supra note 7, p. 77.
31) Since the 1994 Convention.
32) See in particular for details Art. 11 of the 1994 Convention.
33) The seat is in Brussels. The address reads: Schola Europaea, c/o European Commission, Bâtiment J II, 30 – 2ème étage, B-1049 Brussels. Previously, the seat of the European Schools was in another building; the move, in May 2004, provides further evidence that the European Schools have moved closer to the EU not only legally but also in location.
5. Budget

In accordance with Article 25 of the 1994 Convention, the budget of the Schools is 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;

2. the contribution from the European Communities, which is intended to cover the difference between the total amount of expenditure by the Schools and the total of other revenue;

3. contributions from non-Community organisations with which the Board of Governors has concluded an Agreement;

4. the School's own revenue, notably the school fees charged to parents by the Board of Governors;

5. miscellaneous revenue.35

In practice, financing is provided mainly by subsidies from the European Union.36 From the financial viewpoint, school fees are hardly significant, as they are charged only for children whose parents are employed neither by one of the two aforementioned Institutions, nor by an organisation or a company which has concluded an agreement with the European Schools on the admission of pupils and on the payment of the actual costs of the education provided.37 In the year 2009, 20.8 per cent of the Schools’ resources came from the Member States, 58.8 per cent from the European Commission and 6.7 per cent from the European Patent Organisation, while school fees generated 11.8 per cent and 1.9 per cent of the total budget was provided by other sources.38 In cases in which school fees are charged

35) In the 1957 Statute, donations and legacies were still expressly mentioned.


37) Bayerischer Verwaltungsgerichtshof (Bavarian Administrative Court), Decision of 23 August 1989 – Case 7 CS 89/90, Bayerische Verwaltungsblätter 1990, pp. 469 et seq., 471, point c, 2nd paragraph; Europarecht 1989, p. 359; see also ECJ, supra note 7, 1986 ECR p. 29, p. 72.

legal problems arise, however. For example, the Bavarian Administrative Court (Bayerischer Verwaltungsgerichtshof) had to deal with the question of whether the European Schools also ought to charge school fees in Germany.\(^{39}\) Initially, the Court examined the admissibility of the means of legal address or appeal. It found that legal action through administrative channels was a possibility. There was a public law dispute as the “use relationship” was governed by public law.\(^{40}\) The qualification as a public institution used in the German text is indeed unhelpful. In intergovernmental agreements which are concluded in various languages, consideration ought to be given to the interpretation of the concepts used but also to the linguistic version in the other languages and to their meaning in respective national law. The French version describes the legal status as that of an *établissement public*. Under French law, an *établissement public* always creates its legal relationship with its users in accordance with public law only. In addition, the Court points out that Article 26(4) of the 1957 Statute – concerning the obligation to pay school fees – states that these fees are imposed on pupils’ parents by decision of the Board of Governors. This wording, which also appears in the same form in the French text, argues in favour of a unilateral sovereign demand for payment.

However, the Court considers the applicant’s appeal to be unfounded. There are deemed to be no doubts about the authorisation basis of Article 26(4) of the 1957 Statute from the following perspective, namely that it neither determines itself the level of the school fees to be charged nor establishes guidelines for that purpose, but simply assigns it to the decision of the Board of Governors. The provisions of German constitutional law, according to which in the case of authorisation to legislate, content, purpose and scope should be laid down in the actual authorisation basis, do not belong to the principles which in the case of transfer of sovereign rights to intergovernmental institutions, ought to be observed inalienably. For the same reason, it is unremarkable that in accordance with the Bavarian

\(^{39}\) Bavarian Administrative Court, *supra* note 37; O. Rojahn rejects this in I. von Münch and Ph. Kunig (eds.), *Grundgesetz, Kommentar*, Volume 2, 3rd ed. (Beck, Munich, 1995), Art. 24, paragraph 40. In his opinion, the regulatory powers of the school organs concern only internal organisation and do not impinge – as this was assumed in the transfer process in accordance with Art. 24(1) of the *Grundgesetz* (Federal Constitution) – on the jurisdiction of the Federal Republic of Germany.

\(^{40}\) Thus as a result also in Varouxakis, *supra* note 1., p. 26.
constitution, no fees are charged for primary school attendance. The relevant provision of the Bavarian constitution establishes no fundamental right.

6. Personnel Law

A special feature about European Schools is the fact that they have no permanently employed staff. All employees (in the public service) are seconded to the European Schools by their national employers. Their terms and conditions of service are laid down in the “Regulations for Members of the Seconded Staff of the European Schools”.

Employees’ pay is equivalent to the salaries of officials of the European Union. It is adjusted once a year in line with the latter. The pay package is calculated by following a somewhat complicated procedure. The national authorities continue to pay their national salaries to employees seconded to a European School. They inform the Director of the School in question of the amounts paid, giving details of all components which are used for calculation purposes, including statutory social security contributions and taxes. The European School then pays the difference in amount between national earnings, minus social security contributions, and the salary laid in the Staff Regulations. In addition, an adjustment is made to the tax burden to bring it into line with EU conditions. If the amount levied in taxes on the national salary is different from the amount which would be levied pursuant to the regulations applicable to officials of the European Union laying down conditions and procedures for applying the tax for the benefit of the European Union, a positive or negative adjustment is made. This involves either deducting the difference from the supplement or increasing the supplement to the extent necessary. The difference in amount between national remuneration and the salary provided for in the Staff Regulations which is paid by the European School is not, pursuant to a decision of the Board of Governors of January 1957, subject to national taxation.\footnote{Published by the ECJ, supra note 7, 1986 ECR p. 29, p. 52.} \footnote{Also decided by the German Bundesfinanzhof (Supreme Tax Court), see Bundesfinanzhof, Judgment of 15 December 1999 – Case I R 80/98, Internationales Steuerrecht 2000, p. 266.}
7. Legal Nature of the European Schools

According to the first sentence of Article 6 of the 1957 Statute, the European School has the status of a public institution in the law of each of the Contracting Parties. In the 1994 Convention, the fifth sentence of Article 6 states that the School “shall be treated in each Member State, subject to the specific provisions of this Convention, as an educational establishment governed by public law”. In accordance with the second sentence of the 1957 Statute and the first sentence of the 1994 Convention, the School has legal personality to the extent necessary for the attainment of its objectives. Article 3 of the Protocol again makes it clear that each School has separate legal personality in accordance with Article 6 of the 1957 Statute. According to the third sentence of Article 6 of the 1957 Convention, the School may be a party to legal proceedings.43 This provision is also to be found in the same place in the 1994 Convention.

The German Federal Administrative Court (Bundesverwaltungsgericht)44 and the Bavarian Administrative Court (Bayerischer Verwaltungsgerichtshof) hold the view that the legal personality of a public institution under international law was granted to the European School by virtue of Article 6 of the 1957 Statute.45 As such they are not part of the national administrative system and are not subject to the legal and technical supervision of the State. This is endorsed by Kegel (legal person under public law with an international character),46 Seidl-Hohenveldern and Loibl (international

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43) See also Verwaltungsgerichtshof Mannheim (Administrative Court), Decision of 2 March 2000, supra note 26.


45) Bayerischer Verwaltungsgerichtshof (Bavarian Administrative Court), supra note 37.

46) Kegel and Schurig, supra note 2, §17 II 3 b, p. 585.
public institution)\textsuperscript{47} and Oppermann (special legal personality under international law).	extsuperscript{48}

This view has been challenged by Varouxakis\textsuperscript{49} and Henrichs.\textsuperscript{50} Both doubt that the European Schools are an international organisation in the narrow sense. Varouxakis objects that the European Schools do not have the right to be a party to legal proceedings in international courts of law. Henrichs argues along similar lines. In his opinion, the argument against the European Schools being described as an international organisation is that they do not have what true international organisations have, namely distinguishing activity in a typical sovereign rights area, since there is no agreement on certain privileges or the exclusion of national jurisdiction by means of an arbitration clause. Riegel counters that the constitutive elements for an international organisation under public law are only the setting-up by effectively enacting an international law Treaty, the establishment of its own organs and the assignment of a sovereign purpose, which as a rule is fixed for a lengthy period.\textsuperscript{51} All these elements are present in the case of the European Schools.

I approve of the last aforementioned opinion, which recently has been held by the German Federal Supreme Court of Justice (\textit{Bundesgerichtshof}).\textsuperscript{52} Pursuant to the generally accepted definition of an international organization, an international organization is based on a treaty under international law, concluded by two or more subjects of international law, performing matters of common interest to its members with its own organs.\textsuperscript{53} On a closer examination of the legal status of the European Schools, we find that all these requirements are fulfilled.

\textsuperscript{49} Varouxakis, \textit{supra} note 1, p. 53. He talks about a “multinational institution” (p. 56).
\textsuperscript{50} Henrichs, \textit{supra} note 44, p. 358.
\textsuperscript{51} Riegel, \textit{supra} note 44, p. 147.
8. Procedural Questions

In the case of the European Schools, two questions arise from the procedural viewpoint. Firstly, a point to be clarified is which court is competent to decide on differences of opinion between the Contracting States. The second issue is regarding litigation with employees. Since the setting-up of the European Schools, decision-making power has lain with the Board of Appeal (renamed the Complaints Board in the English version of the 1994 Convention), an “in-house” administrative organ of the European Schools.54 In connection with this, the question to be addressed is whether there are further means of redress against a decision of the Complaints Board. Both of these topics will be discussed below.

8.1. Jurisdiction of the CJEC in the Event of Disputes Regarding Interpretation of the Convention

Until the entry into force of the 1994 Convention, it was not expressly laid down when the CJEC was competent in disputes concerning the rights and obligations of the Contracting Parties. The CJEC itself had to rule on this question for the first time in 1986. The occasion was a dispute regarding interpretation of the decision of the Board of Governors of January 1957 on non-taxation of allowances paid by the European Schools.55 The United Kingdom had implemented this decision only in the case of its employees seconded from abroad, but not in the case of British employees at the European School situated in the United Kingdom. As the UK tax authorities

54) There is a similar institution at, for example, the European Patent Office, see Art. 21 of the European Patent Convention (EPC 2000); see in this connection B. Jestaedt, Patentrecht (Heymanns, Cologne, 2005), p. 25, paragraph 109. The EU Office for Harmonization in the internal market (Trade marks and designs) in Alicante also has Boards of Appeal; see in this connection J. Pirrung, “Die Rolle des Richters in der europäischen Gerichtsbarkeit”, in M. Coester et al. (eds.), Privatrecht in Europa. Vielfalt, Kollision, Kooperation. Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag (Beck, Munich, 2004), p. 866 (p. 879). In accordance with the Trade Mark Regulation, actions may, however, be brought before the Court of Justice against decisions of the Boards of Appeal on appeals (Art. 63 of the Trade Mark Regulation); see in this connection Ph. von Kapff in F. L. Ekey and D. Klippel (eds.), Heidelberger Kommentar zum Markenrecht (C.F. Müller, Heidelberg, 2003), Art. 63 of the TMR. Since the Nice Treaty (OJEC No C80, p. 1 of 10 March 2001), the Council is allowed generally to set up “judicial panels” (Art. 220(2), 225a of the EEC Treaty in the Nice Treaty version).

55) Printed at the ECJ, supra note 7, 1986 ECR p. 29 (p. 52).
wished to make subject to income tax the supplements and allowances paid to D.G.E. Hurd, a British national and the then Head of the European School in Culham, a dispute arose. As a result, the English court referred the case to the CJEC for a preliminary ruling.

The CJEC firstly addressed the question of its jurisdiction. It found that the European Schools were set up not on the basis of the Treaties establishing the European Communities or on the basis of measures adopted by the Community Institutions but on the basis of two international agreements. Those agreements, together with the instruments, measures and decisions of organs of the European Schools adopted on that basis, do not fall within any of the categories of measures covered within Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty. However, in order to determine the scope of Article 3 of the Act of Accession of the United Kingdom to the European Communities with regard to such instruments, measures and decisions of organs of the European Schools, it may be necessary to define their legal status and to interpret them. Jurisdiction to interpret is, however, limited; it does not include defining Member States’ obligations under such instruments and measures.

Article 3(3) of the Act of Accession extends the *acquis communautaire*, which the new Member States are under a duty to accept by virtue of their accession to the Communities, all declarations or resolutions or other positions concerning the European Communities adopted by common agreement of the Member States. The 1957 decision comes into that category.

If a Member State makes the supplement paid by the European School liable to national tax, the School refunds the amount of this tax to the teacher by means of a differential allowance. The financial burden resulting from this process falls entirely on the Community budget, since the Community pays the difference between on the one hand, the School’s own income and the national salaries of the teachers and on the other hand, the total budget of the European School. Such conduct is contrary to the duty of genuine cooperation and assistance which Member States owe to the Community and which finds expression in the obligations laid down in Article 5 of the

56) ECJ, *supra* note 7.

57) Corresponds to Art. 234 of the EEC Treaty in the 2 October 1997 version and Art. 267 TFEU.

58) Tallies with Art. 234 of the EEC Treaty and Art. 267 TFEU.
Treaty establishing the European Community to facilitate the achievement of the Community’s tasks and to refrain from jeopardizing the attainment of the objectives of the Treaty.59 At the same time the CJEC finds that this obligation does not produce direct effects capable of being relied upon in relations between Member States and their subjects. Neither Article 7 of the EEC Treaty nor the general principles of Community law require a Member State to give effect to the 1957 decision.60

This case law was confirmed by a CJEC Judgment of 5 April 1990.61 In Case C-6/89, pursuant to which the Commission of the European Communities took action against the Kingdom of Belgium on account of a very similar issue, the CJEC published a summary judgment which substantially repeats the guiding principles behind the decision in the Hurd decision.

In Article 26 of the 1994 Convention, the legal course of action to be embarked upon in the event of such disputes was spelled out.62 The article says: “[t]he 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”. The seemingly contrived grounds on which the CJEC denied its jurisdiction in principle in the individual case, then – albeit with restrictions – confirmed it, are no longer therefore necessary as a rule since the entry into force of the new Convention. Even though there is consensus on the Board of Governors on interpretation of the Convention, this case law may still be of significance in the context of preliminary ruling proceedings in the event of legal action taken by individual employees of the European Schools. Within its scope so far, i.e. without the authority, the CJEC might determine on a binding basis obligations of the Member States and take positions, since, according to its wording, the new Convention only justifies jurisdiction but does not rule out additional competence.63

59) Corresponds to Art. 10 of the EEC Treaty and Art. 4(3) of the Treaty on European Union.
60) Corresponds to Art. 12 of the EEC Treaty and Art. 18 TFEU.
61) ECJ, Case C-6/89, Commission v. Belgium, 1990 ECR, I-1595 (summ. pub.).
62) Such a provision was called for by Varouxakis, supra note 1, p. 57 as long ago as 1968.
63) See Gruber, supra note 4, pp. 453 et seq.
8.2. Means of Redress for Employees against Decisions of the School

Until the entry into force of the 1994 Convention, legal redress procedures for employees were laid down only in the Staff Regulations. In accordance with Article 79 of the Staff Regulations, an administrative appeal might be lodged with the Representative of the Board of Governors against express and implied decisions in the administrative and financial areas. If the disputed decision had been taken by a Director, the prior opinion of the Administrative Board of the School was required. An administrative appeal might be lodged with the Board of Inspectors against express or implied decisions in the educational area. The Representative of the Board of Governors or the Board of Inspectors, as the case might be, were required to take a reasoned decision within five months of the lodging of the administrative appeal and notify the persons concerned of this decision without delay. If no decision had been taken at the end of the five-month period, according to Article 79(5) of the Staff Regulations, this was deemed to constitute an implied decision rejecting the appeal. According to Article 80 of the Staff Regulations, an appeal to a Board of Appeal against a decision to reject an administrative appeal was permissible. This Board of Appeal was composed of three legal experts who were selected by the Board of Governors, on a proposal from the Member States, from amongst legal experts of different nationalities and appointed for three years. Renewal of appointment was permissible. One of the members of the Board of Appeal had to have experience in the field of the Staff Regulations of Officials of the European Communities. Special rules of procedure, called “Implementing Regulations for the Functioning of the Board of Appeal”, determined procedural matters. The appeal had to be lodged within three months of the notification or publication of the act which was the subject of the appeal. The Board of Appeal had to reach a decision within six months of the lodging of the appeal and the appellants had to be notified of the decision within fifteen days thereof. According to the Staff Regulations, there were no means of redress against the decisions of the Board of Appeal.

64) Regulations for Members of the Seconded Staff of the European Schools.
65) Bundesverwaltungsgericht – Judgment of 29 October 1992, supra note 44, in BVerwGE 91, p. 126, the passage about the composition of the Board of Appeal was not printed. For the composition of the Board of Appeal when the European Schools first came into being, see Varouxakis, supra note 1, p. 17.
In 1992, the German Federal Administrative Court (Bundesverwaltungsgericht)\textsuperscript{66} addressed the question of whether action against such a decision could be taken in German administrative courts. A German teacher, who was seconded to the European School in Karlsruhe, objected to the calculation of his salary, which was the subject of the appeal. The Board of Appeal of the European Schools dismissed his appeal. As a result, the teacher took legal action in the Karlsruhe Administrative Court. The action was dismissed because it did not come under German jurisdiction. The direct appeal lodged with the Federal Administrative Court was also unsuccessful.\textsuperscript{67}

In the opinion of the Federal Administrative Court, the European School, by virtue of the autonomy in the personnel area which it enjoys as an intergovernmental institution, determined the terms and conditions of employment of its staff independently as an “in-house” matter. According to convention, these also include provisions on legal protection and guaranteed legal protection in the event of disputes of an official employment-related nature. The Staff Regulations take account of this principle. Consequently, regulations of this nature are not the product of derived German official authority within the meaning of Article 19(4) or Article 20(2) of the Federal Constitution, but of original law, to which all public employees have the same legal entitlement equally, irrespective of their country of employment. Hence, the effect of the legal protection guarantee of Article 19(4) of the Federal Constitution is inapplicable here. This is the case even if legal protection against measures of the intergovernmental institution is inadequate compared with domestic standards. Article 19(4) of the Federal Constitution guarantees no international “overriding jurisdiction” of German courts. Moreover, the guaranteed legal protection afforded to appellants through the Staff Regulations also corresponds to constitutional law benchmarks commensurate with rule of law standards. The Board of Appeal guarantees court-style legal protection. To some extent, it is irrelevant that the three legal experts competent to take decisions are not judges and that they perform their duties in an honorary capacity. What is crucial, however, is that they are objectively and personally independent. In view of the fact that the office is basically held in an honorary capacity, meaning

\textsuperscript{66} Bundesverwaltungsgericht – Judgment of 29 October 1992, supra note 44.

\textsuperscript{67} In the same sense the Constitutional Court of Belgium (Conseil d’Etat), Judgment of 17 November 1982, no. 22 657, Dalfino v. Conseil supérieur des Ecoles, Rec.arr. 1982, p. 1544.
that it is not instrumental in ensuring the livelihood of the members of the Board of Appeal, it is not assumed that the personal independence of the members, with the accompanying possibility of re-appointment, given the short period of office, is likely to be compromised.

Henrichs objected to this opinion that the requirement of legal certainty demands that through its founding act, its own law-making powers be granted to an international institution to interpret the law narrowly.68 Here the curtailment of courses of law through the Staff Regulations is not covered by a mandate in the Convention or the institution’s operational purpose.

The Contracting Parties seem to have taken this criticism seriously, as with the new version of the Statute, namely the 1994 Convention, the Board of Appeal (renamed the Complaints Board) was expressly granted “sole jurisdiction in the first and final instance” [first sentence of Article 27(2)]. According to Article 27(2), its jurisdiction encompasses

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 or the Administrative Board of a School in the exercise of their powers as specified by this Convention. Moreover, the composition of the new Complaints Board, which had previously been based only on internal regulations of the European Schools, was now included in the Convention and at the same time its powers were laid down in greater detail. According to Article 27(3) of the Convention, the members of the Complaints Board may only be persons whose independence is beyond doubt and who are recognised as being competent in law. Only persons on a list compiled by the CJEC for the European Schools are eligible for membership of the Complaints Board.69 Meanwhile, six new members of the Complaints Board have been appointed on the basis of the 1994 Convention. Additionally, the Complaints Board must have a Statute. The Statute of the Complaints Board determines the number of members, 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 Convention also lays down the Rules of Procedure of the Complaints Board.

68) Henrichs, supra note 44, p. 358.
69) See also 2004 Annual Report of the Secretary-General of the European Schools, p. 4.
The Board of Governors has to adopt the Statute of the Complaints Board, acting unanimously, which has already happened.71

9. Concluding Evaluation and Outlook

In European law studies, there has been little focus on the European Schools.72 This is due mainly to the fact that the European Schools are not based on European Union law, but on an international law treaty concluded by EU States. To that extent, the legal basis is similar to that of the European University Institute in Florence, which is also based on an international law treaty.73 Schweitzer and Hummer74 use for such agreements the term ‘accompanying Community law’, while Oppermann talks, with reference to the European Schools, of special “legal personality by virtue of an international law treaty on the fringe of the EU”.75 Oppermann’s words were meant for the old Statute. With the new Convention, the European Communities became a Contracting Party to the Convention defining the Statute of the European Schools. The European Commission has a seat and a vote on the central governing body of the European Schools, namely the Board of Governors.76 This means that the European Schools are now not only a de facto EU Institution, as has been the case so far, but have also become almost a de jure EU Institution. They ought therefore also to be given more consideration in European law literature, as there is now a direct contractual connection with the European Union.

However, the process of rapprochement with the EU seems to be going even further. In a Communication from the Commission to the Council and the European Parliament entitled “Consultation on options for developing the European Schools system” of 19 July 2004, the Commission points

70) See Art. 27(4) of the 1994 Convention.
71) See 2004 Annual Report of the Secretary-General of the European Schools, p. 4.
72) A short introduction is to be found in R. Streinz, EUV/EGV (Beck, Munich, 2003), Art. 7 EGV, paragraph 16.
75) Oppermann et al., supra note 48, p. 644, para. 44.
76) See in this connection Art. 8(1)(b) of the 1994 Convention.
out that as the prime user of the European Schools, it feels obliged to take a proactive and pioneering role in bringing about the necessary changes to the structure of the European Schools – particularly in view of EU enlargement.\textsuperscript{77} In addition to other demands including more autonomy for the individual European Schools, the Commission – in view of its financial contribution, which amounts to almost 60 per cent of the budget – calls for a seat on the Board of Governors for the European Parliament, the Economic and Social Committee,\textsuperscript{78} the Committee of the Regions,\textsuperscript{79} the CJEC and the European Court of Auditors. The current legal basis, whereby the European Institutions are represented on the Board of Governors only by the European Commission, with only one vote alongside 17 other voting members (in 2004, now: 27), means that it can only bring its influence to bear in a limited way. This is considered by the Commission to be no longer to be acceptable, in view of the EU’s financial commitment.

This demand for greater influence for the European Institutions is, therefore, tricky from the legal angle because the European Union – as is expressly emphasized in the Commission’s paper – is not, under the Treaty on European Union, responsible for or competent to deal with educational matters.\textsuperscript{80} With reference to the importance of the European Schools for the European Union in respect of the recruitment of new staff, the Commission brushes aside this objection.\textsuperscript{81} However, it does describe the European Schools as an instrument for recruiting and retaining staff. The logical conclusion to be drawn – in so far as the construction put on this hypothesis is deemed to stand up to scrutiny – is that legally there is nothing to prevent wholesale integration of the European Schools into the European Union. I am not convinced by this line of argument from the Commission. In view of the uncertain connection improperly and imprecisely substantiated by the Commission, between school policy and an EU staffing situation, which may possibly be influenced by school policy


\textsuperscript{78} See in this connection Art. 257 et seq. of the EEC Treaty and Art. 301 et seq. of the TFEU.

\textsuperscript{79} See in this connection Art. 263 et seq. of the EEC Treaty and Art. 305 et seq. of the TFEU.

\textsuperscript{80} See point 4 of the Communication.

\textsuperscript{81} On staff recruitment in general by the EU, e.g. by the European Court of Auditors, see J. Gruber, “Personalrekrutierung durch den Europäischen Rechnungshof”, Der Öffentliche Dienst (2001) pp. 65–67.
and the ancillary competence of the EU, if one endorses this view, means that it would be interpreted extremely broadly.\textsuperscript{82}

\textsuperscript{82} In the aforementioned decision in the \textit{Hurd} case, it emerges, however, that at least the CJEC is relatively liberal in determining derived competence. More convincing, on the other hand, is the commentary by I. E. Schwartz in H. von der Groeben and J. Schwarze (eds.), \textit{Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaften}, Volume 4, 6th ed. (Nomos, Baden-Baden, 2004), Art. 308, paragraphs 129–131, which takes the view that in the 1994 Agreement with the European Schools, the EC already exceeded its competence.