Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 7 July 2011 [1]

Case C-545/09

European Commission
v

United Kingdom of Great Britain and Northern Ireland

(Promotion and retirement rights of teachers seconded or assigned by a Member State to the European Schools — Freezing of remuneration during secondment or assignment — Interpretation and application of Articles 12(4)(a) and 25(1) of the Convention defining the Statute of the European Schools — Arbitration clause)

I – Introduction

1. In the present case, the Court of Justice of the European Union has been asked for the first time to rule on the interpretation and application of certain provisions of the Convention defining the Statute of the European Schools, [2] which was signed at Luxembourg on 21 June 1994, which entered into force on 1 October 2002, [3] and to which all the Member States and the European Communities (now the European Union) are Contracting Parties ('the Convention').

2. More specifically, the European Commission has brought proceedings before the Court pursuant to the arbitration clause laid down in Article 26 of the Convention, in the context of a dispute between the Commission and the United Kingdom of Great Britain and Northern Ireland, seeking a declaration, first, that Article 12(4)(a) of the Convention is to be interpreted and applied so as to ensure that teachers seconded or assigned by a Member State have access during their secondment or assignment to the same career and salary progression as teachers assigned to that Member State and, secondly, that the exclusion of certain teachers seconded or assigned by the United Kingdom, during their secondment, from access to improved pay scales (in particular those known as 'threshold pay', 'excellent teacher system' or 'advanced skills teachers') and from access to other additional payments (such as 'teaching and learning responsibility payments'), and also from progression within existing salary scales available to teachers employed in maintained schools [4] in England and Wales, is incompatible with Articles 12(4)(a) and 25(1) of the Convention.

1 — Original language: French.

2 — OJ 1994 L 212, p. 3.

3 — Under Article 33 of the Convention, the Convention enters 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. See also Case C-132/09 *Commission* v *Belgium* [2010] ECR I-8695, paragraphs 13 and 14. Whilst Annex I to the Convention lists only 10 European Schools, there are currently 14 schools situated in seven Member States (5 in Belgium, 3 in Germany, 1 in Italy, 2 in Luxembourg, 1 in the Netherlands, 1 in Spain, and 1 in the United Kingdom). Those schools currently have approximately 22 500 pupils on the registers.

4 — Although the French version of the application uses the expression '*écoles publiques*', the original language version employs the expression 'maintained schools' which, as will be explained below, corresponds to 'subsidised' (French: '*subventionnés*') educational establishments.

3. In essence, the Commission alleges that the United Kingdom has failed to ensure that teachers assigned by that Member State to European Schools retain promotion and retirement rights guaranteed by their national rules in accordance with Article 12(4)(a) of the Convention and to continue payment of the remuneration paid to those teachers, in contravention of Article 25(1) of the Convention.

4. The context to the dispute between the Commission and the United Kingdom is distinctive in two regards.

5. First, the rules applicable to European Schools and to their teachers. Second, the education system and the system of remuneration applicable to teachers in the United Kingdom, for, in this case, England and Wales.

6. As regards the first point, it should be borne in mind, as is highlighted in the preamble to the Convention, that the European School system is '*sui generis*' and was introduced to provide the education together of children of the staff of the European Institutions in order to ensure the proper functioning of those institutions. [5] The preamble states that that system constitutes a form of cooperation between the Member States and between them and the Union while fully acknowledging the Member States' responsibility for the content of teaching and the organisation of their educational system. [6]

7. It is with this in mind that, first of all, under Article 25 of the Convention, the budget of the European Schools are financed inter alia by contributions from the Member States through the continuing payment of the remuneration for teachers seconded or assigned by those States and by the contribution from the Union, which is intended to cover the difference between the total amount of expenditure by the Schools and the total of other revenue.

8. Secondly, under Article 3(2) of the Convention, instruction at the European Schools is provided by teachers seconded or assigned by the Member States in accordance with decisions taken by the Board of Governors — one of the organs of those Schools [7] — under the procedure laid down in Article 12(4).

9. In accordance with Article 12(4)(a) of the Convention, in administrative matters, the Board of Governors determines each year, on a proposal from the Boards of Inspectors, the teaching staff requirements by creating or eliminating posts. It ensures a fair allocation of posts among the Member States. It settles with the governments questions relating to the assignment or secondment of the secondary school teachers, primary school teachers and education counsellors of the School. Staff retain promotion and retirement rights guaranteed by their national rules.

10. Furthermore, according to the Regulations for Members of the Seconded Staff of the European Schools, adopted by the Board of Governors on the basis of Article 12(1) of the Convention and applicable from 1 September 1996, secondment may not, in principle, be for longer than nine years.

11. Those regulations also contain provisions on remuneration and on the conditions of employment of teachers seconded or assigned to those schools. In particular, Article 49 of the regulations provides that teachers on secondment continue to receive their national salary, paid by the competent national authorities, and also receive the difference between the remuneration as laid down in the regulations and the exchange value of their national salary, less compulsory social security deductions, which is

5 — See also Case C-196/09 *Miles and Others* [2011] ECR I-5105, paragraph 39. The schools provide a multilingual and multicultural education for nursery, primary and secondary level children.

6 — This recital in the preamble partly reproduces the content of Article 165(1) TFEU.

7 — The Board of Governors is composed, inter alia, of representatives at ministerial level of the Member States and a member of the Commission. It is responsible for supervising the implementation of the Convention and, for this purpose, it has the necessary decision-making powers in educational, budgetary and administrative matters in accordance with Article 10 of the Convention.

paid by the European School ('the European supplement'). Furthermore, under Article 72(1) of the regulations, members of staff whose service terminates are entitled, on leaving — provided that they leave for reasons other than disciplinary action — to the payment of a severance grant proportionate to the length of actual service, up to a maximum of nine years. The grant is calculated, in accordance with Article 72(2), on the basis of the difference between one and a half months of the last basic European salary, weighted at the rate for the country of origin, and one and a half months of the last basic national salary for each year of service.

12. However, the Regulations make no provision for the retirement of seconded teachers, who continue to contribute to their national schemes during their secondment.

13. As regards the second point, which concerns the distinctive features of the education system in the United Kingdom, it should be noted that the education system is a decentralised matter, split between three separate educational 'jurisdictions', namely England and Wales, which together form one 'jurisdiction', Northern Ireland, and Scotland. The basic terms of employment differ from one 'jurisdiction' to another.

14. For the jurisdiction comprising England and Wales, the only relevant jurisdiction for the purposes of the present case, the majority of teachers are employed by maintained schools. The salaries and conditions of employment of those teachers are determined by order of the competent minister in the 'School Teachers Pay and Conditions Document' (STPCD), which is binding in relation to any contract of employment concluded by a maintained school.

15. Some teachers are employed not in maintained schools but in other types of school, such as independent, mixed-ability State schools supported by sponsors ('academies'), private schools, the European School in Culham and schools run by foreign governments. For such schools, the terms and conditions of employment laid down in the STPCD are optional.

16. The STPCD of 2009 sets out the pay scales, the key features of which are as follows.

17. There is a basic salary scale for classroom teachers, which has six points. The main criterion for moving up this pay scale is the level of experience measured in completed years of teaching. In general, a teacher's employer must award one point on the scale for each year of employment as a classroom teacher. Thus, leaving aside exceptional cases where the results achieved are unsatisfactory, progression up this scale is automatic.

18. In 2000, a new scheme entitled 'threshold pay' was introduced. Under this scheme, teachers in England and Wales may, when they reach the threshold level at the top of the basic scale, apply to cross the threshold into the higher salary scale ('post threshold pay scale'), divided into three points (U1 to U3). Teachers wishing to make such an application must satisfy certain professional performance standards, provide evidence of their qualifications and request an assessment of their abilities. The professional standards to be met are set out in a document entitled 'Professional Standards for Teachers'. The assessments are carried out by head teachers who must ensure that the teacher being assessed meets those standards. Once a teacher has crossed the threshold into the higher scale ('post-threshold teacher'), progress up that scale is not automatic but is subject to the conclusions of an annual review meeting.

19. In the case of maintained schools, the STPCD also provides for the possibility of creating posts for 'Excellent Teachers', or 'ETs', and 'advanced skills teachers', or 'ASTs', for which there are special salary scales (AST 1 to AST 18), and posts entitling teachers to 'Teaching and Learning Responsibility Payments' or 'TLRPs'. Teachers may not occupy more than one of these posts at the same time.

20. Teachers wishing to join the Excellent Teacher Scheme must have been placed at the highest of the three levels of the post-threshold pay scale for at least two years and possess specific professional abilities as laid down in the Professional Standards for Teachers. However, they may apply for assessment in this connection only in relation to a vacancy for an ET post in their own school. The assessments are carried out by external assessors, in order to ensure consistency in the assessment process. In addition to their normal classroom duties, ETs play an important role in their school by helping other teachers to improve their effectiveness and by contributing to the achievement of educational objectives by improving the quality of teaching in the school.

21. In order to be eligible for an AST post, candidates need not necessarily have passed the threshold, but must nevertheless meet post-threshold teacher standards, that is to say the professional performance standards applicable to ETs, and the special professional standards for ASTs, as laid down in the Professional Standards for Teachers. Assessments in this connection are carried out by external assessors. These posts entail additional responsibilities. ASTs in principle spend 80% of their time teaching in class and the remaining time on additional tasks, which may be carried out with or for the benefit of teachers from other schools. Unlike ET posts, AST posts therefore call for cooperation with other schools.

22. Finally, TLRPs are available to all classroom teachers, whether or not they have passed the threshold. These additional payments, which attach to specific posts within the school's staffing structure, rather than to particular individuals, are awarded to teachers who take on 'sustained additional responsibility in the context of [the school's] staffing structure'. They are intended to reward responsibilities which go beyond those of all classroom teachers and concern, inter alia, benefits for pupils outside the class or leadership in subject or curriculum area development.

23. Irrespective of the status of their school of origin, any teacher in the United Kingdom may apply to be assigned to European Schools.

24. However, teachers selected do not retain their contractual relationship with their previous employer, but enter into a new contract of employment with the Department for Children, Schools and Families ('the Ministry of Education') for the purpose of the assignment.

25. This contract of employment stipulates that the STPCD does not apply to teachers seconded from England and Wales to the European Schools. It nevertheless provides that the national salaries paid monthly to seconded teachers are fixed in line with the basic salary scale laid down in the STPCD and that annual nationally negotiated pay increases applicable under the STPCD are to be paid. It further states that no other increases in national salary will be paid and that a seconded teacher may not, during his secondment to a European School, apply to be paid on a higher salary scale or for any additional allowance or status referred to in the STPCD. Lastly, the contract of employment specifies that employment in a European School is pensionable under the Teachers' Pension Scheme for England and Wales and that contributions are based on national salary only.

26. Following a large number of complaints by British teachers assigned to European Schools and several parliamentary questions, the Commission has repeatedly raised this issue with successive Secretaries of State responsible for education in the UK at various times from 2000 onwards, arguing that the decision that British teachers seconded to the European Schools were not entitled to the higher performance-related pay scales was incompatible with the Convention. An initial exchange of letters in 2000 and 2001 and a further exchange of letters in 2007 failed to resolve the difficulty. The Commission then requested that the matter be discussed at the meeting of the Board of Governors of 20 to 22 October 2008. On 20 November 2008 a videoconference took place between representatives of the Commission and the Ministry of Education, which once again failed to resolve the dispute. On 13 January 2009, the Commission made a final request to the Board of Governors with a view to resolving the situation, while announcing that, if there were no result, it would have to make a request to the Court under Article 26 of the Convention.

27. The interpretation of Articles 12(4)(a) and 25(1) of the Convention was considered at the meeting of the Board of Governors of 20 and 21 January 2009. Following that meeting, the Board of Governors concluded that it had been unable to resolve this dispute and took formal note of the Commission's intention of requesting the Court for a ruling on the interpretation and application of the said articles and of bringing an action against the United Kingdom on the basis of Article 26 of the Convention in conjunction with Articles 10 and 39 EC.

28. In these circumstances, on 18 December 2009, the Commission brought the present action.

29. The Commission claims that the Court should:

— declare that Article 12(4)(a) of the Convention is to be interpreted and applied so as to ensure that teachers seconded by a Member State have access during their secondment to the same career and salary progression as teachers assigned within the territory of that Member State and that the exclusion of certain teachers seconded by the United Kingdom, during their secondment, from access to improved pay scales (in particular those known as 'threshold pay', 'excellent teacher system' or 'advanced skills teachers') and from access to other additional payments (such as 'teaching and learning responsibility payments'), and also from progression within existing salary scales available to teachers employed in maintained schools in England and Wales, is incompatible with Articles 12(4)(a) and 25(1) of the Convention.

— order the United Kingdom to bear the costs.

30. The United Kingdom contends that the Court should dismiss the action.

31. The parties submitted oral argument at the hearing which took place on 4 May 2011.

II – Analysis

32. As has been shown in the introduction, the Commission's claims can be divided into two limbs. The first limb concerns, in fairly general terms, the interpretation of the last sentence of Article 12(4)(a) of the Convention, whilst the second, which is more specific, essentially concerns the career progression of certain teachers assigned by the United Kingdom to European Schools during their period of assignment.

33. This dichotomous claim seems to reflect the wording of the arbitration clause laid down in Article 26 of the Convention, under which the Court has sole jurisdiction in disputes between Contracting Parties relating to the 'interpretation and application' of the Convention which have not been resolved by the Board of Governors.

34. Even though, as the written pleadings submitted by the parties show, it is not very easy to distinguish one limb from the other, I will follow the approach suggested in the Commission's application.

A – *The interpretation of the last sentence of Article 12(4)(a) of the Convention*

35. As I have already mentioned in the introduction, Article 12(4)(a) of the Convention confers on the Board of Governors the task of determining each year the teaching staff requirements of European Schools, ensuring a fair allocation of posts among the Member States. That provision also provides that the Board of Governors must 'settle with the Governments questions relating to the assignment or secondment of the ... teachers ... Staff shall retain promotion and retirement rights guaranteed by their national rules'.

36. As regards the interpretation of the last sentence of Article 12(4)(a) of the Convention, the Commission argues, first of all, that it imposes an obligation on the Member States and confers a right on seconded or assigned teachers and, secondly, that the word 'promotion' must be broadly interpreted so as to cover the different national systems of remuneration applicable to teachers in the event of secondment or assignment, including placement in a higher salary scale.

37. The United Kingdom is firmly opposed to such an interpretation. It considers, first of all, that Article 12(4)(a) of the Convention is addressed only to the Board of Governors, without imposing obligations on the Member States. This provision requires the Board of Governors, in exercising its administrative functions, to respect national rules regarding promotion and retirement. Indeed, in the view of the United Kingdom, there would be little sense in the Convention imposing an obligation upon Member States to respect their own national rules. Secondly, the United Kingdom considers that the term 'promotion' only refers to advancement to more senior positions having greater responsibilities within the structure of a school, such as the positions of head teacher or deputy head teacher.

38. I essentially agree with the interpretation proposed by the Commission.

39. It is true that the last sentence of Article 12(4)(a) of the Convention forms part of a chapter relating to the powers of the Board of Governors and that Article 3(2) of the Convention refers to decisions taken by the Board of Governors under Article 12(4).

40. However, contrary to the claims made by the United Kingdom, Article 12(4)(a) of the Convention is not addressed solely to the Board of Governors, but also to the Member States, as Contracting Parties, as is shown explicitly by the penultimate sentence in that article, which refers to 'the Governments'.

41. By providing that seconded or assigned teachers retain their promotion and retirement rights guaranteed by their national rules, that provision does not seek to make the retention of those rights subject to a decision by the Board of Governors, but to require the Member States to ensure that those teachers are not penalised as a result of their secondment or assignment to European Schools, which is temporary by nature.

42. Contrary to the view taken by the United Kingdom, it seems that such penalisation cannot simply be disregarded on the basis of the argument that each Member State must respect its own national rules.

43. In the absence of an obligation laid down in the Convention to ensure that seconded teachers 'retain' (French: '*conservent*') promotion and retirement rights guaranteed by their 'national rules' (French: '*statut national*'), that is to say rights to which they could be entitled if they continued to be employed in their Member State of origin, such national rules could easily be amended or adapted by the Member States having specific regard to particular situations, including those which generally involve movement to another Member State, as in the case of the vast majority of teachers from the United Kingdom seconded or assigned to European Schools.

44. Consequently, if it is not to be rendered ineffective, it would not seem possible to interpret the last sentence of Article 12(4)(a) of the Convention as imposing obligations only vis-à-vis the Board of Governors, since the adoption and the content of the rules on the promotion and retirement of seconded or assigned teachers are determined at national level.

45. As far as 'promotion' (French: '*avancement*') is concerned, it should be noted that the English version of the last sentence of Article 12(4)(a) of the Convention uses the word 'promotion', which might partly explain the controversy surrounding that term. Whilst from reading other language versions of the Convention there is no clear tendency which makes it possible to identify which of

these two terms is preponderant, it seems that, irrespective of the term used, since the purpose of the last sentence of Article 12(4)(a) of the Convention is, as I have stated, to prevent the period of secondment or assignment penalising teachers assigned to European Schools, it is not conceivable, as the United Kingdom suggests, that the rights which must be retained by those teachers are limited to access to posts which have a name reflecting more senior status in the hierarchy of national schools and having greater responsibilities.

46. Moreover, the very meaning of the word 'promotion' cannot be limited to access to such posts. As is illustrated by the promotion system in the European Union civil service, the word also generally designates access to grades within a single career (such as assistants or administrators), giving rise to the application of improved remuneration, without entailing a different title or additional responsibilities. In my view, the notion of promotion (French: *avancement*) within the meaning of the last sentence of Article 12(4)(a) of the Convention therefore relates to a situation of career progression. This interpretation allows the most uniform possible application of the last sentence of Article 12(4)(a) of the Convention, having regard to the diversity of national promotion and remuneration systems.

47. At this stage, it should therefore be noted that the last sentence of Article 12(4)(a) of the Convention requires the Contracting Parties to ensure that, during the period of their secondment or assignment, teachers seconded or assigned to European Schools retain career progression and retirement rights guaranteed by their national rules.

48. It is still necessary to consider a final point which, although it has been relied on by the United Kingdom more to oppose the applicability of the last sentence of Article 12(4)(a) of the Convention in its territory, relates, from a certain perspective, to the interpretation of that provision. This point concerns the three expressions, reproduced below in inverted commas, contained in the expression promotion 'rights' 'guaranteed' by the 'national rules'.

49. The United Kingdom essentially takes the view that this expression must be given a strict, literal interpretation. However, in the light of the specific characteristics of the United Kingdom education system, teachers in England and Wales assigned to European Schools do not enjoy any promotion 'rights' 'guaranteed' by the 'national rules'.

50. Although, at this stage of the reasoning, I should confine myself to the aspect of this argument which concerns the interpretation of the contested expression, it should nevertheless be noted that, like the other Member States, the United Kingdom is certainly not exempted, in any way, from complying with the obligations stemming from the last sentence of Article 12(4)(a) of the Convention.

51. Whilst it is thus perfectly possible that, because of the specific characteristics of the United Kingdom education system, teachers in England and Wales do not have status as an official or national agent, unlike in some Member States, the obligation under Article 12(4)(a) of the Convention must nevertheless apply to all the Contracting Parties to that Convention, including all the Member States, notwithstanding any specific characteristics.

52. In my view, the reference to '*statut national*' (English: 'national rules') in the French version of the last sentence of Article 12(4)(a) of the Convention should be interpreted with a degree of flexibility, having regard to the specific characteristics of the education system of the Member States, so that the provision is able to retain its practical effect and apply in each of those States. It is also, in my opinion, the reason why the English version, as well as other language versions, of that provision do not mention the expression '*statut national*', which would have been a little incongruous in the context of

the United Kingdom — and indeed in the context of other Member States where, on the basis of the distribution of powers in the field of education, education is devolved to infra-State structures — but relates more generally to the retention of the promotion rights guaranteed by 'national rules', [8] i.e. rules adopted by the Member States.

53. As regards the promotion 'rights' 'guaranteed' by such national rules, in my view it is necessary to go beyond a strict, literal interpretation of these words. As I have already stated with regard to the interpretation of the word 'promotion', emphasis must be given to the purpose of the contested provision, which specifically seeks not to penalise teachers from a Member State assigned or seconded to European Schools by depriving them of promotion and retirement rights which they would have enjoyed if they had continued to work at educational establishments in their Member State of origin.

54. Contrary to the claims made by the United Kingdom, the promotion 'rights' do not necessarily and exclusively have to be limited to situations of automatic promotion rights linked to seniority. Not only does that argument seem to contradict the claim made by that same Member State, which has been examined above, that the notion of promotion should be limited to access to posts which have a name reflecting a more senior status in the hierarchy of national schools and having greater responsibilities, but to accept such an argument would reduce the scope of the last sentence of Article 12(4)(a) of the Convention to situations which a literal interpretation of that provision would not even support.

55. Consequently, the Member States' obligation consists in preserving for teachers assigned or seconded to European Schools the career progression rights which would have been granted to them if they had continued to be employed in that Member State. Thus, depending on the content of the rights recognised in each of the Member States for their respective teachers, those rights may, for example, take the form of an actual right to promotion or simply a right to participate in procedures with a view to career progression. The content of the promotion rights may therefore vary from one Member State to the next. On the other hand, they cannot have a narrower scope than would have been enjoyed by teachers seconded or assigned to European Schools if they had remained in post in the educational establishment in their State of origin, like their colleagues who continued to be employed in that Member State. A different interpretation would deny the assurance given to such teachers by the last sentence of Article 12(4)(a) of the Convention that the promotion rights guaranteed by their national rules will be 'retained'.

56. Consequently, I propose answering the first limb of the Commission's application as follows: the last sentence of Article 12(4)(a) of the Convention must be interpreted as requiring the Contracting Parties to ensure that teachers seconded or assigned to European Schools, during their secondment or their assignment, retain career progression and retirement rights laid down by the national rules of their Member State of origin which would have been applicable to them if they had continued to be employed in an educational establishment of that Member State.

57. It is in the light of this interpretation that the second limb of the application, which concerns, more specifically, the conduct of the United Kingdom with regard to the promotion of teachers which it assigns to the European Schools, should be examined.

8 — A similar expression is used in the German ('*der Regelung ihres Herkunftsstaates*') and Spanish ('*normativas nacionales*') versions of the last sentence of Article 12(4)(a) of the Convention, probably because in those Member States education is not the responsibility of their central organs.

B – *The conduct of the United Kingdom with regard to the promotion of teachers which it assigns to the European Schools during their period of assignment*

58. Under the second limb of the application, the Commission claims that certain teachers assigned by the United Kingdom to European Schools must be able to be eligible, during their period of assignment, for the higher salary scale ('post-threshold pay scale'), posts (ET and AST) and additional payments (TLRP) provided for by the STPCD, and for progression on the existing salary scale, like their fellow teachers who continue to be employed by maintained schools in England and Wales.

59. As this limb is worded, and contrary to the claims made by the United Kingdom on various occasions during the present proceedings, the Commission's complaints do not therefore concern the situation of *all* teachers in England and Wales assigned to European Schools, but only a certain category of them who, it claims, may enjoy equal treatment, as regards promotion, with their colleagues employed by maintained schools.

60. Irrespective of the debate between the parties as to whether the STPCD lays down national rules within the meaning of Article 12(4)(a) of the Convention — a debate to which I will return later — it is clear that a common denominator for the category of teachers assigned to European Schools for the purposes of the second limb of the Commission's application includes those who, before their assignment, were eligible for access to the higher salary scale, that is to say teachers who, prior to their assignment, were at the top (M6) of the basic salary scale under the STPCD.[9] In my view, it must also include teachers who progressed on the basic scale and were at the top of that scale during their period of assignment and who, during that period, could have applied for access to the higher salary scale and/or to the posts mentioned in the Commission's application, if those teachers had not been required to waive those rights in the contract entered into with the Ministry of Education. It is common ground that all the teachers assigned by the United Kingdom to European Schools benefit from the application of the STPCD basic scale. According to the explanations given by the United Kingdom, those teachers have also continued to progress on that scale and, in some circumstances, have been able to reach the top of that scale during their period of assignment.

61. It is less clear, however, on the basis of the wording of that second limb of the Commission's claims, that the category of teachers concerned includes not only teachers who, before their assignment, were employed by maintained educational establishments, i.e. establishments which were subject to the STPCD, but also teachers who worked for non-maintained educational establishments which therefore had the simple option to apply the STPCD.

62. Before examining this point, it seems important to resolve the question of the classification of the STPCD having regard to the last sentence of Article 12(4)(a) of the Convention.

63. As I have stated, the United Kingdom pleads that the STPCD does not constitute national rules within the meaning of that article, since a large number of teachers in the United Kingdom are not covered by that document.

64. This argument does not persuade me.

65. It is true that the conditions of employment and of remuneration provided for by that document, adopted by order of the United Kingdom Minister for Education, are not automatically applicable to all teachers in England and Wales.

9 — Which, according to the explanations given by the United Kingdom, amounts to 53 teachers of the 250 assigned to the European Schools at the time of the facts in the main proceedings.

66. However, its application is compulsory for all teachers employed by maintained educational establishments [10] and optional for teachers employed by independent schools. [11] In addition, as I have already stated and as the United Kingdom conceded at the hearing, the basic scale provided for by the STPCD is binding for all teachers from England and Wales assigned to European Schools under the contract that the teachers enter into with the Ministry of Education, despite the fact that some of them had been employed by independent schools before their secondment which, in some cases, did not apply or, at least, did not fully apply the conditions of employment and remuneration provided for by the STPCD.

67. Since the United Kingdom has not indicated what other alternative document could be designated as including the relevant national rules within the meaning of the last sentence of Article 12(4)(a) of the Convention, it follows that, failing the identification of an unacceptable legal vacuum in the United Kingdom's situation, only the STPCD is capable of having the characteristics of such national rules.

68. Contrary also to the claims made by the United Kingdom, I do not think that accepting that the STPCD lays down national rules within the meaning of the last sentence of Article 12(4)(a) of the Convention amounts to conferring on teachers seconded or assigned to European Schools rights which they could not claim under national legislation and, thus, to an infringement of Article 165 TFEU.

69. It is clear that the purpose of the Commission's application is not to require the United Kingdom to reform the organisation of its education system by seeking to confer rights on teachers seconded or assigned to European Schools which they could not claim if they remained in post in the United Kingdom. Pursuing such a purpose would run counter to the provisions of Article 165(1) TFEU, the content of which is, moreover, reiterated in the preamble to the Convention, as I have already mentioned. [12]

70. In these circumstances, and having regard to the specific characteristics of the education system in the United Kingdom, the promotion right which teachers assigned to European Schools must be assured of retaining under the last sentence of Article 12(4)(a) of the Convention must include the rights which they would have enjoyed if they had continued to be employed in the United Kingdom, like their counterparts in England and Wales. However, as the Commission has expressly asserted, the second limb of its application does not seek for teachers assigned by the United Kingdom to European Schools to be automatically granted promotion to or on the higher salary scale or to obtain the posts and additional payments mentioned in the STPCD during their period of employment with those schools, but simply for teachers assigned to European Schools, like their counterparts who continue to be employed by maintained schools in England and Wales, to retain, during their assignment, the right to *participate in the procedure allowing access* to that scale and to the said posts and additional payments.

71. It is these promotion rights which the STPCD guarantees for teachers in England and Wales employed by maintained schools and teachers in independent schools which apply the STPCD in full, who have acquired sufficient seniority and have therefore reached the top of the basic scale (point M6), since, as the United Kingdom acknowledged at the hearing, some of them opt not to apply for progression to the higher scale and, in addition, at least 95% of those who participate in the procedure gain access to that scale.

10 — According to information provided by the United Kingdom, 435 000 people.

11 — I.e., according to the United Kingdom, an undetermined proportion of the 89 000 teachers employed in this type of establishment in England and Wales.

12 — See footnote 6 of this Opinion.

72. Conversely, it is common ground that such freedom of choice is not available to teachers from England and Wales assigned to European Schools, since they are required, under the contract entered into with the United Kingdom Ministry of Education, to waive any possibility of taking part, during their assignment, in the procedures for access to the higher salary scale and to the posts and additional payments covered by the STPCD.

73. The obligation imposed by the last sentence of Article 12(4)(a) of the Convention would, in my view, be rendered ineffective if it did not apply to a Member State which, although it does not grant its teachers promotion rights in the strict sense, nevertheless accords them a right to participate in the procedure giving access to the higher salary scale and to the posts and additional payments provided for by its national rules.

74. In these circumstances, I consider that the category of teachers assigned to European Schools who may 'retain the promotion rights' for the purposes of the last sentence of Article 12(4)(a) of the Convention, under the STPCD, are those who, if they had remained in the United Kingdom like their colleagues in England and Wales, could have benefited from the application of the conditions laid down by the STPCD in order to access the higher salary scale, to progress towards it, and to obtain the right to apply for the posts and additional payments covered in that document.

75. The relevant group is therefore, as the Commission claims, teachers who, prior to their assignment to European Schools, were employed in maintained educational establishments which, by their nature, must apply the STPCD in full, but also teachers who worked for independent educational establishments which optionally applied the STPCD in full. Within these two categories of teachers, consideration must also be given to those who, even though they had not reached the top of the basic salary scale before their assignment, reached it during their period of assignment.

76. It is these groups of teachers which, had they not been assigned to European Schools, could have claimed the benefit of the application of the provisions of the STPCD in full. Consequently, it is also only these groups which are capable of 'retaining', within the meaning of the last sentence of Article 12(4)(a) of the Convention, the right to be able to participate in the selection process enabling them to access the higher salary scale laid down by the STPCD and the posts and additional payments covered by that document, a right which they were required to waive when they concluded the contracts assigning them to European Schools with the United Kingdom Ministry of Education.

77. Other teachers, i.e. those who, prior to their assignment to European Schools, taught in non-maintained educational establishments which did not apply, or did not apply in full, the STPCD are not therefore covered by the second limb of the Commission's application. It is perfectly logical that those teachers could not waive a right which they could not originally claim. [13]

78. That being so, and as will be clear, I consider that a Member State which requires, including by means of contract, some of its teachers which it decides to assign to European Schools to waive 'the promotion rights' which they should, in principle, have 'retained' pursuant to the last sentence of Article 12(4)(a) of the Convention if they had remained in post in the United Kingdom manifestly infringes that provision.

79. As can be inferred from the above considerations, this position holds not only with regard to access to the higher salary scale, but also with regard to access to ET and AST posts and to posts linked with TLRP additional payments.

13 — Such a distinction does not give rise to discrimination since, first of all, from a legal point of view, those teachers are in a different situation to the abovementioned groups of teachers and, secondly, from a financial point of view, during their period of assignment the European supplement should compensate for the difference which might exist with teachers in those groups.

80. First of all, access to such posts is conditional on the satisfaction of professional performance standards applicable to progression to the higher salary scale. [14]

81. Secondly, these posts are associated with greater responsibilities and benefit from higher remuneration than posts remunerated according to the basic salary scale.

82. The fact that, unlike with access to the higher salary scale, specific posts must be created cannot exclude progression to those posts from the scope of the notion of 'promotion' within the meaning of the last sentence of Article 12(4)(a) of the Convention. This is also recognised, moreover, by the United Kingdom when it advocates, albeit erroneously, a narrow conception of the notion of promotion, encompassing only progression to more senior posts. As I have already stated, in my view the notion of 'promotion' must be given an autonomous interpretation and cover, more broadly, any kind of career progression for the teachers concerned, whether it be access to a higher salary scale or access to posts with greater teaching and management responsibilities, even though such posts would not have any particular hierarchical status within the structure of the educational establishments. So far as it is relevant, as regards TLRP additional payments, I would add that, as the United Kingdom pointed out with reference to the relevant provisions of the STPCD, these additional payments have a sustained nature and are also linked to posts with additional teaching and learning responsibilities, rather than to specific individuals, which means, in my view, that they also fall within the scope of the notion of 'promotion' under the last sentence of Article 12(4)(a) of the Convention.

83. In addition, for the sake of completeness, the United Kingdom cannot claim that teachers assigned to European Schools have freely consented to waive the full application of the STPCD during their period of assignment. It is sufficient to note in this regard that such a waiver clause is a standard stipulation imposed on teachers by the Ministry of Education without any possibility of individual negotiation. The choice available to those teachers is therefore either to accept the assignment to European Schools on the conditions laid down by the Ministry of Education or to refuse the assignment.

84. At this stage, the United Kingdom still pleads difficulties which are essentially organisational and budgetary to deny teachers assigned to European Schools the right to be able to participate, during their assignment to European Schools, in the procedures relating to promotion laid down by the STPCD.

85. As far as the organisational difficulties are concerned, the United Kingdom essentially relies on considerations connected with, first, certain specific characteristics of the greater responsibilities taken on by applicants for the higher salary scale and for ET and AST posts and posts linked with TLRP additional payments and, second, problems of assessing teachers assigned to European Schools.

86. Although these concerns may be legitimate, they cannot, in my view, prevail over the right recognised by the last sentence of Article 12(4)(a) of the Convention for teachers assigned or seconded to European Schools.

14 — In addition, applicants for ET posts must have been on the third level of the higher salary scale for at least two years before they take up their post (see point 20 of this Opinion).

87. As regards the teachers' access to the higher salary scale, the United Kingdom has not denied that, in the case of schools located in its territory for which the STPCD was fully applicable, the assessment of skills and knowledge acquired was carried out by the head teachers of each of the schools.[15] Consequently, I find it difficult to understand the reasons why a similar assessment, based on the same criteria for eligibility for that higher scale laid down by the United Kingdom authorities, could not be carried out by the head teacher of the European School concerned, if necessary in cooperation with the competent inspector within that school, who is appointed in accordance with the provisions of the Convention, represents the Member State in question and ensures supervision of the work of teachers from that Member State[16] and with the United Kingdom Minister for Education.

88. As regards access to ET and AST posts and to posts with entitlement to the TLRP and the assessment of the performance of teachers applying for such posts, I cannot concur with the argument put forward by the United Kingdom that, simply because those posts require teachers to undertake additional responsibilities, in particular managing and training other teachers, whether in their own establishment (ET posts) or in other establishments (AST posts), in principle, teachers assigned to European Schools can *never* satisfy such conditions during their period of service at those schools and an assessment of the satisfaction of those conditions is impossible to carry out in their case.

89. In this regard, I would point out, first of all, that whilst, as the United Kingdom states, the STPCD provides that the pre-assessment of the qualifications of an applicant for an ET or AST post must, in principle be conducted by the head teacher, that document nevertheless envisages the case of applications from teachers not employed by a maintained school (unattached teachers), which must be pre-assessed by a person with management responsibility for the applicant.[17] Applied to the case of teachers assigned to European Schools, this provision could, as the case may be, therefore allow a manager from the European School in question to carry out this first stage of the performance assessment for those posts in coordination with the competent inspector from that school and the United Kingdom Ministry of Education, with which those teachers have concluded their contract.

90. Secondly, whilst the material in the file shows that the assessment of aptitude to perform ET and AST duties is, strictly speaking, entrusted to a single body for applicants in England and Wales who continue to be employed in the United Kingdom, I cannot see why such an assessment could not be carried out for teachers from the United Kingdom who are assigned to European Schools and who wish to apply for those posts, whereas that Member State acknowledges that it can be done for teachers working for other educational establishments located in the territory of other Member States.

15 — According to the papers before the Court, the 10 professional standards which must be satisfied by teachers who have reached point 6 on the basic scale and wish to apply for the higher scale are as follows: 1. Contribute significantly, where appropriate, to implementing workplace policies and practice and to promoting collective responsibility for their implementation; 2. Have an extensive knowledge and understanding of how to use and adapt a range of teaching, learning and behaviour management strategies, including how to personalise learning to provide opportunities for all learners to achieve their potential; 3. Have an extensive and well-informed understanding of the assessment requirements and arrangements for the subjects/curriculum areas they teach, including those related to public examinations and qualifications; 4. Have up-to-date knowledge and understanding of the different types of qualifications and specifications and their suitability for meeting learners' needs; 5. Have a more developed knowledge and understanding of their subjects/curriculum areas and related pedagogy including how learning progresses within them; 6. Have sufficient depth of knowledge and experience to be able to give advice on the development and well-being of children and young people; 7. Be flexible, creative and adept at designing learning sequences within lessons and across lessons that are effective and consistently well-matched to learning objectives and the needs of learners and which integrate recent developments, including those relating to subject/curriculum knowledge; 8. Have teaching skills which lead to learners achieving well relative to their prior attainment, making progress as good as, or better than, similar learners nationally; 9. Promote collaboration and work effectively as a team member; and 10. Contribute to the professional development of colleagues through coaching and mentoring, demonstrating effective practice, and providing advice and feedback.

16 — See Articles 15 to 18 of the Convention.

17 — See Article 30(3) and (4) of the STPCD.

91. The fact, which is also mentioned by the United Kingdom, that those establishments provide education which is closer to the British system than the European Schools seems entirely to disregard the *sui generis* nature of those schools, whose role of providing the education together of children of the staff of the European Union is performed for each of the Member States while fully acknowledging the Member States' responsibility for the content of teaching and the organisation of their educational system.

92. Lastly, whilst it is true that applicants for AST status must undertake to take on some of their responsibilities vis-à-vis teaching staff from establishments other than the one for which they work, a teacher assigned to a European School can make such a commitment perfectly well for the future. Moreover, according to the STPCD, a commitment does not necessarily have to be performed at a school. [18]

93. Furthermore, in the light of the fact, put forward by the United Kingdom, that the selection of British teachers assigned to European Schools is particularly strict, I doubt that such teachers are unable, in principle, to meet the professional standards and additional responsibilities required, in particular, for access to ET and AST status, as the United Kingdom would try to suggest.

94. In my view, there are consequently no organisational difficulties such that it would be justified to exclude teachers assigned to European Schools covered by the Commission's application from the procedures for access to ET and AST posts and to posts linked with TLRP additional payments.

95. The same conclusion must be drawn with regard to the budgetary obstacles pleaded by the United Kingdom.

96. I will not dwell on the manifestly unacceptable argument that teachers seconded or assigned to European Schools could be deprived of the right to benefit from the application of the last sentence of Article 12(4)(a) of the Convention simply because they would enjoy improved financial conditions, on account of the payment of the European supplement, than their counterparts in England and Wales who have continued to be employed by educational establishments in the United Kingdom.

97. More seriously, the United Kingdom also claims that ET and AST posts and posts linked with TLRP additional payments require additional appropriations in any educational establishment wishing to create such posts and that it would not therefore be conceivable to create posts for teachers assigned to European Schools during their period of assignment.

98. This argument does not appear to be relevant, however. Despite some confusion between the parties on this point, it is not for the United Kingdom, in my view, to create ad hoc posts for teachers assigned to European Schools. On the contrary, it must simply give them the opportunity to apply for those posts. In other words, having regard to the last sentence of Article 12(4)(a) of the Convention, the United Kingdom must assure them that they are able to undergo the assessments required by the STPCD and, more specifically in relation to obtaining ET status, permit them, during their period of assignment, to access and progress on the higher career scale so that they are able to respond to a vacancy notice issued by an educational establishment which has decided to create an ET post on the same conditions as if they had continued to be employed in an educational establishment in the United Kingdom.

99. For all these reasons, I consider that the United Kingdom has failed to fulfil the obligation laid down in the last sentence of Article 12(4)(a) of the Convention.

18 — See Article 65(2) of the STPCD, which states that this working time may also be carried out at facilities of the appointing authority or 'elsewhere'.

100. This conclusion applies not only to promotion rights, but also, in the light of the circumstances of the present case, to the retirement rights of teachers assigned to European Schools for the purposes of the second limb of the present application.

101. In so far as, during their assignment, the pension of these teachers is calculated only on the basis of their national salary, namely the salary resulting from the application of the basic salary scale provided for by the STPCD, and during that same period those teachers were required to waive the possibility, at the very least, of benefiting from access to the higher salary scale, they have lost the opportunity to have their pension rights calculated with reference to that promotion.

102. In my view, such a loss of opportunity is genuine and serious, at least as regards teachers who, before their assignment to European Schools, had reached the top of the basic salary scale. It can safely be assumed that among those who would have applied for access to the higher salary scale, the success rate would undoubtedly have been no lower than for teachers who continued to be employed by maintained schools in the United Kingdom and made such an application, i.e. at least 95%.[19]

103. Lastly, a ruling must also be given on the alleged infringement of Article 25(1) of the Convention, under which the budget of the Schools is financed by contributions from the Member States through the continuing payment of the remuneration for seconded or assigned teaching staff.

104. The infringement of this provision appears to be ancillary to the infringement of the last sentence of Article 12(4)(a) of the Convention in so far as if a Member State fails to ensure that its teachers assigned or seconded to European Schools retain their promotion rights, such a failure will have irreparable negative repercussions on 'the continuing payment of the remuneration' for those teachers. In the present case, the freezing of promotion for teachers assigned by the United Kingdom to European Schools, which is the subject of the Commission's application, entails, at the very least, a freezing of the remuneration that they could reasonably expect in crossing the threshold for access to the higher salary scale.

105. I therefore consider that, by its conduct, the United Kingdom has also infringed Article 25(1) of the Convention.

106. I would add, in conclusion, that the Commission has not raised a separate complaint that the United Kingdom has infringed Article 5 EC (Article 4(3) TEU).[20] That means that the Court is not required to rule on the validity of the proceedings, based on an infringement of a provision of the Treaty, pursuant to the arbitration clause under Article 26 of the Convention.

107. On all these grounds, I suggest that the Commission's application be granted. In addition, as it has applied for costs against the United Kingdom, I also propose, pursuant to Article 69(2) of the Rules of Procedure of the Court of Justice, that this application be granted.

19 — See, with regard to the notion of loss of genuine opportunity, recognised in employment law and/or public service law in a number of Member States, including the United Kingdom, and the economic value of the lost opportunity, points 53 to 55 of my Opinion in Case C-348/06 P *Commission* v *Girardot* [2008] ECR I-833.

20 — I would point out in this regard that, in Case 44/84 *Hurd* [1986] ECR 29 and Case C-6/89 *Commission* v *Belgium* [1990] ECR I-1595, the Court essentially found that a Member State was likely to infringe Article 5 EC where, by adopting a unilateral measure, and by virtue of the mechanism for compensation, paid from the Communities' budget, for the difference between the European School's own income and the national salaries of the teachers, set up by the Convention defining the Statute of the European Schools (in this case the Convention of 1958, to which the Communities were not Contracting Parties), that Member State creates expenditure for that budget which it should not have borne. See also points 121 to 130 of my Opinion in Case C-132/09 *Commission* v *Belgium*.

III – Conclusion

108. In the light of the foregoing considerations, I propose that the Court:

(1) declare that the last sentence of Article 12(4)(a) of the Convention defining the Statute of the European Schools, signed at Luxembourg on 21 June 1994, must be interpreted as requiring the Contracting Parties to ensure that teachers seconded or assigned to the European Schools, during their secondment or their assignment, retain career progression and retirement rights laid down by the national rules of their Member State of origin which would have been applicable to them if they had continued to be employed in an educational establishment of that Member State;

(2) declare that the exclusion of certain teachers assigned to the European Schools by the United Kingdom of Great Britain and Northern Ireland, during their period of assignment, from access to improved pay scales (in particular those known as 'post-threshold pay scale', 'excellent teacher pay scale' or 'advanced skills teacher pay spine') and from access to other additional payments (such as 'teaching and learning responsibility payments'), from which they could have benefited if they had continued to be employed by educational establishments in that Member State, like their counterparts employed in maintained schools in England and Wales, is incompatible with the last sentence of Article 12(4)(a) and Article 25(1) of the Convention defining the Statute of the European Schools;

(3) order the United Kingdom of Great Britain and Northern Ireland to pay the costs.