Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 4 September 2014[1]

Joined Cases C-464/13 and C-465/13

Europäische Schule München
v
Silvana Oberto (C-464/13),
Barbara O'Leary (C-465/13)

(Requests for a preliminary ruling from the Bundesarbeitsgericht (Germany))

(Statute of the European Schools — Competence of the Complaints Board of the European Schools or of the courts of the country in which the schools are situated to rule on a fixed-term employment contract entered into between the European School and a teacher not posted or seconded by a Member State)

I – **Introduction**

1. Under Article 27(2) of the Convention defining the Statute of the European Schools, concluded in Luxembourg on 21 June 1994[2] between the Member States and the European Communities ('the 1994 Convention'), are disputes on the fixed nature of the duration of employment contracts concluded repeatedly over the course of several years between the director of a European School and his part-time teachers matters for the courts of the State in which that school is situated or for the Complaints Board of the European Schools?

2. That is the essence of the questions referred to the Court for a preliminary ruling by the Bundesarbeitsgericht (Federal Labour Court, Germany) in two sets of proceedings between the Europäische Schule München (European School, Munich) and two of its part-time teachers, Ms Oberto and Ms O'Leary, who have been so engaged since 1998 and 2003 respectively, under fixed-term contracts of one year, renewable from time to time by the head teacher of the school under the Conditions of Employment for Part-time Teachers of European Schools recruited between 1 September 1994 and 31 August 2011, approved by the Board of Governors of the European Schools ('the Conditions of employment for part-time teachers').[3]

1 — Original language: French.

2 — OJ 1994 L 212, p. 3. The convention entered into force on 1 October 2002.

3 — 2011-06-D-24-en-1.

3. In two actions brought before the Arbeitsgericht München (Labour Court, Munich), Ms Oberto and Ms O'Leary challenged the one-year limitation on the duration of their contracts of employment, the last of which terminated in August 2011. They maintained before the Arbeitsgericht München that the German courts have jurisdiction to determine the validity of limitations on the duration of their employment relationship with the Europäische Schule München. Conversely, the European School alleges that it is not subject to the German judicial system since the dispute in the main proceedings falls within the exclusive competence of the Complaints Board of the European Schools.

4. In an interim judgment, the Arbeitsgericht München declared the action admissible, which was confirmed on appeal. Faced with an appeal on a point of law brought by the Europäische Schule München, the Bundesarbeitsgericht is querying the interpretation of the first sentence of Article 27(2) of the 1994 Convention.

5. The Bundesarbeitsgericht therefore decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the first sentence of Article 27(2) of the [1994 Convention] to be interpreted as meaning that part-time teachers employed by a European School who are not seconded by the Member States are persons covered by [that] convention and are not — unlike the administrative and ancillary staff — excepted from the application of that provision?

(2) If the Court of Justice answers the first question in the affirmative:

Is the first sentence of Article 27(2) of the [1994 Convention] to be interpreted as meaning that that provision also covers the legality of any act, based on [that] convention or on the rules made under it, which is performed in relation to part-time teachers by the head teacher of a school in the exercise of his powers and which adversely affects such part-time teachers?

(3) If the Court of Justice answers the second question in the affirmative:

Is the first sentence of Article 27(2) of the [1994 Convention] to be interpreted as meaning that the conclusion of a contract between the head teacher of a European School and a part-time teacher concerning the fixed-term nature of the part-time teacher's employment relationship constitutes an act which is performed by the head teacher in relation to that part-time teacher and which adversely affects the latter?

(4) If the Court of Justice answers the second or third question in the negative:

Is the first sentence of Article 27(2) of the [1994 Convention] to be interpreted as meaning that the Complaints Board referred to therein has exclusive jurisdiction in the first and final instance, once all administrative channels have been exhausted, in any dispute relating to the fixed-term nature of a contract of employment which the head teacher of a school concludes with a part-time teacher if that contract is essentially based on the requirement of the Board of Governors in point 1.3 of the Conditions of Employment …, which provides for "annual contracts"?'

6. Those questions have formed the subject-matter of written observations on the part of the parties to the main proceedings and on the part of the European Commission. Those interested parties also presented oral argument at the hearing on 15 May 2014.

II – **Analysis**

A – *The Court's competence to reply to the questions*

7. The Court's competence to reply to the questions referred for a preliminary ruling has been called into question in the written observations of the Europäische Schule München, by reason of the international nature of the 1994 Convention. Although at the hearing the Europäische Schule München rightly waived that objection, it is an issue of public policy that calls for closer examination.

8. On their creation, the European Schools, whose purpose is to educate together children of the staff of the institutions of the European Union from nursery school to secondary school, [4] were governed by the Statute of the European School signed at Luxembourg on 12 April 1957 [5] and the Protocol on the setting-up of European Schools with reference to the Statute of the European School signed on 13 April 1962. [6] Those instruments were entered into by the six founding Member States of the European Communities; the latter have not acceded to those instruments.

9. The Court has inferred from the intergovernmental nature of the 1957 Statute that it lacks jurisdiction to interpret the provisions of that statute, either in the context of a reference for a preliminary ruling or under the procedure provided for in Article 226 EC for a declaration of a failure by a Member State to fulfil its obligations under the EC Treaty. [7] Since that instrument was entered into only by the Member States, it did not form an integral part of Community law. [8]

10. The 1957 Statute and the Protocol on the setting-up of European Schools were, however, repealed and replaced by the 1994 Convention under Article 34 thereof.

11. The 1994 Convention was entered into not only by the Member States but also by the European Communities. Their participation was provided for in 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. [9]

12. Therefore, that convention constitutes an agreement entered into by the Council of the European Union which, as regards the present day European Union, means that it has formed an integral part of its legal order with effect from the entry into force of that agreement on 1 October 2002. It follows that the Court is competent to give a preliminary ruling on the interpretation of the provisions of the 1994 Convention. [10]

4 — See Articles 1 and 3 of the 1994 Convention. The European Schools to which the Statute applies are currently 14 in number, with a total of 23 000 pupils, and award the European baccalaureate. Five of those schools are in Belgium, three in Germany (including the Europäische Schule München), two in Luxembourg, one in Spain, one in Italy, one in the Netherlands and one in the United Kingdom. Since 2005, and in order to cope with the presence of agencies of the European Union or other similar bodies in other Member States, the Board of Governors of the European Schools decided to establish a certain number of accredited schools, described as 'Type II', dispensing an education equivalent to the 14 European Schools, and also authorised to award the European Baccalaureate. Those accredited European Schools currently numbering nine (two in France, one in Germany, one in Finland, one in Greece, one in Ireland, one in Italy, one in the Netherlands and one in the United Kingdom), are not, however, listed in Annex I to the 1994 Convention.

5 — *United Nations Treaties Series*, volume 443, p. 129 ('the 1957 Statute').

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

7 — See, respectively, judgments in *Hurd* (44/84, EU:C:1986:2, paragraphs 20 to 22) and in *Commission* v *Belgium* (C-132/09, EU:C:2010:562, paragraph 45).

8 — See, in particular, judgment in *Commission* v *Belgium* (EU:C:2010:562, paragraph 44). It should also be noted that the European Communities did not in any way assume the obligations of the Member States within the bodies established by the 1957 Statute and that the latter made no provision conferring jurisdiction on the Court of Justice.

9 — OJ 1994 L 212, p. 1.

10 — See, in particular, by analogy judgments in *Bogiatzi* (C-301/08, EU:C:2009:649, paragraph 23) and *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 73). See, as regards the 1994 Convention, my Opinion in *Commission* v *Belgium* (C-132/09, EU:C:2010:342, footnote 46).

13. That finding is not invalidated by the judgment in *Miles and Others*[11] which related not to the nature of the 1994 Convention within the EU legal order, but concerned whether the Complaints Board of the European Schools was to be classified as a 'court or tribunal of one of the Member States' under Article 267 TFEU.

14. I would add that the Court's jurisdiction to reply in preliminary ruling proceedings to the questions raised by the national court as to the interpretation of the provisions of the 1994 Convention likewise extends, in my view, to measures adopted under those provisions and provided for by them, in particular in order to assess the scope of such measures. Those measures enable those provisions to be precisely interpreted as to their scope. They form a necessary part of the latter and cannot be ignored by the Court.

15. As the arguments concerning the reply to be given below to the questions referred will show, in the present case those measures include the Conditions of employment for part-time teachers, a measure of general scope adopted by the Board of Governors of the European Schools, which is the chief decision-making body common to those schools and whose composition includes, inter alia, representatives of the Member States and of the European Commission.[12] Moreover, the national court is itself fully aware of the need for such an approach when it expressly refers to the Conditions of employment for part-time teachers in its fourth question concerning the interpretation of Article 27(2) of the 1994 Convention.

16. The Court's competence to reply to the questions raised by the national court is in my view free from doubt. Thus, it is appropriate to examine those questions, all of which essentially seek to determine whether Article 27(2) of the 1994 Convention must be interpreted as precluding the national court, as the court or tribunal of the Member State in which the Europäische Schule München is situated, from having jurisdiction to determine applications brought before it by Ms Oberto and Ms O'Leary, on the ground that those applications ought to have been brought before the Complaints Board of the European Schools under the abovementioned article.

B – *Article 27(2) of the 1994 Convention and the scope of the Complaints Board of the European Schools' competence*

17. Although the 1957 Statute did not provide for any specific machinery for settling disputes between the persons therein referred to and the European Schools, the 1994 Convention established a Complaints Board with 'strictly limited jurisdiction' for the purposes of providing 'adequate legal protection against acts of the Board of Governors or the Administrative Boards [of those schools] … to the teaching staff as well as other persons covered by it'.[13]

18. The wording of the first question referred mentions two categories of staff employed by the European School, that is to say the teaching staff, on the one hand, and the administrative and ancillary staff, on the other.

19. As regards the jurisdiction of the Complaints Board of the European Schools, the first subparagraph of Article 27(2) of the 1994 Convention states that that provision applies in the first and final instance, once all administrative channels have been exhausted, to 'any dispute concerning the application of [that] Convention to all persons covered by it with the exception of administrative and ancillary staff, and regarding the legality of any act based on the [1994] Convention or rules made under it, adversely affecting such persons, on the part of the Board of Governors of the Administrative Board of a school in the exercise of their powers as specified by [that] Convention'.

11 — C-196/09, EU:C:2011:388.

12 — See Articles 8 and 10 of the 1994 Convention.

13 — See fourth recital in the preamble to the 1994 Convention.

20. It follows from that provision that the scope *ratione personae* of the competence of the Complaints Board of the European Schools encompasses disputes involving those persons covered by the 1994 Convention, with the exception of disputes concerning administrative and ancillary staff.

21. Disputes between administrative and ancillary staff and the European Schools accordingly come within the competence of the courts of the State in which those schools are situated.

22. That interpretation is confirmed, first of all, by Article 27(7) of the 1994 Convention under which 'other disputes to which the [European] Schools are party', that is to say, those which do not fall within the exclusive and strictly defined competence of the Complaints Board of the European Schools, 'fall within national jurisdiction'.

23. Next, that interpretation is supported by Article 36 of the Regulations governing the administrative and ancillary staff of the European Schools approved by the Board of Governors in Lisbon on 17 and 18 April 2007, under which national courts have sole jurisdiction to determine disputes between a member of the administrative and ancillary staff and a European School concerning the lawfulness of a measure adopted under the Statute governing that section of staff that adversely affects the staff member. [14]

24. Conversely, under the first subparagraph of Article 27(2) of the 1994 Convention, disputes between the teaching staff and the European Schools come within the exclusive competence of the Complaints Board of the European Schools.

25. However, that finding cannot suffice to resolve the issue submitted by the national court concerning disputes between a European School and its part-time teachers.

26. First, it is clear from the provisions of the 1994 Convention that the category of 'teaching staff' in that convention does not strictly speaking include part-time teachers.

27. It follows from Article 3(2) of the 1994 Convention that instruction is to be provided by teachers seconded or assigned by the Member States and belonging to the education system of their respective Member States who, under Article 12(4)(a) of that convention, unconditionally retain the promotion and retirement rights guaranteed by their national rules during the period of their secondment or assignment to the European Schools. [15]

28. Furthermore, the second subparagraph of Article 27(2) of the 1994 Convention establishes a distinction between 'the Service Regulations for the teaching staff', adopted by the Board of Governors [16] under Article 12(1) of that convention, and 'the conditions of employment for part-time teachers'.

29. Part-time teachers therefore do not fall either within the category of the 'administrative and ancillary staff' of the schools or of the 'teaching staff', within the meaning of the 1994 Convention.

14 — 2007-D-153-en-6, p. 18.

15 — See, to that effect, judgment in *Commission* v *United Kingdom* (C-545/09, EU:C:2012:52, paragraphs 41 and 48). Previously, the Complaints Board of the European Schools described the successive annual contracts binding a part-time teacher to the Brussels II European School as employment relationships 'under a private law regime wholly distinct from that of staff seconded to the European Schools', on the basis that the latter staff, unlike part-time teaching staff, are sent by their national authorities (see decision of the Complaints Board of 22 June 2001, Case 01/001, p. 7). That decision, like all those adopted by the Complaints Board, is available on its website at http://schola-europaea.eu/cree/.

16 — See Regulations for Members of the Seconded Staff of the European Schools, as amended most recently by the Board of Governors on 5 December 2013 (2011-04-D-14-en-3).

30. In my view, they more properly belong to the category of 'other persons' covered by the 1994 Convention, and any disputes between them and the European Schools must, as a matter of principle, be referred to the Complaints Board of the European Schools under the first subparagraph of Article 27(2) of the 1994 Convention.

31. None the less, and secondly, the second subparagraph of Article 27(2) of the 1994 Convention refers specifically to the 'the conditions of employment for part-time teachers' in order to determine the 'conditions and the detailed rules relative to' proceedings before the Complaints Board of the European Schools.

32. The Conditions of employment for part-time teachers adopted by the Board of Governors also govern the employment relationships between Ms O'Leary and Ms Oberto and the the Europäische Schule München in the main proceedings.

33. It is clear from those conditions of employment that part-time teachers are recruited in certain situations so as to meet a temporary need; their contracts of employment are annual. [17]

34. Moreover, whereas point 3.2 of the Conditions of employment for part-time teachers states that several provisions of the Regulations for Members of the Seconded Staff of the European Schools, including point 80 thereof, on proceedings before the Complaints Board of the European Schools, 'shall apply to teachers recruited by the [head teacher]', point 3.4 of the Conditions of employment for part-time teachers, entitled 'Legislation of the country in which the School is situated' states as follows: 'The conditions of appointment and of dismissal of part-time teachers … shall be governed by the legislation of the country in which the School is situated with respect to employment relationship, social security and taxation regulations, without prejudice to the provisions above. The courts of the country in which the School is situated shall have jurisdiction in any dispute to be resolved'.

35. Pursuant to the reference in the second subparagraph of Article 27(2) of the 1994 Convention to the conditions and the detailed rules established by the Conditions of employment for part-time teachers, point 3.4 of the Conditions of employment for part-time teachers therefore governs the extent of the competence of the Complaints Board of the European Schools and of the procedure applicable before it to disputes between the latter and the European Schools to an extent which it is necessary to determine.

36. Referring in its written observations to the decision of the Complaints Board of 21 August 2012 in case 12/12 ('the decision in case 12/12'), the Europäische Schule München essentially considers that the competence of the Complaints Board of the European Schools extends to all employment-related disputes between a part-time teacher and a European School, under point 3.2 of the Conditions of employment for part-time teachers.

37. Although the assessment of the Complaints Board plainly cannot bind the Court, the inference drawn by the Europäische Schule München from the decision in case 12/12 must, it seems to me, be clearly distinguished for two reasons.

17 — See, respectively, points 1.2., 2(a) and 1.3 of the Conditions of employment for part-time teachers. In its written observations, the Europäische Schule München has none the less stated that part-time teachers represent nearly 40% of all the staff in that school. Furthermore, according to a document of the Secretary-General of the European Schools on the reform of the European Schools system approved by the Board of Governors on 23 April 2009 (2009-D-353-en-4, p. 5), an irreducible number of part-time teachers, representing approximately 25% of the total number of teaching staff, is essential.

38. First, in that case the Complaints Board had to decide on the legality of a decision of the head teacher of the Europäische Schule München refusing to pay a part-time teacher overtime for supervision. The Complaints Board dismissed the action as inadmissible chiefly on the ground that the action had not been preceded by the statutory pre-litigation procedure.[18] However, as the subject-matter of the dispute and the ancillary reasoning as to the merits of the decision of the Complaints Board make apparent, the action concerned the pay of part-time teachers and not their 'conditions of appointment and of dismissal', within the meaning of point 3.4 of the Conditions of employment for part-time teachers.

39. Secondly, it is true that before declaring the action inadmissible the Complaints Board none the less gave to understand that it was competent to hear such an action in light of the reference, in point 3.2 of the Conditions of employment for part-time teachers, to Article 80 of the Regulations for members of the seconded staff, Article 3.2 of which 'prevails over [point] 3.4 of the Conditions [of employment for part-time teachers] and confers jurisdiction on the courts of the country in which the school is situated, in this case the Arbeitsgericht München, but "without prejudice to the provisions above" and thus secondarily'.[19] However, with all due respect to the Complaints Board, it is clear from point 3.4 of the Conditions of employment for part-time teachers, which is set out in point 34 hereof, that the wording 'without prejudice to the provisions above' at the end of the first sentence of that point bears no relationship to the second sentence of that point, which concerns conferral of jurisdiction on the courts of the host country 'in any dispute to be resolved'.

40. The expression 'without prejudice to the provisions above' in the first sentence of point 3.4 of the Conditions of employment for part-time teachers relates exclusively to 'conditions of appointment and of dismissal of part-time teachers' and can therefore be construed as referring only to the substantive rather than the procedural conditions provided for in the other provisions of the Conditions of employment for part-time teachers.

41. This approach appears to me to be in keeping with the objective of the 1994 Convention already alluded to, which is to provide strict limits on the jurisdiction of the Complaints Board of the European Schools, without excessively affecting the residual powers of the courts of the State in which the schools are situated, as provided for in Article 27(7) of that convention.

42. In that regard, and in order to dispel any ambiguity, it is clear in the light of all the foregoing that the overarching argument put forward by the Europäische Schule München, that the European Schools enjoy judicial immunity before the national courts as an international organisation, also cannot be accepted.[20]

43. The 1994 Convention and measures adopted in implementation of it bear sufficient witness to the intention of the contracting parties to ensure a balanced division of competences as between the Complaints Board of the European Schools and the courts of the States in which the European Schools are located. Thus, no intention is evinced to enable those schools to enjoy full immunity before the national courts, including in relation to employment, both for those performing the essential function of the European Schools, namely teaching, and for those involved in that function only on an ancillary or indirect basis.

18 — Point 9(b) of the decision in case 12/12. In the alternative, the Complaints Board of the European Schools considered that the action must in any event be dismissed as unfounded on the essential ground that time spent supervising must be regarded as an 'other activity' ancillary to the activity of teaching not giving rise to additional pay.

19 — Point 9(a) of the aforementioned decision.

20 — See recently on this subject, in particular, Orzan, M.F., 'Le immunità ed i privilegi delle organizzazioni internazionali', in Del Vecchio, A., *Diritto delle Organizzazioni Internazionali*, Edizioni Scientifiche Italiane, 2012, p. 243.

44. It follows, in my view, that the competence of the Complaints Board of the European Schools extends to disputes between a part-time teacher and a European School, save, first, for those concerning the conditions of appointment and of dismissal of those persons under the second subparagraph of Article 27(2) of the 1994 Convention read in conjunction with point 3.4 of the Conditions of employment for part-time teachers and, secondly, for other disputes involving the schools, in particular those relating to civil and criminal liability, as mentioned in Article 27(7) of the 1994 Convention.

45. In the present case, since the disputes in the main proceedings concern the successive use of annual contracts,[21] and thus a material condition concerning the appointment of part-time teachers, they come within the competence of the courts of the country in which the Europäische Schule München is situated pursuant to point 3.4 of the Conditions of employment for part-time teachers.

46. The conferral of competence on the courts of the place in which the European Schools are located is, it seems to me, all the more correct and justified since it thereby enables adequate substantive-law protection to be provided for the rights of part-time workers with regard to their conditions of appointment and of dismissal. In spite of the fact that they have the status of worker, those part-time teachers undoubtedly do not enjoy such protection under the system of judicial remedies put in place by the 1994 Convention.

47. It will be recalled that, under the case-law, a national of a Member State employed in another Member State in an international organisation does not thereby lose his status as a worker as defined in Article 45 TFEU.[22] The continued acknowledgement of this status is all the more important when part-time teachers recruited by the European Schools largely come under the employment, work, social security and income tax regulations of the State in which the international organisation in question is situated.

48. It should also be noted that in their respective actions before the courts of Munich where the Europäische Schule München is located, Ms Oberto and Ms O'Leary are essentially seeking to obtain the protection of the German legislation transposing Council Directive 1999/70/EC of 28 June 1999, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP,[23] in particular clause 5(1) of the framework agreement on fixed-term work concluded on 18 March 1999 ('the framework agreement'), which is set out in the annex to that directive.

49. The purpose of that clause is to implement one of the objectives of the framework agreement, namely to place limits on successive recourse to fixed-term employment contracts or relationships, which is regarded as a *potential* source of abuse to the detriment of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure.[24]

50. Thus, Directive 1999/70 requires the Member States to seek to prevent the abusive use of successive fixed-term employment contracts or relationships by adopting in a manner which is both effective and binding at least one of the three measures set out in clause 5(1)(a) to (c) of the framework agreement. These relate respectively to objective reasons justifying the renewal of such contracts or relationships, the maximum total duration of successive fixed-term employment contracts or relationships and the number of renewals of such contracts or relationships.[25]

21 — Point 1.3 of the Conditions of employment for part-time teachers provides that 'contracts of appointment shall be annual'.

22 — See in particular judgment in *Gardella* (C-233/12, EU:C:2013:449, paragraphs 25 and 26), in relation to an employee of the European Patent Office.

23 — OJ 1999 L 175, p. 3.

24 — See, inter alia, judgment in *Márquez Samohano* (C-190/13, EU:C:2014:146, paragraph 41 and the case-law cited).

25 — See, to that effect, judgment in *Márquez Samohano* (EU:C:2014:146, paragraph 42 and the case-law cited).

51. The first paragraph of Article 2 of Directive 1999/70 requires in that connection that the Member States must 'at any time' be in a position to guarantee the results imposed by the directive.

52. Moreover, the EU judicature has also acknowledged that clause 5(1) of the framework agreement, implemented by Directive 1999/70, gave specific expression to the principle of the prohibition of abuse of rights, which is a general principle of law entailing that, in relations between EU institutions and their agents recruited for a fixed period, the provisions applicable to those agents must as far as possible be interpreted so as to comply with the purposes and minimum requirements of the framework agreement and ultimately with the principle of the prohibition of abuse of rights. [26]

53. Accordingly, persons recruited for a fixed term either by an employer in a Member State or by the EU institutions must be entitled to expect that they may benefit from a common base of minimum requirements laid down under clause 5(1) of the framework agreement, implemented by Directive 1999/70 or afforded by the prohibition on abuse of rights which finds specific expression in that clause.

54. The Member States and the European Union, which, I should point out, are the sole contracting parties to the 1994 Convention, cannot, by entering into the 1994 Convention, legitimately have intended no longer to afford to EU workers the benefit of this common base, even though the regime governing those workers, as in the case of the part-time teachers of the European Schools, largely comes under the legislation of the Member State hosting those schools.

55. Moreover, at the hearing the Commission did not deny that the minimum requirements laid down under clause 5(1) of the framework agreement implemented by Directive 1999/70 were capable of applying in employment relations between the European Schools and their part-time teachers. It merely maintained, in essence, that the Conditions of employment for part-time teachers adopted under the 1994 Convention had not kept pace with legal developments reflected in clause 5(1) of the framework agreement, in its specific manifestation of the principle that abuse of rights is not permitted.

56. As an EU measure, the 1994 Convention must be interpreted in the light of the general principle of the prohibition of abuse of rights, which finds specific expression in employment relationships within the European Union in clause 5.1 of the framework agreement implemented by Directive 1999/70. That provision requires minimum measures to be adopted in order to seek to prevent abuses resulting from successive fixed-term contracts or employment relationships.

57. None the less, it must be stated that the provisions of the 1994 Convention do not guarantee, beyond all doubt, that such a common base of minimum measures resulting from EU law may be relied on before the judicial body established by it, notwithstanding the fact that part-time teachers at the European Schools have the status of workers under Article 45 TFEU.

58. Having regard to the *sui generis* nature of the system of cooperation established by the 1994 Convention and the question whether a body has the status of an international organisation, [27] the Complaints Board of the European Schools has already held that international instruments, including those under Union law to which the European Schools are not themselves parties, are not legally binding on them as such. [28]

26 — See, in particular, judgment in *Adjemian and Others* v *Commission* (T-325/09 P, EU:T:2011:506, paragraphs 57 and 62) and order in *Christoph and Others* v *Commission* (F-63/08, EU:F:2013:36, paragraph 75). It is worth remembering that it was in its judgment in *Kofoed* (C-321/05, EU:C:2007:408, paragraph 38) that the Court explicitly recognised that the prohibition on the abuse of rights constituted a general principle of EU law.

27 — See to that effect judgment in *Miles and Others* (EU:C:2011:388, paragraphs 39 and 42).

28 — See, inter alia, decision of the Complaints Board of 30 July 2007, in case 07/14, paragraph 18, and decision of the Complaints Board of 15 October 2009 in case 09/35, paragraph 12.

59. It is true that the Complaints Board has stated that it is prepared to accept that the fundamental principles, or the general principles, to which those instruments refer and which are commonly acknowledged both in the legal order of the European Union and in that of the Member States are 'capable' of being used as a point of reference to guide the actions of the bodies of the European Schools over and above the rules of law peculiar to them.[29]

60. None the less, the discretion reserved to itself by the Complaints Board of the European Schools for determining the rules and principles stemming in particular from EU law, which are merely *capable* of serving as a point of reference in examining the lawfulness of the actions and acts of the European Schools, does not guarantee observance 'at any time' of the general prohibition on abuse of rights, to which specific expression is given as regards employment relationships within the European Union by the common basic minimum requirements of clause 5.1 of the framework agreement implemented by Directive 1999/70, with regard to workers whose status is governed to a large extent, as in the case of part-time teachers, by the legislation on employment, social security and taxation of the Member State in which the European Schools are located.

61. Such a discretion is, it seems to me, of particular concern since the Complaints Board of the European Schools gives judgment at first and last instance and is not empowered to submit a question to the court for a preliminary ruling under Article 267 TFEU following the judgment in *Miles and Others*.[30]

62. The establishment by the 1994 Convention of a Complaints Board of the European Schools allowed a certain level of judicial protection for persons covered by that convention to be guaranteed. Plainly that does not mean, from a substantive-law perspective, that those persons may in fact, and beyond any possible doubt, rely on the minimum requirements provided for in clause 5 of the framework agreement implemented by Directive 99/70 as specific manifestations of a general principle of law binding on all the contracting parties to the 1994 Convention, and which cannot, in my view, be disregarded by the bodies established under that Convention.

63. It is therefore not, in my view, sufficient for such a procedural remedy to have been established.[31] It would also be necessary for that remedy to guarantee that the rights conferred on the persons covered by the 1994 Convention, that is to say, those availale under EU law concerning the prevention of abuse of rights which may arise from the use of successive fixed term employment contracts, can *in fact* be relied on before the judicial body established under that convention.[32]

29 — See decision of the Complaints Board of 28 August 2012, in case 12/35, paragraph 11.

30 — EU:C:2011:388, paragraph 46. In that connection, it must be observed that, in his annual report for 2013 (2014-02-D-16-en-2, document of 11 and 12 March 2014, p. 11), the Chairman of the Complaints Board of the European Schools, noting and accepting the 'suggestion' by the Court in *Miles and Others* (EU:C:2011:388, paragraph 45) that it was for the contracting parties to develop the system of judicial protection established by the 1994 Convention, stated that such progress would 'guarantee … effective respect of the rights which the persons referred to in the said Convention derive' in order to 'ensure that its litigants benefit from legal protection comparable with that enjoyed by any citizen of the European Union'.

31 — This could possibly suffice as regards the *civil and procedural rights* guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, where there are generally speaking internal remedies provided for by international organisations which do not maintain the same close relations with the Member States and the institutions of the European Union as the European Schools (see in that connection judgment of the European Court of Human Rights of 19 February 1999 in *Waite and Kennedy v. Germany* No 26083/94, ECHR 1999-I, §§ 67-73; and decision of 5 March 2013 in *Chapman v. Belgium*, No 39619/06, §§ 48-54).

32 — Even as regards the right of access to a court under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, certain national courts will review the genuinely effective nature of the machinery for resolving disputes in employment relationships established by the international organisations, failing which those national courts will declare themselves competent to determine disputes submitted before them where there is a connecting factor: see in that regard the examples referred to by Orzan, M.F., op. cit. in footnote 20, pp. 260 and 265.

64. Since, as has been established, those rights cannot be relied on before that body beyond any possible doubt, I am of the view that until the judicial system under the 1994 Convention is amended in such a way as to authorise the Complaints Board of the European Schools to refer questions on the interpretation of EU law to the Court,[33] the correct approach in the present case is that the question whether the rights of part-time teachers regarding their conditions of appointment and of dismissal by the European Schools have been observed should be reviewed by the courts of the Member State in which those schools are located.

65. A contrary solution would be tantamount to removing from the competence of national courts disputes concerning at least in part the application and interpretation of Union law, whereas the judicial body established by the 1994 Convention does not currently come within the judicial system of the Union. By analogy with the reasoning set out in the Opinion by the Court in relation to the draft agreement establishing a unified patent litigation system,[34] such a solution would, it seems to me, be incompatible with primary EU law.

66. That is why I consider that both the letter of Article 27 of the 1994 Convention, read in the light of the Conditions of employment for part-time teachers, and the context and spirit in which those instruments must be interpreted, militate in favour of the conditions of appointment and of dismissal of part-time teachers coming under the jurisdiction of the courts of the Member State in which the European Schools are located.

67. Contrary to what the Europäische Schule München argued at the hearing, to confer such competence on the courts of the Member State in which the European Schools are located does not in any way entail making part-time teachers subject to different regimes. Furthermore, as both the school and the Commission acknowledged at the hearing, apart from the fact that certain European Schools no longer limit themselves to offering annual contracts to their part-time teachers and that those members of staff are therefore not subject to entirely uniform rules on recruitment, the minimum requirements in clause 5.1 of the framework agreement implemented by Directive 1999/70, as a specific manifestation of the prohibition on abuse of rights to be guaranteed by the national courts, constitute a base common to all the Member States, in particular those who host European Schools under the 1994 Convention.

68. I would reiterate, finally, that the approach that I am inviting the Court to follow in these cases should not be interpreted as calling into question the judicial immunity enjoyed by international organisations under their founding instruments.

69. Rather my approach is based on the relations which, as has been stated many times, are particularly close and functional between the European Schools, the Member States and the EU institutions and on the original scheme of the provisions of the 1994 Convention and measures adopted under it which recognise, inter alia, the residual jurisdiction of the national courts to determine disputes between persons covered by that convention and the European Schools, other than disputes for whose resolution the Complaints Board of the European Schools is solely responsible.

33 — In the annual report for 2013 cited in footnote 30 above, the Chairman of the Complaints Board of the European Schools states that he is currently chairing a working group responsible for submitting to the Secretary-General of the Board of Governors of the European Schools a proposal as to 'how to strengthen legal protection in the European Schools system'. Generally the Court has recognised that an international agreement concluded with third countries may validly confer new judicial powers on the Court provided that in so doing it does not change the essential character of the function of the Court as conceived in the EU and FEU Treaties (see inter alia, Opinion 1/09, EU:C:2011:123, paragraph 75). Such a possibility must *a fortiori* be recognised in the event of an international agreement concluded exclusively between the Member States and the European Union.

34 — Opinion 1/09 (EU:C:2011:123, paragraphs 80 to 82).

III – **Conclusion**

70. In the light of all the foregoing considerations, I propose that the following answers be given to the questions referred for a preliminary ruling by the Bundesarbeitsgericht:

Article 27(2) and (7) of the Convention defining the Statute of the European Schools, concluded in Luxembourg on 21 June 1994 between the Member States and the European Communities, must be interpreted as conferring jurisdiction on the courts of the States in which the European Schools are located to determine a dispute between those schools and part-time teachers regarding their conditions of appointment and of dismissal under the Conditions of employment for part-time teachers of the European Schools recruited between 1 September 1994 and 31 August 2011, approved by the Board of Governors of those schools.