OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 15 June 2010 [1]

I — Introduction

1. In this case the Commission of the European Communities asks the Court to declare that, by refusing to bear the furniture and teaching equipment costs of the European Schools located in its territory, the Kingdom of Belgium has failed to fulfil its obligations under the Establishment Agreement concluded on 12 October 1962 between the Executive Board (now called, and hereinafter referred to as, 'the Board of Governors') of the European School and the Government of the Kingdom of Belgium ('the Establishment Agreement'), read in conjunction with Article 10 EC.

II — Legal framework

A — *Statute of the European Schools*

2. When they were first set up, the European Schools were governed by two agreements: the Statute of the European School, signed at Luxembourg on 12 April 1957 ('the 1957 Convention'), [2] and the Protocol on the setting-up of European Schools with reference to the Statute of the European School, signed at Luxembourg on 13 April 1962 ('the 1962 Protocol'). [3] Those two instruments were concluded by the six founding Member States of the European Communities.

3. The Board of Governors established by the 1957 Convention is composed of the competent Minister or Ministers of each of the Contracting Parties. Under Article 9 of that convention, the Board of Governors is to be responsible for the application of the convention and, for that purpose, is to have the necessary powers in educational, financial and administrative matters. It is to adopt the General Regulations of the School by common agreement. Article 28 of the convention provides that the Board of Governors may negotiate with the government of the country in which the headquarters of the school are situated any further agreements for the purpose

1 — Original language: French.

2 — *United Nations Treaty Series*, Volume 443, p. 129.

3 — *United Nations Treaty Series*, Volume 752, p. 267.

of ensuring that the school operates in the best possible material and moral conditions.

4. The 1957 Convention and the 1962 Protocol were cancelled and replaced by the Convention defining the Statute of the European Schools of 21 June 1994, which is currently in force ('the 1994 Convention'), as laid down in Article 34 of the latter. [4] The 1994 Convention was concluded by the Member States and the European Communities; the latter's participation was the subject of Council Decision 94/557/EC, Euratom of 17 June 1994 authorising the European Community and the European Atomic Energy Community to sign and conclude the Convention defining the Statute of the European Schools. [5]

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

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

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

8. The second paragraph of Article 6 of the 1994 Convention provides that, as far as their rights and obligations are concerned, the schools are to be treated in each Member State, subject to the specific provisions of the convention, as educational establishments governed by public law.

9. Pursuant to Article 10 of the 1994 Convention, the Board of Governors – which is composed, in particular, of a representative at ministerial level of each of the Member States and of a member of the Commission – is to supervise the implementation of the convention and, for this purpose, is to have the necessary decision-making powers in educational, budgetary and administrative matters and those required for the negotiation of the agreements referred to in Articles 28 to 30 of the convention.

10. Under Article 30 of the convention, the Board of Governors may negotiate with the government of a country in which a school is located any additional agreement required to ensure that the school can operate under the best possible conditions.

4 — OJ 1994 L 212, p. 3.
5 — OJ 1994 L 212, p. 1.

11. Article 25 of the 1994 Convention provides that the budget of the schools is to be financed inter alia by contributions from the Member States through the continuing payment of the remuneration for seconded or assigned teaching staff and, where appropriate, a financial contribution, and by the contribution from the European Communities, which is intended to cover the difference between the total amount of expenditure by the schools and the total of other revenue.

12. Under Article 26 of the 1994 Convention, the Court of Justice is to have sole jurisdiction in disputes between Contracting Parties relating to the interpretation and application of the convention which have not been resolved by the Board of Governors.

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

14. In response to written questions put to the parties, the Commission and the Kingdom of Belgium have confirmed that the 1994 Convention entered into force on 1 October 2002.

B — *Establishment Agreement*

15. On 12 October 1962, the Board of Governors and the Government of the Kingdom of Belgium signed the Establishment Agreement for the purpose of ensuring that the European Schools in Brussels and Mol would operate in the best possible material and moral conditions, as provided for by Article 28 of the 1957 Convention.

16. In Chapter I of the Establishment Agreement, which is entitled 'School buildings and equipment', Article 1 reads as follows:

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

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

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

17. Article 13 of the Establishment Agreement provides that the agreement is to enter into force on the day on which the Belgian Government notifies the Board of Governors

of the completion of the constitutional formalities. Article 13 further states that the provisions of the Establishment Agreement are to have effect from 17 September 1958, with the exception of Articles 2 and 3 which are to have effect from the date on which the agreement enters into force.

18. The Establishment Agreement was ratified by the Kingdom of Belgium on 8 November 1975. [6] It is still in force and has not been amended subsequently.

C — *Karlsruhe decision*

19. At a meeting held in Karlsruhe from 17 to 19 May 1967, the Board of Governors considered the arrangements for financing expenditure on equipment and on the construction of school buildings, following a report produced by the Group with responsibility for financial matters ('the Karlsruhe decision').

20. Point 12 of the minutes of that meeting states that the Board of Governors approved the report which the Group with responsibility for financial matters had produced relating to the financing of expenditure on equipment and the construction of school buildings and mandated it to draw up provisions that should be included in the agreement to be signed between the Board of Governors and the governments of the countries in which European Schools are established.

21. Point 12 also states that the Board of Governors adopted the decisions included in the annex to those minutes and specifies that those decisions did not have retroactive effect.

22. In accordance with point 12(1) of the annex to the minutes, the costs of equipment which becomes a 'fixture' as a result of its incorporation into a building are to be borne by the host country, even if it is to be provided in the course of the life of the school. Furniture and teaching equipment continue to be a type of investment which must be met from normal budgetary appropriations and are thus closely linked to the running of the school.

23. Point 12(3) of the annex contains the following statement: 'the Board of Governors asks each of the Member States to conclude with it an agreement intended to ensure that European Schools have operating conditions as provided for in Article 28 of the [1957 Convention] … The Board of Governors approves the provisions below concerning the financing of expenditure on equipment and the construction of school buildings. Those provisions could constitute Article 1 of the agreement between the Board of Governors

6 — Law approving the Agreement between the Government of the Kingdom of Belgium and the Board of Governors of the European Schools, *Moniteur Belge* of 7 February 1976, p. 1415.

and the governments of the countries in which the European Schools are established'.

III — Pre-litigation procedure and forms of order sought by the parties

24. Following lengthy correspondence between the Board of Governors and the Belgian authorities between 1995 and 2006 and a letter of 30 October 2006 in which those authorities stated that they took the view that they were not required to bear the furniture and teaching equipment costs claimed from the Kingdom of Belgium since 1995, the Commission sent a letter of formal notice dated 23 October 2007 to the Kingdom of Belgium under Article 226 EC.

25. In that letter, the Commission alleged that the Kingdom of Belgium had failed to observe Article 10 EC, first, by refusing since 1995 to finance the initial fitting-out of the European Schools located in its territory with furniture and teaching equipment, involving an amount of EUR 837 708.33 claimed in respect of the Brussels II and Brussels III European Schools, and second, by refusing since 1989 to pay an annual operating and equipment grant intended to cover the running costs of the European Schools established in its territory, the amount of which was still to be determined. In the view of the Commission, on the basis of the judgment in *Commission* v *Belgium* [7] the conduct of the Belgian authorities interfered with the system adopted for financing the Community and apportioning financial burdens between the Member States, in breach of Article 10 EC.

26. As it was not satisfied with the reply sent by the Kingdom of Belgium on 22 February 2008, on 27 June 2008 the Commission issued a reasoned opinion pursuant to the first paragraph of Article 226 EC.

27. In that reasoned opinion, the Commission took the view that, by refusing to cover the costs of furniture and teaching equipment, the Kingdom of Belgium had failed to fulfil its obligations under Article 10 EC and invited that Member State to take the necessary measures to comply with the reasoned opinion within two months of its receipt.

28. Since the Kingdom of Belgium failed to take the required measures within the deadline set, the Commission brought the present action by a document lodged at the Court Registry on 6 April 2009.

7 — Case C-6/89 [1990] ECR I-1595.

29. The Commission claims that the Court should:

— declare that, by refusing to bear the costs of furniture and teaching equipment for the European Schools, the Kingdom of Belgium has failed to fulfil its obligations under the Establishment Agreement, read in conjunction with Article 10 EC;

— order the Kingdom of Belgium to pay the costs.

30. The Kingdom of Belgium contends that the Court should:

— declare that it lacks jurisdiction to rule on the action;

— in the alternative, declare the action inadmissible;

— in the further alternative, declare the action unfounded;

— order the Commission to pay the costs.

IV — Analysis

31. As its principal contention, the Kingdom of Belgium submits that the Court has no jurisdiction to decide the present case; in the alternative, it claims that the action for failure to fulfil obligations is inadmissible.

32. I would point out from the outset that it appears to me that these two claims by the Kingdom of Belgium can be upheld as regards that part of the claimed failure to fulfil obligations that is based on infringement of the Establishment Agreement. On the other hand, as I shall have occasion to explain in what follows, I propose that the substance of the part of the claimed failure to fulfil obligations that is based on infringement of Article 10 EC be examined.

A — *Jurisdiction of the Court*

1. Arguments of the parties

33. As its principal contention, the Belgian Government disputes the jurisdiction of the Court to hear and determine questions relating to the Establishment Agreement. It takes the view that infringement proceedings under Article 226 EC are not legitimately brought unless the Commission establishes (i) the infringement of a provision of Community law, (ii) the infringement of an agreement to which the Community is a party, or (iii) the existence of a clause conferring jurisdiction.

34. In this case, the Belgian Government submits that a Community provision has not been infringed (no infringement of the provisions of the EC Treaty or of its annexes, or of secondary Community law), that the Establishment Agreement is not an agreement to which the Community is a party and that there is no clause which confers jurisdiction. In its view, the Establishment Agreement cannot be regarded as an act 'deriving from' the 1994 Convention (or the 1957 Convention), since the act by which the Kingdom of Belgium concludes such agreements draws its binding force solely from the sovereignty of the Belgian State.

35. The Commission rejects the position of the Belgian Government on two grounds.

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

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

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

39. The Commission observes that the Establishment Agreement was originally an act 'deriving from' the 1957 Convention and that as early as 1962 the High Authority of the European Coal and Steel Community (ECSC) was a voting member of the Board of Governors. The High Authority was therefore a Contracting Party to the Establishment Agreement. The Commission explains that it took the place of the ECSC High Authority on

the signature of the Merger Treaty of 8 April 1965 and that the purpose of the 1994 Convention was both to consolidate the *acquis* of the 1957 Convention and to strengthen the role of the European Communities as Contracting Parties. The Commission therefore concludes that, in the light of the fact that the Establishment Agreement was adopted on the basis of Article 28 of the 1957 Convention and that provision is likewise made for establishment agreements in the 1994 Convention, the Establishment Agreement forms part of the rights and obligations to which the Communities subscribed in 1994.

2. Assessment

40. I would observe first that, as is apparent inter alia from paragraph 35 of its application initiating proceedings and from paragraphs 12 to 14 of its reply, the Commission alleges (i) that the Kingdom of Belgium has infringed the Establishment Agreement, which is stated to have formed an integral part of Community law since the signature of the 1994 Convention from which that agreement is derived, and (ii) [8] that it has interfered with the system adopted for financing the Community and apportioning financial burdens between the Member States thereby infringing Article 10 EC, by its refusal to bear the costs relating to furniture and teaching equipment of the European Schools located on its territory since 13 December 1995 [9] as far as the financing of the initial fitting-out is concerned and since 1986 [10] as regards payment of the annual operating and equipment grant relating to furniture and teaching equipment for the European Schools.

41. Those two parts of the alleged failure to fulfil obligations are therefore framed independently, as indeed the Commission appears to concede in paragraph 12 of its reply, [11] even though the form of order sought in the application concerns an infringement of the Establishment Agreement 'read in conjunction with Article 10 EC'.

42. As is clear from its line of argument summarised above, the Kingdom of Belgium contends that the Court has no jurisdiction to rule on the infringement of the Establishment Agreement alleged by the Commission, since in its opinion that agreement is not among the provisions which are for the Court to review. Nevertheless, it also takes the view, in particular in paragraph 63 of its defence and the form of order sought, that the Court should declare that it has no jurisdiction to

8 — In paragraph 35 of its application, the Commission uses the word 'furthermore' to introduce the part of the alleged failure to fulfil obligations relating to the infringement of Article 10 EC.

9 — According to the reasoned opinion sent to the Kingdom of Belgium, the first unpaid debit note is dated 13 December 1995.

10 — See paragraphs 20 and 21 of the application.

11 — In this paragraph of its reply, the Commission takes the view that 'in any event, the Establishment Agreement undoubtedly forms part of Community law, even if considered independently of Article 10 EC. The Establishment Agreement must be regarded as being an act "deriving from" the 1994 Convention, which itself forms part of Community law'.

rule on 'this case', inevitably including with those words the second part of the alleged failure to fulfil obligations, which is based on the infringement of Article 10 EC.

43. However, the argument extending the plea of lack of jurisdiction to that second part of the alleged failure to fulfil obligations should, in my opinion, be rejected, since that part does in fact concern the infringement of a provision of Community law – Article 10 EC – in relation to which the Court enjoys jurisdiction.

44. On the other hand, it is my view that the jurisdiction of the Court to rule on the alleged infringement of the Establishment Agreement must be considered having regard to the following two key points, namely (i) the fact that the 1994 Convention came into force only on 1 October 2002 whereas, according to the Commission's pleadings, the alleged failure to fulfil obligations commenced in 1986 as far as the refusal to pay the annual grant is concerned and on 13 December 1995 in relation to the financing of the initial fitting-out and (ii) the fact that the Commission has brought an action before the Court based exclusively on the second paragraph of Article 226 EC and not, at least in part, on the basis of the arbitration clause laid down in Article 26 of the 1994 Convention.

45. On the first point, I am of the opinion that, for the reasons set out in what follows, the Court has *in any event* no jurisdiction to rule on the alleged infringement of the Establishment Agreement as far as the period prior to the entry into force of the 1994 Convention is concerned, that is to say up until 30 September 2002, the date on which sole jurisdiction was conferred on the Court to hear and decide disputes between the Contracting Parties concerning 'the interpretation and application' of that convention, pursuant to Article 26 of the convention.

46. In *Hurd*, [12] the Court held that it did not have jurisdiction to give a ruling on the interpretation of the 1957 Convention and the obligations arising under it for the Member States since, despite the fact that that convention was linked to the Community and the functioning of its institutions, it was an international agreement concluded by the Member States which did not form an integral part of Community law. [13] That assessment does not in my view have to be in any way restricted to the procedural context in *Hurd*, where the Court was asked to give a preliminary ruling, but likewise applies in the context of the proceedings provided for in Article 226 EC, the subject-matter of which can be only

12 — Case 44/84 [1986] ECR 29.
13 — Paragraphs 20 to 22.

a failure by a Member State to fulfil one of its obligations *under the EC Treaty*.

47. To my mind, the Court has no jurisdiction in relation to the Establishment Agreement *for the whole of the period prior to the entry into force of the 1994 Convention*, that is to say, in this case, for the period from 1986 to 30 September 2002.

48. As is stated in its preamble, that agreement was initially based on Article 28 of the 1957 Convention, which affords the Board of Governors the power to negotiate with the government of the Member State in which a school is established any *further* agreements [French: 'tout accord *complémentaire*'] for the purpose of ensuring that the European Schools operate in the best possible material and moral conditions. The rules in that agreement therefore had to be consistent with those laid down in the 1957 Convention.

49. The view taken by the Belgian Government is strangely ambiguous in that regard since in paragraph 22 of its defence it states that the Establishment Agreement was signed 'pursuant to the [1957] Convention', whereas in paragraph 20 of its rejoinder it attempts to deny that the agreement 'derives from' and is supplementary to the convention, claiming that the former does not have its legal basis in the latter. I find that assertion to be untenable for the reasons set out in the previous point of this Opinion. I would add that, if the 1957 Convention had not been replaced by the 1994 Convention but had quite simply been repealed, the Board of Governors, as a body established by the 1957 Convention, would automatically have been divested of any legal personality. The Establishment Agreement would therefore inevitably have been affected as a result, and on that basis it is reasonable to say that that agreement 'derives from' and is supplementary to the 1957 Convention.

50. In this connection, I also have some difficulty in following the Commission's argument which appears to suggest that, on account of the ECSC High Authority's participation in the Board of Governors from 1962, the Establishment Agreement is among the provisions which are to be reviewed by the Court.

51. In my opinion, the ECSC High Authority's participation in the Board of Governors in no way affects the legal arrangements under the Establishment Agreement. Neither the ECSC nor, later, the Communities were parties to the 1957 Convention. Furthermore, jurisdiction was not conferred on the Court by any provision of that convention. Consequently, as an act supplementary to that convention, the Establishment Agreement was likewise not among the provisions which are to be reviewed by the Court. Moreover, it is in my view a mistake to confuse the Board of Governors with the members which made up that board and on that basis take the view that the Establishment Agreement was concluded between the Kingdom of Belgium, of the one

part, and the other Member States at the time and the Communities, of the other part.

52. At this stage of the analysis, I am therefore of the opinion that the Court should declare that it does not have jurisdiction to rule on the part of the claim alleging failure to fulfil obligations which is based on infringement of the Establishment Agreement in respect of the period from 1986 to 30 September 2002.

53. As far as the period from the entry into force of the 1994 Convention is concerned, that is to say from 1 October 2002 onwards, I take the view that the Court does, *in principle*, have jurisdiction to decide such a dispute. However, such jurisdiction would derive not from the fact that the Establishment Agreement forms part of Community law, as the Commission seeks to assert in this case, but from the clause conferring jurisdiction laid down in Article 26 of the 1994 Convention, under which the Court has exclusive 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.

54. I would point out first that, under Article 34 of the 1994 Convention, to which the European Communities has acceded, that convention 'cancelled and replaced' the 1957 Convention and the reference to Article 28 of the 1957 Convention contained in the Establishment Agreement is to be understood as relating to the corresponding article of the 1994 Convention, namely Article 30. Also, pursuant to Article 33 of the 1994 Convention, that convention entered into force on the first day of the month following the deposit of instruments of ratification by all the Member States and of notification of its conclusion by the European Communities, that is to say on 1 October 2002.

55. From that date onwards, the Court therefore has jurisdiction, under Article 26 of the 1994 Convention, to rule on disputes between Contracting Parties relating to the interpretation and application of that convention, as indeed the Kingdom of Belgium concedes.

56. Next, I would make the further point that, as provided in Article 10 of the 1994 Convention, which replaced Article 9 of the 1957 Convention, the Board of Governors is to supervise the *implementation* [French: '*application*'] of the convention and, *for this purpose*, is to have the necessary decision-making powers in educational, budgetary and administrative matters and for the negotiation of the agreements referred to in Articles 28 to 30. The 1994 Convention is therefore implemented in particular by the conclusion of establishment agreements, which means as a result that the Court's power of review as to the application of the convention under Article 26 thereof must also cover the interpretation and performance of the Establishment Agreement.

57. That said, it should nevertheless be noted that this case has not been brought before the Court – not even in part – on the basis of the arbitration clause laid down in Article 26 of the 1994 Convention, but exclusively on the basis of the second paragraph of Article 226 EC, that is to say on the ground of the infringement of an obligation under the Treaty.

58. Indeed, as is clear from its pleadings, the Commission takes the view that, since the accession of the European Communities to the 1994 Convention, that is to say since 21 June 1994, both that convention and the Establishment Agreement as an act 'deriving from' it have been an integral part of Community law.

59. I am unconvinced by that approach.

60. First, as I have set out above, the 1994 Convention entered into force only on 1 October 2002. Consequently, it might be relied upon against the 12 Member States signatories thereto, including the Kingdom of Belgium, only with effect from that date and not from 1994.

61. Second, the argument advanced by the Commission seeks to ignore the principle of independent legal remedies. Irrespective of the issues linked to the Establishment Agreement, the fact that, as the Commission asserts, the 1994 Convention may itself be an integral part of Community law does not appear to me to be a sufficient ground on which to disapply the arbitration clause and to allow the Commission to choose which of the two means of judicial redress – that is to say that laid down in Article 26 of the 1994 Convention or that provided for in the second paragraph of Article 226 EC – it considers to be the most appropriate. I therefore fail to see how, since 1 October 2002, on the pretext that the 1994 Convention is part of Community law, the Commission could properly base, for example, an action alleging the infringement of a provision of that convention by a Member State not on Article 26 of the convention but on the second paragraph of Article 226 EC. [14] To my mind, the same applies to the alleged infringement of an act relating to the implementation of the 1994 Convention, such as in this case the Establishment Agreement, which is directly linked to the 1994 Convention.

62. For all of these reasons, I take the view that the Court does not have jurisdiction to rule on the first part of the claim under the second paragraph of Article 226 EC alleging failure to fulfil obligations, relating to the alleged infringement of the Establishment Agreement.

14 — In so far as it is relevant, I would moreover point out that the action in Case C-545/09 *Commission* v *United Kingdom*, pending before the Court, in which the Commission claims that the United Kingdom of Great Britain and Northern Ireland has failed to comply with Article 12 of the 1994 Convention, was brought on the basis of Article 26 of that convention.

63. On the other hand, I do propose that the Court should declare that it has jurisdiction to rule on this action in so far as the Commission claims that the Kingdom of Belgium has failed to fulfil its obligations under Article 10 EC.

B — *Admissibility of the action*

1. Arguments of the parties

64. The Belgian Government submits, in the alternative, that the action is inadmissible, first, because of the lack of consistency between the complaints raised in the reasoned opinion and those contained in the application and, secondly, on account of the equivocal nature of Article 10 EC as a legal basis.

65. As regards its first plea of inadmissibility, the Kingdom of Belgium notes the significance of the pre-litigation stage, which is intended to define the subject-matter of the dispute and afford the Member State the opportunity, on the one hand, to comply with its obligations under Community law and, on the other hand, to avail itself of its right to defend itself against the complaints made by the Commission. It observes that, in this case, the lack of consistency between the reasoned opinion and the application is specifically due to the choice of legal basis. The Kingdom of Belgium submits that, whereas in the operative part of the reasoned opinion the Commission makes reference only to Article 10 EC, relating to the duty of genuine cooperation, in its action it has decided, without providing any explanation whatsoever, to combine that duty with infringement of the Establishment Agreement. The action must, however, be based on the same grounds and pleas in law as the reasoned opinion. The Kingdom of Belgium goes on to state that the reference to Article 10 EC in the reasoned opinion is made in overly vague terms.

66. In the view of the Belgian Government, there is nothing of relevance in *Commission* v *Denmark*, [15] to which the Commission refers in its pleadings and in which the Court held admissible two complaints contained in one of the actions for failure to fulfil obligations brought against Denmark, relating to compliance with control measures for fishing activities in the 1988 fishing year. It states that in paragraph 36 of that judgment the Court found that, although the operative part of the reasoned opinion did not contain any reference to the relevant provision of the applicable regulation, the reasoned opinion nevertheless rejected the Danish Government's argument set out by it in its reply to the letter of formal notice that it had complied with that provision. Thus, in the view of the Kingdom of Belgium, although the case-law of the Court does not require that the arguments advanced in the various procedural documents be identical word for word, it

15 — Judgment of 14 July 2005 in Joined Cases C-259/03, C-260/03 and C-343/03.

does however demand substantial similarity between those documents. The Kingdom of Belgium concludes that, whilst the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application do not have to be exactly the same, they are not even roughly the same in this case.

67. As regards the second objection to the admissibility of the action, based on the equivocal nature of Article 10 EC as a legal basis, the Belgian Government submits that, in this case, the Commission merely makes reference to Article 10 EC, which it proposes to combine with the Establishment Agreement without providing any evidence whatsoever capable of supporting such a combination. The Commission should first of all have clearly identified the Community obligation at issue by providing relevant evidence and arguments and then gone on to establish the existence of an infringement. The Belgian Government takes the view that, in this case, no such proof was provided and that the application contains mere presumptions and allegations unsupported by evidence.

68. In addition, the Kingdom of Belgium notes that the Commission, in paragraph 35 of its application, refers to two separate infringements. On the one hand, the Commission regards non-compliance with the Establishment Agreement as an infringement of Community law and, on the other hand, it submits that the conduct of the Belgian authorities interferes with the system adopted for financing the Community and apportioning financial burdens between the Member States, thereby infringing Article 10 EC. The defendant Member State observes, however, that the Commission makes no mention of such infringements in the form of order sought in the application, but combines the separate infringements alleged in order to conclude that, by refusing to bear the costs of furniture and teaching equipment for the European Schools, the Kingdom of Belgium has failed to fulfil its obligations under the Establishment Agreement, read in conjunction with Article 10 EC.

69. Furthermore, the Belgian Government observes that the Commission sets out for the first time in its reply a causal link between the infringement of the Establishment Agreement and the infringement of Article 10 EC. In the Belgian Government's view, these evasive assertions demonstrate a lack of consistency and clarity.

70. With regard to the alleged lack of consistency between the reasoned opinion and the application, the Commission states that, although it is true that, read in isolation, the operative part of the reasoned opinion refers exclusively to an infringement of Article 10 EC, the mere fact that the operative part of the reasoned opinion does not refer to all the provisions in respect of which,

by its application, the Commission is seeking a declaration of failure to fulfil obligations is not, however, sufficient to establish an infringement of the rights of the defence if the complaint appears clearly in the text of the reasoned opinion. It submits that, in accordance with the case-law of the Court, the complaints which the letter of formal notice sets out, the operative part of the reasoned opinion and the form of order sought in the application do not have to be exactly the same and its initial complaints may be further explained provided the subject-matter of the proceedings is not altered. Furthermore, even if the Court were to take the view that the Commission should not have made reference to the Establishment Agreement in the form of order sought in its application, the only effect of that conclusion would be to render the action inadmissible in part.

71. As for the allegedly equivocal nature of the legal basis, the Commission takes the view that its application indicates with the necessary degree of precision the provisions which, in its view, have been infringed by the Kingdom of Belgium. First, paragraph 35 of its application clearly states that the conduct of the Belgian authorities entails an infringement both of the Establishment Agreement and of Article 10 EC and, second, such a combined infringement of the principle of genuine cooperation and of another provision of Community law has been found by the Court on several occasions.

72. The Commission adds that, following the Community's accession to the 1994 Convention, the reference to Article 10 EC is no longer strictly necessary and that, where in an action for failure to fulfil obligations it pleads both infringement of that article and infringement of a more specific Community provision, the action is admissible even if the Court does not rule on the infringement of that article as a separate failure to fulfil obligations and rules solely on the infringement of the more specific Community provision. It further adds that it can even happen sometimes that the Commission seeks a declaration that Article 10 EC and another provision of Community law have been infringed and the Court upholds the action without mentioning Article 10 EC, either in the grounds or in the operative part of the judgment, with the result that a superfluous reference to Article 10 EC in the action is clearly of no consequence to its admissibility.

73. On the burden of proof, the Commission states merely that what separates the parties to these proceedings is not the nature of the conduct of the Belgian authorities but the interpretation of the provisions governing that conduct with a view to establishing the scope of the obligations on the Kingdom of Belgium.

2. Assessment

74. As I have already stated in point 40 of this Opinion, it is clear from the application initiating proceedings that the alleged failure to fulfil obligations consists of two separate parts. The first is based on infringement of the Establishment Agreement, whereas the second has its basis in infringement of Article 10 EC.

75. The pleas of inadmissibility raised by the Kingdom of Belgium relate to the two parts of the action, in respect of which, in my opinion, two different answers should be given.

(a) Admissibility of the first part of the claim alleging failure to fulfil obligations, relating to infringement of the Establishment Agreement

76. As far as the first part of the claim alleging failure to fulfil obligations is concerned, as I have set out above I take the view that the Court does not have jurisdiction to hear and decide on that part.

77. In any event, and in particular if the Court were not to concur with the view I have expressed in the foregoing points of this Opinion, I invite the Court to declare this part of the claim inadmissible since the complaint based on infringement of the Establishment Agreement has extended the subject-matter of the proceedings as defined during the pre-litigation procedure.

78. In that regard, it should be noted that, although extensive reference is made to the Establishment Agreement both in the letter of formal notice and in the reasoned opinion that were sent to the Kingdom of Belgium, those two documents however merely allege that that Member State has infringed Article 10 EC – a complaint corresponding solely to the second part of the claim on which the Commission's application is based – in so far as the conduct of the Belgian authorities interferes with the system adopted for financing the Community and apportioning financial burdens between the Member States.

79. In addition, even assuming that certain passages of the documents from the pre-litigation procedure may tend to suggest that the Commission intended to determine that the Establishment Agreement had been infringed, that breach was clearly never regarded in the course of that procedure as a separate breach of Community law but was classified as a precondition for the finding of a failure to comply with Article 10 EC inasmuch as it had negative consequences for the Community budget and the apportionment of the financial burdens between Member States.

80. It is settled case-law that the subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision and, consequently, the reasoned opinion and the application must be founded on identical complaints such that, although the complaints set out in the operative part of the reasoned opinion and the form of order sought in the application need not be absolutely the same, the subject-matter of the proceedings as defined in the reasoned opinion is neither extended nor altered. [16]

81. This requirement, which applies to the Commission, addresses the twofold concern that the pre-litigation procedure, first, is intended to give the Member State concerned an opportunity to comply with its obligations under Community law and, second, must also enable the Member State to avail itself of its right to defend itself against the complaints formulated by the Commission. [17]

82. Accordingly, since in this case a complaint based on the infringement *per se* of the Establishment Agreement cannot be inferred from the pre-litigation procedure, in particular from the reasoned opinion, the first part of the claim alleging failure to fulfil obligations must, in my view, be declared inadmissible at the stage of proceedings before the Court. [18]

83. That assessment is not invalidated by *Commission* v *Denmark* referred to by the Commission, in which two complaints contained in one of the actions for failure to fulfil obligations brought against Denmark, relating to compliance with control measures for fishing activities within a fishing year, were held to be admissible.

84. First, it is apparent from paragraph 35 of that judgment that the judgment is clearly an integral part of the line of case-law to which I have just referred concerning the requirement that the complaints set out during the pre-litigation stage and those put forward in the action before the Court must be the same, and is not part of any parallel line of case-law. Consequently, the fact that in *Commission* v *Denmark* the Court held the relevant complaints in the action for failure to fulfil obligations to be admissible appears to be explained solely by the particular facts of that case, which in my view cannot be regarded as setting a precedent for this case.

85. Secondly, it is indeed clear, inter alia from paragraphs 28, 30 and 36 of that judgment, that the complaints at issue were held to be admissible on the ground that, although the

16 — See, to that effect, Case C-484/04 *Commission* v *United Kingdom* [2006] ECR I-7471, paragraph 25 and the case-law cited.

17 — See, to that effect, *Commission* v *United Kingdom*, paragraph 24 and the case-law cited.

18 — See, to that effect, Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 11.

operative part of the reasoned opinion issued against the Kingdom of Denmark contained no reference to a specific article of one of the Community regulations relevant to that case, the Commission nevertheless rejected in that reasoned opinion the assertion that the defendant Member State had complied with the obligations under that article, obligations which had been raised against it in the letter of formal notice and which it presumed were abandoned at the reasoned opinion stage.

86. However, in this case, as I have already highlighted, the Commission at no point during the two stages of the pre-litigation procedure alleged a failure to fulfil obligations for the purposes of the second paragraph of Article 226 EC that was constituted by an infringement of the Establishment Agreement.

87. Accordingly, the omission in the pre-litigation procedure conducted against the Kingdom of Belgium of any complaint relating to the separate infringement of the Establishment Agreement is quite different in nature from the issue raised in *Commission* v *Denmark*, since the subject-matter of the present proceedings, as defined during the pre-litigation stage, is restricted to a failure to observe Article 10 EC.

88. I am therefore of the opinion that the first part of the claim alleging failure to fulfil obligations should be dismissed as inadmissible in so far as the Court does not first find that it does not have jurisdiction to dispose of it.

(b) Admissibility of the second part of the claim alleging failure to fulfil obligations, relating to infringement of Article 10 EC

89. I would draw attention to the fact that the Kingdom of Belgium asserts that the action brought is equivocal inasmuch as it is in part based on Article 10 EC and/or that provision read in conjunction with the Establishment Agreement.

90. In the light of my proposal that the first part of the action should be dismissed as inadmissible, the assertion relating to the equivocal nature of the action can therefore now only concern the second part of the alleged failure to fulfil obligations.

91. Thus defined, it does not appear to me that the plea of inadmissibility raised by the Kingdom of Belgium should be successful.

92. It is admittedly true that the action brought by the Commission is not a model of clarity as far as the relationships between the Establishment Agreement and Article 10 EC are concerned. In particular, as I have highlighted in points 40 and 41 of this Opinion, although the form of order sought in the application makes reference to an infringement of the Establishment Agreement and Article 10 EC read in conjunction, the grounds of that application rather point clearly to separate infringements. In its reply, the Commission even appears to take the view that the alleged

infringements overlap in the sense that, in its submission, a complaint based on the infringement of Article 10 EC has no longer been strictly necessary since the signature of the 1994 Convention.

93. Despite such regrettable imprecision at the stage of the proceedings before the Court, the fact remains that, consistently throughout both the pre-litigation stage and the stage before the Court in these proceedings, the subject-matter of the alleged failure to fulfil obligations has been, if only in part as regards that second stage, the infringement of Article 10 EC.

94. However, it is necessary to point out the partial lack of consistency between the pre-litigation procedure and the action brought as regards the duration of the alleged infringement of Article 10 EC in so far as that infringement relates to the Belgian authorities' refusal to award the annual operating and equipment grant. As far as this complaint is concerned, whilst at the stage of the letter of formal notice and reasoned opinion the Commission alleged an infringement of Article 10 EC only after the devolution of education in Belgium to the communities, that is to say from 1989 onwards, [19] the application states that that article was already infringed three years earlier, namely in 1986. [20] Such an extension of the duration of the alleged failure to fulfil obligations at the stage of the application initiating proceedings cannot be accepted and is therefore inadmissible.

95. In these circumstances, the second part of the claim alleging failure to fulfil obligations must be regarded as being admissible [21] in so far as it concerns, first, the refusal of the Belgian authorities since 1989 to award the annual operating and equipment grant to the European Schools located in the territory of the Kingdom of Belgium for the maintenance and replacement of their furniture and teaching equipment and, second, the refusal of the Belgian authorities to finance the initial fitting-out of those schools with furniture and teaching equipment since 13 December 1995.

96. In the light of that analysis, I suggest that the Court should rule exclusively on the substance of this part of the claim as I have just defined it.

19 — See the letter of formal notice, p. 7.

20 — See paragraphs 20 and 21 of the application.

21 — See, in this regard, Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 15, which states that, 'at this stage of the procedure, which is concerned with the question of admissibility, it is sufficient for the Commission to rely expressly on an infringement of the provisions of Community law in support of its application. The question whether Community law has actually been infringed falls to be examined in connection with the substance of the case'.

C — *Substance of the second part of the claim alleging failure to fulfil obligations, which is based on the infringement of Article 10 EC*

1. Arguments of the parties

97. First, the Commission states that the Kingdom of Belgium financed the fitting-out of the European Schools in Uccle (Brussels I), in Mol and in Woluwe (Brussels II) and that the Kingdom of Belgium paid an annual grant of BEF 500 000 for those schools until 1985. It observes that thereafter the Kingdom of Belgium ceased to make the annual payments.

98. The Commission also observes that, since 1995, the Kingdom of Belgium likewise has not paid the invoices sent to it by the European Schools for expenditure on furniture and teaching equipment incurred as a result of the extension of the Brussels II European School in 1995 to 1997 and the opening of the Brussels III European School in 1999. It states that, consequently, that expenditure was recorded in the budget of those schools and has therefore temporarily been covered by the contribution from the Community budget paid by the Commission to the budget of the European Schools, in accordance with Article 25 of the 1994 Convention.

99. Next, in the view of the Commission, the financial obligation on the Belgian authorities clearly follows from Article 1 of the Establishment Agreement and the harm caused to the Community budget arising from their refusal to honour their commitments constitutes an infringement of Article 10 EC. Relying on *Hurd* and Case C-6/89 *Commission* v *Belgium*, in which the Court held that the functioning of the Community institutions could be impeded in a manner contrary to Article 10 EC by measures taken within the framework of the implementation of the 1957 Convention, the Commission takes the view that the conduct of the Belgian authorities interferes with the system adopted for financing the Community and apportioning financial burdens between the Member States, thereby infringing that article.

100. The Commission also explains, in essence, that the purport of the obligation laid down in Article 1 of the Establishment Agreement was not altered by the Karlsruhe decision. In particular, it submits that it is made explicitly clear in point 12 of the minutes of the meeting of the Board of Governors that the Board of Governors merely established a general policy framework for future agreements. It also observes that the Board of Governors would not even have been competent to amend, by a mere unilateral decision, the content of the Establishment Agreement, on account of the principle of the hierarchy of rules and of Article 28 of the 1957 Convention under which the material operating conditions of the schools in the State in which

they are established are to be specified in an establishment agreement.

101. The Commission adds that, whilst under Article 1 of the Establishment Agreement the provision of furniture and teaching equipment for the European Schools is to be financed 'in accordance with the criteria applied to [Belgian] establishments', the study of Belgian law commissioned by it shows that the costs of both the initial fitting-out of, and the annual operating grant paid to, schools belonging to the official network of the French, Flemish and German-speaking Communities are borne by the Belgian public authorities. Thus, since the latter schools are to be the point of reference to determine the financial responsibility for the furniture and teaching equipment of the European Schools established in Belgium, in accordance with the second paragraph of Article 6 of the 1994 Convention the Kingdom of Belgium cannot rely on domestic factors, such as the devolution of education to the communities, to oppose such financial responsibility.

102. Finally, having recalled that on several occasions and until very recently the Belgian authorities recognised their debts, the Commission submits that the obligations on the Kingdom of Belgium must be interpreted in the light of the purpose of the Establishment Agreement and the principle of good faith which, in accordance with case-law, forms an integral part of Article 10 EC and of general international law. [22] In this regard, the Commission states that, since the purpose of the Establishment Agreement was, as set out in its preamble, to take the appropriate measures to ensure the best possible operating conditions for the European Schools, when the decisions on the main seat of the Council and the Commission were adopted the Kingdom of Belgium guaranteed, by means of a series of acts, the material conditions of the European Schools and, by its conduct, led the institutions and the other Member States to understand that it acknowledged and approved its financial commitments to those schools. The Kingdom of Belgium therefore led the institutions and the other Member States to expect that it would assume its financial obligations towards the European Schools established in its territory.

103. The Kingdom of Belgium disputes the alleged failure to fulfil obligations under Article 10 EC.

104. Its principal submission is that the action is unfounded because the legal basis of the Commission's action is incorrect.

105. In its view, Article 10 EC cannot be applied *per se* but rather requires there to be an obligation which governs its application. The

22 — Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 52.

Kingdom of Belgium is of the opinion that the first paragraph of Article 10 EC provides, in essence, that the Member States are to take all necessary measures to carry out their obligations arising out of the Treaty or resulting from action taken by the institutions. However, in its reliance on that article, the Commission has not in any way first identified the Community obligation supporting such reliance.

106. Moreover, in the view of the Kingdom of Belgium, *Hurd* and Case C-6/89 *Commission* v *Belgium*, on which the Commission relies, change nothing in this regard. It follows from the first judgment that the duties on the Member States under Article 10 EC may not be applied to a convention between the Member States (such as the 1957 Convention) or a convention concluded essentially (but not exclusively) by the Member States (such as the 1994 Convention). In addition, the Kingdom of Belgium takes the view that, unlike in the case which gave rise to the judgment in *Hurd*, the Kingdom of Belgium's refusal in this case to finance certain costs incurred by the European Schools does not give rise to transfers of funds to the detriment of the European Community, but at most affects the operation of those schools. Similarly, unlike this case, Case C-6/89 *Commission* v *Belgium* concerned a national measure which resulted in the national salary paid to the teaching staff at the European Schools being reduced, leading to an increase in the share of financing for which the Community was responsible.

107. The Kingdom of Belgium takes the view that in this case the Commission has failed to prove that it would have had to pay invoices as a consequence of the Kingdom of Belgium's alleged failure to fulfil obligations. In the context of proceedings for failure to fulfil obligations, it is for the Commission to prove all the facts on which it bases its action. Moreover, the Belgian Government is of the opinion that it would not be enough for the Commission to establish that the contribution from the Community to the functioning of the European Schools has increased, but rather that contribution would additionally have to relate to items of movable property which have become fixtures, since the Karlsruhe decision is concerned only with items of this type.

108. In the alternative, the Kingdom of Belgium submits that the action for failure to fulfil obligations finds no support in a correct interpretation of the Establishment Agreement, which must moreover be read in the light of the Karlsruhe decision and Belgian law on education.

109. Essentially, the Kingdom of Belgium contends first that the Establishment Agreement applies only to Schools in existence or envisaged at the time that agreement was concluded and to their reasonable foreseeable development, and does not in any event apply to the financing of furniture and teaching

equipment when the Brussels II European School was extended in 1995 to 1997 and the Brussels III European School was opened in 1999. In this connection, the Kingdom of Belgium submits that none of the actions or conduct referred to by the Commission could have given rise to a legitimate expectation on the part of the institutions and the other Member States that the Kingdom of Belgium would provide financing to the European Schools extending far beyond the commitments laid down in the Establishment Agreement.

110. Secondly, the Belgian Government asserts that the Establishment Agreement must be interpreted in the light of the Karlsruhe decision, which in no way merely draws up a policy framework for future establishment agreements but on the contrary is intended to have immediate legal effects. Furthermore, the Karlsuhe decision is a subsequent agreement reached between the parties regarding the Establishment Agreement, which must be taken into account, in accordance with the Vienna Convention on the Law of Treaties of 23 May 1969,[23] when interpreting and applying the Establishment Agreement. For this reason, having regard to the Karlsruhe decision, the furniture which the Kingdom of Belgium undertakes to provide, pursuant to Article 1 of the Establishment Agreement, can include only furniture which becomes fixtures.

23 — *United Nations Treaty Series*, Volume 1155, p. 331.

111. Thirdly and finally, the Kingdom of Belgium takes the view that the rules which apply to the financing of Belgian schools likewise cannot support the arguments advanced by the Commission. It points out that, following the devolution of education to the communities, the applicable criteria to determine the scope of the financing of the European Schools that is in dispute are those laid down by the French, Flemish and German-speaking Communities in their own legislation. It adds that, although two types of official schools exist in each community, namely those organised by the communities themselves and those subsidised by those communities, the European Schools must be regarded as belonging exclusively to that second category from the perspective of Belgian law.

112. In any event, although the financing rules applicable to the two types of schools are different, neither set of rules permits any financing of the initial fitting-out of, or the award of an annual operating grant to, the European Schools.

113. According to the Kingdom of Belgium, under the legislation of the different communities, only items of property which are immovable by nature or become fixtures are to be financed as part of the initial fitting-out of schools. The costs of furniture and teaching equipment are certainly not of that nature. Nor are the costs of a school's initial fitting-out covered by annual financing of the

school's operating expenses from the year of its establishment, in particular because Belgian secondary schools may receive grants only after they have been in operation for one year and on the basis of a favourable opinion from the inspection services.

whereas enrolment fees charged to the pupils of the European Schools exceed the authorised statutory limits, a fact which excludes them from grant entitlement.

2. Assessment

115. Under the first sentence of the first paragraph of Article 10 EC, Member States are to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions and, under the second sentence of that provision, they are to facilitate the achievement of the Community's tasks. The second paragraph of Article 10 EC provides that Member States are to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

114. With regard to the annual operating grant, the Kingdom of Belgium observes that, although under Belgian law subsidised establishments are entitled to an annual grant, that grant is a general, flat-rate grant, covering the costs associated with the operation of the establishment, its equipment and the free distribution of school textbooks and supplies, which corresponds to a set amount per duly enrolled pupil. This feature of the system precludes full financial responsibility for actual costs claimed merely on the basis of invoices. The Belgian Government states that, although the award of the annual grant seeks to achieve the twofold objective of free access to education and equality, that grant remains subject to compliance with various legal conditions (regular inspections and checks, observance of rules governing the organisation of studies, the regulations applicable to staff and language laws) and that, in the event of non-compliance, schools cannot claim the grant. In addition, as far as such a grant is concerned the costs are strictly limited,

116. The Court has inferred from a reading of the second sentence of the first paragraph of Article 10 EC in conjunction with the second paragraph of that provision a duty of genuine cooperation of general application on the part of, in particular, the Member States. [24] The Court has also held on several occasions that the obligation arising from the

24 — See, inter alia, to that effect Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraph 37; *Hurd*, paragraph 38; Case C-266/03 *Commission* v *Luxembourg* [2005] ECR I-4805, paragraphs 57 and 58; Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraphs 63 and 64; and Case C-246/07 *Commission* v *Sweden* [2010] ECR I-3317, paragraphs 69 to 71.

provisions of Article 10 EC cited above likewise includes the duty not to adopt measures which are likely to impede the functioning of the Community institutions. [25]

117. Consequently, the Kingdom of Belgium's particularly simplistic reading of the scope of Article 10 EC, which is limited to the first sentence of its first paragraph, to the effect that that article requires only that Member States take all necessary measures to carry out their obligations arising from the Treaty must clearly be rejected. That approach ignores the fact that, even in the exercise of their retained or residual competences, Member States are to refrain from impeding both the competences of the Community and the functioning of the Community institutions. [26]

118. To my mind, this is precisely the object of a duty of genuine cooperation on the part of the Member States, as expressed in Article 10 EC, namely that it prohibits them from prejudicing, through the exercise of their own competences, the effectiveness of the Community's competences, including the functioning of its institutions. [27] Moreover, in the present case, the second part of the claim alleging failure to fulfil obligations is based on Article 10 EC and not on a particular paragraph of that article.

119. In *Hurd* and Case C-6/89 *Commission* v *Belgium*, which form part of the line of caselaw described in point 116 of this Opinion, the Court held that the unilateral conduct of a Member State which, by affecting the salaries of the teaching staff at the European Schools, interfered with or was capable of interfering with the system adopted for financing the Community and apportioning financial burdens between the Member States constituted an infringement of the duty of genuine cooperation expressed in Article 5 of the EEC Treaty (which became Article 5 of the EC Treaty, which itself became Article 10 EC), having regard to the financial mechanism laid down in the regulations for members of the teaching staff of those schools, under which, in essence, the burden not borne by the Member States falls to the Community budget.

120. Since the relevance of those judgments to the resolution of the present case is contested by the Kingdom of Belgium, they should be examined more closely. [28]

25 — See Case 208/80 *Bruce of Donington* [1981] ECR 2205, paragraph 14; *Luxembourg* v *Parliament*, paragraph 37; *Hurd*, paragraph 39; and Case C-333/88 *Tither* [1990] ECR I-1133, paragraph 16.

26 — Accordingly, in *Commission* v *Luxembourg*, paragraph 58, *Commission* v *Germany*, paragraph 64, and *Commission* v *Sweden*, paragraph 71, the Court held that the duty of genuine cooperation expressed in Article 10 EC does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries. In *Commission* v *Sweden*, the Court rejected the argument advanced by the defendant Member State that the duty of genuine cooperation is limited in scope in areas in which competence is shared between the Community and the Member States.

27 — See, to that effect, Blanquet, M., *L'article 5 du traité CEE*, LGDJ, Paris, 1994, p. 312.

28 — It should be noted that Case C-6/89 *Commission* v *Belgium* has not been published in full in the ECR.

121. In the first case, Mr Hurd, a teacher of British nationality seconded to the Culham European School located in the United Kingdom, was in dispute with the United Kingdom tax authorities regarding tax assessments which related to the sums paid to him by the European School as salary supplements, referred to as 'European supplements'. [29] Pursuant to a decision of the Board of Governors adopted in 1957, those supplements were to be exempt from all tax. In the United Kingdom, only the European supplements paid by the Culham School to members of the teaching staff who were not British nationals were in fact exempted from income tax. The dispute between Mr Hurd and the United Kingdom tax authorities before the national court therefore raised the question of whether the income tax claimed from him in relation to the payment of the European supplements was compatible with Community law, in particular Article 3 of the Act concerning the conditions of accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland [30] ('the Act of Accession') and Articles 5 and 7 of the EEC Treaty.

122. First, the Court was asked about its jurisdiction to interpret, in preliminary rulings, Article 3 of the Act of Accession, as well as 'all other agreements concluded by the original Member States relating to the functioning of the Communities or connected with their activities' and the 'declarations or resolutions … or other positions … concerning the European Communities adopted by common agreement of the Member States'; those words are used in that article and appear to encompass, first, the 1957 Convention and, second, the decision of the Board of Governors of 1957 on the European supplements.

123. Whilst the Court accepted that it had jurisdiction to interpret Article 3 of the Act of Accession, as previously mentioned in point 46 of this Opinion it declined all jurisdiction to interpret the 1957 Convention and the instruments, measures and decisions of organs of the European Schools adopted on that basis, since they did not fall within any of the categories of measures covered by Article 177 of the EEC Treaty (which became Article 177 of the EC Treaty, which itself became Article 234 EC). [31] In particular, the Court stated that it had no jurisdiction to define the obligations arising from those measures for the Member States. [32]

124. Secondly, the Court was called upon to give a ruling on the question of whether a Member State had to exempt from domestic taxation the European supplements of the members of the teaching staff at the European Schools located on its territory

29 — These supplements corresponded to the difference between the national salary and a standard salary established by the regulations for members of the teaching staff on the basis of the Staff Regulations of Officials of the European Communities.

30 — OJ, English Special Edition 1972 (27 March).

31 — *Hurd*, paragraph 20.

32 — Paragraph 22.

who were nationals of that Member State, a question which concerned in particular the scope of the obligation contained in Article 5 of the EEC Treaty.

125. In paragraph 36 of its judgment, the Court declares that the 1957 Convention and the 1962 Protocol are to be viewed in the context of a whole series of agreements, decisions and other acts by which the Member States collaborate and coordinate their activities so as to contribute to the proper functioning of the Community institutions and to facilitate the achievement of the tasks of the institutions. However, the Court qualifies this by finding that such cooperation and the rules relating thereto do not have their legal basis in the Treaties establishing the European Communities and are not part of the law created by the Communities and derived from the Treaties. [33] Consequently, the Court holds that the duties of genuine cooperation and assistance expressed in Article 5 of the EEC Treaty, 'which are derived from the Treaties, cannot be applied to agreements between the Member States which lie outside that framework, such as for example the Statute of the European School.' [34]

126. However, the Court moderates that conclusion in part by stating that '[t]he position would be different if the implementation of a provision of the Treaties or of secondary Community law or *the functioning of the Community institutions* were impeded by *a measure taken to implement such an agreement* concluded between the Member States outside the scope of the Treaties. In that event, the measure in question could be regarded as contrary to the obligations arising under the second paragraph of Article 5 of the EEC Treaty'. [35]

127. When the Court comes to the specific examination of such a situation, it points out first of all that the result of the mechanism provided for in the regulations for members of the teaching staff of the European Schools is that, if a Member State decides to subject the European supplements to domestic taxation, the school concerned must refund to the teachers the amount of that tax by means of a differential allowance, which may itself be taxed. [36] The Court goes on to observe that the financial burden of that mechanism falls entirely and directly on the Community budget since the Community must pay for the difference between, on the one hand, the European School's own income and the national salaries of the teachers and, on the other hand, the total budget of the European School. [37] It ultimately takes the view that if the attitude of the United Kingdom tax authorities in Mr Hurd's case were adopted generally the result would be an effective transfer of funds from the Community budget to the national budget, and the financial consequences would be directly detrimental to the Community. In

33 — Paragraph 37.
34 — Paragraph 38.
35 — Paragraph 39 (emphasis added).
36 — Paragraph 41.
37 — Paragraph 42.

that way a Member State could unilaterally interfere with the system adopted for financing the Community and apportioning financial burdens between the Member States.[38] The Court therefore draws the conclusion that such conduct is contrary to 'the duty of genuine cooperation and assistance which Member States owe the Community and which finds expression in the obligation laid down in Article 5 of the [EEC] Treaty to facilitate the achievement of the Community's tasks and to refrain from jeopardising the attainment of the objectives of the Treaty'.[39]

128. Largely taking as a basis the line of reasoning developed in *Hurd*, the Court followed an identical approach in Case C-6/89 *Commission* v *Belgium*, in relation to a slightly different set of facts. In that case, the Commission claimed that the Kingdom of Belgium had infringed Article 5 of the EEC Treaty by adopting a royal decree under which the secondment pay or salary allowance granted to Belgian teaching staff seconded to the European Schools was reduced by 50 %, thus giving rise to an additional burden on the Community budget having regard to the financial compensation mechanism laid down in the regulations for members of the teaching staff of the European Schools.[40]

129. It should be pointed out that the Kingdom of Belgium did not dispute that it had in fact failed to fulfil obligations as claimed, but merely stated before the Court that education in Belgium now fell within the competence of the three linguistic communities, meaning that the royal decree at issue could be amended or repealed only following concerted action by the competent bodies, in particular an agreement on apportioning the financial burdens.

130. Having recalled paragraph 36 of *Hurd*, the content of which is set out in point 125 of this Opinion, the Court held that 'it must be acknowledged … that the unilateral decision of a Member State to reduce the national salary paid to teaching staff seconded to the European Schools entails a corresponding increase in the Communities' share of their financing. For that reason, such a decision interferes with the system adopted for financing the Community and apportioning financial burdens among the Member States'.[41] Just as in paragraph 45 of *Hurd*, the Court stated

38 — Paragraph 44.

39 — Paragraph 45.

40 — However, the subject-matter of the alleged failure to fulfil obligations was restricted in the course of the proceedings to exclude the European School established in Munich (Germany), since the Commission explained that the Community was not involved in the financing of that school.

41 — Case C-6/89 *Commission* v *Belgium*, paragraph 13.

that such conduct is contrary to the duty of genuine cooperation and assistance which Member States owe and which finds expression in the obligation laid down in Article 5 of the EEC Treaty. [42] The Court went on to reject the Kingdom of Belgium's argument based on the devolution of education in Belgium to the communities on the ground that a Member State cannot plead provisions, practices or situations in its domestic legal system to justify non-compliance with obligations arising under Community law. [43] It therefore held that Article 5 of the EEC Treaty had been infringed.

131. In the present case, with the exception of somewhat general submissions as to whether or not those two judgments are relevant to the resolution of the dispute, the parties have remained strangely silent throughout the pre-litigation procedure and the proceedings before the Court on what I consider to be two fundamental matters contained in the grounds of the two judgments, which, in my view, have consequences for this case.

132. Those matters relate, first, to the scope of Article 10 EC according to whether the measure at issue falls within the framework of the Treaty (or of Community law more broadly) or outside that framework, on the basis of the distinction made by the Court in paragraphs 38 and 39 of *Hurd*, and, second but in connection therewith, to the unilateral nature of the measure at issue, which was referred to in the two judgments.

133. I would point out that, although in paragraph 38 of *Hurd* the Court stated in essence that the duty of genuine cooperation, as expressed inter alia in Article 5 of the EEC Treaty, cannot be applied to agreements between the Member States outside the framework of the Treaties, such as for example the Statute of the European School, it did however find in paragraph 39 of that judgment that the duty of genuine cooperation is capable of applying to 'a measure taken to implement such an agreement [French: "*une mesure prise dans le cadre de la mise en œuvre d'une telle convention*", that is to say "a measure taken within the framework/context of implementation of such an agreement"] concluded between the Member States outside the scope of the Treaties'.

134. Reference to '*une mesure prise dans le cadre de la mise en œuvre*' of the 1957 Convention appears somewhat ambiguous. A cursory reading of that passage in paragraph 39 of *Hurd* could give the impression that the measure at issue, forming the subject-matter of the examination as to compatibility with the duty of genuine cooperation, was a measure adopted to implement that convention. Indeed, such a reading could, I concede, be supported by the English language version of the judgment which reads 'a measure taken to *implement* such an agreement'. [44]

42 — Paragraph 14.

43 — Paragraph 16. In this connection, the Court refers to Case C-74/89 *Commission* v *Belgium* [1990] ECR I-491.

44 — Emphasis added.

135. Such an interpretation appears to me to be incorrect for two reasons.

136. First, such an interpretation would be tantamount to acknowledging that the finding contained in paragraph 39 of *Hurd* contradicts the principal interpretation given in paragraphs 37 and 38 of that judgment. If in those two paragraphs the Court has held that the duty of genuine cooperation does not apply in relations between the Member States and the Community institutions concerning the 1957 Convention and the agreements, acts, decisions and instruments adopted on the basis of that convention, it cannot logically state in paragraph 39 of the judgment that that same duty of genuine cooperation nevertheless applies to the measures which implement that convention, a form of words which necessarily includes the agreements, acts, decisions and instruments adopted on the basis of the convention.

137. Second, the fact that the wording used in paragraph 39 of *Hurd* cannot in any way mean 'a measure taken to implement' the 1957 Convention may likewise be inferred from the Court's analysis in paragraphs 40 to 45 of that judgment.

138. The specific examination by the Court of infringement of the duty of genuine cooperation in paragraphs 40 to 45 of *Hurd* was conducted not in relation to a measure adopted to implement the 1957 Convention, such as for example the decision of the Board of Governors of 1957, but in relation to a unilateral and independent tax measure seeking to tax the European supplements of the British teaching staff at a European School. That examination, as introduced by the Court in paragraph 40 of *Hurd*, was immediately preceded by the criterion set out in paragraph 39 of that judgment and carried out with 'such … considerations … borne in mind'.

139. Accordingly, whilst the tax measure at issue, which formed the subject-matter of the examination as to compatibility with Article 5 of the EEC Treaty, was by no means a measure adopted *to implement* the 1957 Convention, it was a measure connected with the Statute of the European School solely because it interfered with the application of the decision of the Board of Governors of 1957, that is to say, in other words, it fell within the spectrum or the framework (in the sense of the field of application) of a decision implementing the 1957 Convention.

140. It is likewise for this reason in my view – and this is my second point – that the Court emphasises in both *Hurd* and Case C-6/89 *Commission* v *Belgium* the unilateral nature of the measures at issue being examined as to their compatibility with Article 5 of the EEC Treaty. It sought to ensure that those judgments could not be interpreted as seeking

review of the implementation of the commitments entered into by the Member States in the context of the 1957 Convention.

141. If those are the matters to be learnt from *Hurd* and Case C-6/89 *Commission* v *Belgium*, I take the view that, in this case, the alleged failure to fulfil obligations under Article 10 EC is unfounded as far as the period prior to the entry into force of the 1994 Convention is concerned.

142. The measure at issue, namely the Belgian authorities' refusal to finance the furniture and teaching equipment of the European Schools established in the Kingdom of Belgium, stems from interpretation of the scope of obligations contained in an agreement (the Establishment Agreement) adopted on the basis of the 1957 Convention. Pursuant to paragraphs 37 and 38 of *Hurd*, since such an agreement falls outside the field of application of the provisions of the Treaty and of the duty of genuine cooperation as expressed in Article 10 EC, the same is true, in my view, of the refusal to implement obligations allegedly arising from that agreement. I take the view that to find otherwise would exceed the jurisdiction conferred on the Court because, in order to establish the alleged failure to fulfil obligations under Article 10 EC, the Court would be led to define the scope of the obligations arising from the Establishment Agreement. [45]

45 — See, to that effect, *Hurd*, paragraph 22.

143. It is on the basis of a line of reasoning fairly similar to that set out above that I am likewise of the opinion that the claim alleging failure to fulfil obligations under Article 10 EC must be dismissed as far as the period following the entry into force of the 1994 Convention is concerned.

144. It is admittedly true that, with effect from 1 October 2002 and on account of the Community's accession, the 1994 Convention has been an integral part of Community law and enforceable against the Member States.

145. However, the fact remains that the obligations at issue in this case are defined not in the 1994 Convention but in the Establishment Agreement to which the Community has not acceded. The Establishment Agreement remains an agreement concluded between the Board of Governors and the Kingdom of Belgium. Contrary to the Commission's submissions, it cannot be asserted either that the Community, since it is now a Contracting Party to the 1994 Convention, has also acceded to the rights and obligations laid down in the Establishment Agreement so that that agreement may be categorised as a rule of Community law, or that the Board of Governors is an emanation of the Community.

146. Whilst I concede, as previously stated in points 53 to 56 of this Opinion, that since the entry into force of the 1994 Convention the Establishment Agreement may fall among the provisions capable of being interpreted by the Court, the sole reason for this is that, under the provisions of that convention, in particular Article 26, the agreement falls within the 'application' of that convention for the purposes of the arbitration clause laid down in Article 26. Nevertheless, other than in the situations covered by that clause, the Court has no jurisdiction to rule on the Establishment Agreement. [46] In this case, as I have already had occasion to make clear in point 57 of this Opinion, the Commission brought proceedings before the Court not on the basis of Article 26 of the 1994 Convention but under Article 226 EC.

147. Consequently, the duty of genuine cooperation expressed in Article 10 EC does not apply in the context of the Establishment Agreement, including in respect of the period following the entry into force of the 1994 Convention.

46 — Accordingly, if a reference for a preliminary ruling were be to made to the Court on the interpretation of the 1994 Convention and of the Establishment Agreement in relation to facts post-dating 1 October 2002, the Court should, in my view, declare that it has jurisdiction to interpret the 1994 Convention, since that convention forms part of Community law, but decline jurisdiction to examine the provisions of the Establishment Agreement.

148. I therefore propose that the Court should dismiss the second part of the claim alleging failure to fulfil obligations, which is based on the infringement of Article 10 EC.

149. In the light of all the foregoing, I suggest that the Court dismiss the action for failure to fulfil obligations in its entirety.

V — Costs

150. Under Article 69(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Belgium has applied for the Commission to be ordered to pay the costs and since – as I propose – the Commission should be unsuccessful, the application made by the Kingdom of Belgium should be granted.

VI — Conclusion

151. On those grounds, I propose that the Court:

— dismiss the action;

— order the European Commission to pay the costs.