

Case C-431/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

28 June 2022

Referring court:

Corte suprema di cassazione (Italy)

Date of the decision to refer:

6 June 2022

Applicant:

Scuola europea di Varese

Defendants:

PD and LC, as persons exercising parental responsibility over the minor NG

Subject matter of the main proceedings

Application seeking a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation) on the question of jurisdiction in relation to proceedings pending before an administrative court concerning an appeal against the decision on repeating a year which was adopted by the Class Council at the European School at Varese.

Subject matter and legal basis of the request for a preliminary ruling to the Court of Justice

Request for a preliminary ruling under the third paragraph of Article 267 TFEU concerning the interpretation of the first sentence of the first subparagraph of Article 27(2) of the Convention defining the Statute of the European Schools of 21 June 1994.

Question referred for a preliminary ruling

Is the first sentence of the first subparagraph of Article 27(2) of the Convention defining the Statute of the European Schools, done in Luxembourg on 21 June 1994, to be interpreted as meaning that the Complaints Board referred to therein is to have sole jurisdiction in the first and final instance, once all administrative channels provided for in the General Rules have been exhausted, in any dispute concerning a decision on repeating a year adopted in relation to a secondary-school pupil by the Class Council?

Provisions of international and European Union law relied on

Vienna Convention on the Law of Treaties of 23 May 1969 (ratified by Italy by Law No 112 of 12 February 1974) ('the Vienna Convention'), in particular Articles 3 (scope) and 31 (interpretation in good faith).

Convention defining the Statute of the European Schools, signed in Luxembourg on 21 June 1994 by the Member States of the European Communities and the European Communities themselves, which entered into force on 1 October 1992 (ratified by Italy by Law No 151 of 6 March 1996) ('the Convention'), third and fourth recitals, Articles 1, 5, 6, 7, 10, 11, 12, 14, 26, 27, and 31.

According to the third recital of the Convention, the European School system is a 'sui generis' system, which constitutes, on the basis of an international agreement, a form of cooperation between the Member States and between those States and the European Union, while acknowledging the content of teaching, the educational systems, and the cultural and linguistic diversity of the Member States. According to the fourth recital of that convention, the decision-making procedure within the schools should be modified, experience in the operation of the schools should be taken into account, adequate legal protection against acts of the Board of Governors or the Administrative Boards should be provided to the teaching staff as well as other persons covered by the Convention, and to that end a Complaints Board should be created, with strictly limited jurisdiction, without prejudice to national courts' jurisdiction in relation to civil and criminal liability.

The purpose of the European Schools is to educate together children of the staff of the European Union (Article 1 of the Convention). The organs of those schools are to be: (1) the Board of Governors; (2) the Secretary-General; (3) the Boards of Inspectors; and (4) the Complaints Board. Each School is to be administered by the Administrative Board and managed by the Headteacher (Article 7). The Board of Governors is to lay down the General Rules of the Schools (Article 10), determine which studies are to be undertaken and how they are to be organised (Article 11), and lay down the Service Regulations for the Secretary-General and appoint the Secretary-General and Deputy Secretary-General (Article 12). The Secretary-General is to represent the Board of Governors. He or she is also to represent the Schools in legal proceedings and be responsible to the Board of Governors (Article 14).

Article 26 provides that 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.

Article 27 of the Convention establishes a Complaints Board, which is to 'have sole jurisdiction in the first and final instance, once all administrative channels have been exhausted, in any dispute concerning the application of this Convention to all persons covered by it with the exception of administrative and ancillary staff, and regarding the legality of any act based on the Convention or rules made under it, adversely affecting such persons on the part of the board of Governors of the Administrative Board of a school in the exercise of their powers as specified by this Convention. When such disputes are of a financial character, the Complaints Board shall have unlimited jurisdiction. The conditions and the detailed rules relative to these proceedings shall be laid down, as appropriate, by the Service Regulations for the teaching staff or by the conditions of employment for part-time teachers, or by the General Rules of the Schools. 3. The members of the Complaints Board shall be persons whose independence is beyond doubt and who are recognised as being competent in law. Only persons on a list to be compiled by the Court of Justice of the European Communities shall be eligible for membership of the Complaints Board. (...) 6. The judgments of the Complaints Board shall be binding on the parties and, should the latter fail to implement them, rendered enforceable by the relevant authorities of the Member States in accordance with their respective national laws. 7. Other disputes to which the Schools are party shall fall within national jurisdiction. In particular, national courts' jurisdiction with regard to matters of civil and criminal liability is not affected by this Article.'

General Rules of the European Schools:

General Rules of September 1996 ('the 1996 Rules'), Article 68

General Rules of February 2005 ('the 2005 Rules'), Articles 62, 66, and 67

General Rules of February 2014 ('the 2014 Rules'), Articles 61, 62, 66 and 67

The general rules of the European Schools have been amended over time. In the 1996 version, Article 68 stipulated that decisions on promotion to the year above were to be taken at the end of the school year by the Class Councils on the basis of the pupils' results and that parents or guardians could only appeal against such decisions on the grounds of procedural irregularity or new facts. If these assumptions emerged from an investigation by the Representative of the Board of Governors, the Committee was required to review the case. The deadline was set at ten days after the end of the school year.

The 2005 Rules provided, in Article 62, that decisions on promotion to the year above were to be taken at the end of the school year by the competent Class Councils and that parents could, within seven days after the end of the school year, lodge an appeal against such decisions only on the grounds of a procedural

irregularity or new facts recognised by the Secretary-General following an investigation. The Secretary-General was to decide on the appeal by 31 August at the latest. If the appeal was admissible, the Class Council was required to reconsider the case. Article 66 provided that those decisions could be the subject of administrative appeals and, under Article 67, the parents of the pupils, or a pupil of full age, could bring appeals against explicit or implicit administrative decisions, referred to in the previous article, before the Complaints Board under Article 27 of the Convention. Those appeals were to be examined and judged subject to the conditions laid down by the Rules of Procedure established by the Complaints Board.

Articles 61 and 62 of the 2014 Rules, applicable to the present case, substantially reproduce the content of Article 62 of the 2005 Rules, in particular as regards how to lodge an appeal against decisions on repeating a year taken by Class Councils. Article 66 provides that an administrative appeal may be lodged against the decisions referred to above under the conditions laid down in Article 62 and the decision of the Secretary-General ruling on an administrative appeal is to be notified to the appellants. Article 67 governs the appeals available to a pupil's legal representatives and is essentially identical to Article 67 of the 2005 Rules.

Succinct presentation of the facts and procedure in the main proceedings

- 1 By an application of 20 July 2020, the spouses P.D. and L.C. challenged before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) the decision on repeating a year taken in relation to the following school year 2020/2021, which had been adopted by the Class Council in relation to their son, a fifth-year secondary-school student at the European School at Varese ('the School').
- 2 Taking the view that jurisdiction lay with the Italian courts, P.D. and L.C. challenged the decision of the Class Council before the Regional Administrative Court, Lombardy, submitting that it was unlawful, and they requested the annulment thereof and the adoption, as a provisional step, of measures most likely to prevent the student from losing the school year.
- 3 The School contended that the application for interim measures should be declared inadmissible or dismissed and, as to the substance, that the Regional Administrative Court, Lombardy, should be declared to lack jurisdiction.
- 4 By order of 9 September 2020, the Regional Administrative Court, Lombardy, finding that it had jurisdiction, granted the application for interim measures and ruled that the student was to be admitted, with reservations, to the next class.
- 5 By an appeal of 13 October 2021, the School submitted to the Sezioni Unite (Combined Chambers) of the Supreme Court of Cassation an application for a preliminary ruling on the question of jurisdiction, and claimed that the Italian courts should be declared to lack jurisdiction, and, in the alternative, the School

submitted that a question on interpretation should be referred to the Court of Justice of the European Union ('the Court') pursuant to Article 26 of the Convention and Article 267 TFEU.

The essential arguments of the parties in the main proceedings

- 6 The School submits that the Italian courts completely lack jurisdiction in so far as P.D. and L.C. should have brought their appeal before the Complaints Board established by Article 27 of the Convention as the only body having jurisdiction in relation to unfavourable decisions adopted, in respect of students enrolled at the School, by the Secretary-General of the European Schools, to whom the request for annulment of the decision to repeat a year, taken by the Class Council, was submitted.
- 7 P.D. and L.C., and the public prosecutor who lodged written submissions before the referring court, agree that the Italian courts have jurisdiction, arguing that the act adversely affecting the student was adopted by the Class Council, whereas the Complaints Board has jurisdiction only in respect of acts having an adverse effect adopted by the Board of Governors or the Administrative Board. In support of that position, reference is made to judgment No 138 of the Supreme Court of Cassation, Combined Chambers, of 15 March 1999 (ECLI:IT:CASS:1999:138CIV) concerning a similar dispute. It is also argued that Articles 62(1), 66(1) and 67(1) of the General Rules only provide for the possibility of challenging decisions on repeating a year first in administrative proceedings and then in appeal proceedings before the Complaints Board, but do not provide for an extension of the exclusive competence of the Board also in this regard. Such an extension would constitute a derogation from the Convention, which is not permitted as it is a 'primary' act which only the High Contracting Parties may carry out.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 The referring court refers first of all to the provisions of law relevant to the dispute (in particular, Article 31 of the Vienna Convention).
- 9 The referring court then explains the system of the European schools, recalling that it was established by virtue of two international treaties signed in Luxembourg on 12 April 1957 and 13 April 1960, which were subsequently repealed and replaced by the Convention, and explaining in particular the content of the rules cited above in the section entitled 'Provisions of international and European Union law relied on'.
- 10 The European schools are 'an international organisation which, despite the functional links which it has with the Union, remains formally distinct from it and from those Member States' (judgment of 14 June 2011, *Miles and Others*, C-196/09, EU:C:2011:388, paragraphs 39 and 42).

- 11 In that context, the Court has jurisdiction to rule on the question referred for a preliminary ruling on the interpretation of the Convention, which constitutes an international agreement whose provisions ‘form an integral part of the EU legal system’ (judgment of the Court of 11 March 2015, *Oberto and O’Leary*, C-464/13 and C-465/13, ECLI: EU:C: 2015:163, paragraphs 29 to 31).
- 12 The question referred for a preliminary ruling is relevant since the Supreme Court of Cassation, Combined Chambers, is required to rule definitively, without its ruling being subject to judicial review, on whether, in the present case, the Italian courts have jurisdiction or the Complaints Board has exclusive jurisdiction, as provided for in the 2014 Rules.
- 13 The referring court, as the court of final instance, states that it cannot be considered exempt from the obligation to make a reference for a preliminary ruling under Article 267 TFEU by virtue of the conditions set out in the settled case-law of the Court (judgments of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, ECLI:EU:C:2021:799).
- 14 In that regard, it recalls the abovementioned judgment of the Court of 11 March 2015, C-464/13 and C-465/13, in which the Court interpreted the first sentence of the first subparagraph of Article 27(2) of the Convention as meaning that an act carried out by the headteacher of a European school in the exercise of his or her powers can come within the scope of that provision. Points 1.3, 3.2 and 3.4 of the Conditions of Employment for Part-time Teachers must be interpreted as meaning that a dispute concerning the legality of an agreement on limiting the duration of the employment relationship included in the employment contract concluded between a part-time teacher and that headteacher comes within the exclusive jurisdiction of the Complaints Board of the European Schools (paragraph 76). However, although useful arguments are drawn from that judgment for the resolution of the present dispute, it concerns a different case and the interpretation contained therein of Article 27(2) of the Convention cannot be applied by analogy to the present case.
- 15 The referring court also refers to its own judgment 138/99, cited above, in which it held that the Italian courts had jurisdiction on the basis of an interpretation of Articles 6(2) and 27(1), (2) and (7) of the Convention, in the case of a challenge before the administrative court against a decision on repeating a year adopted by the Class Council, holding that that decision did not fall within the exclusive jurisdiction of the Complaints Board under Article 27 of the Convention as it was not an act adopted by the Board of Governors or the School’s Administrative Board, but that Italian jurisdiction should apply since it concerned ‘another dispute’ which is thus reserved to ‘national jurisdiction’ under paragraph 7 of Article 27.
- 16 It should be observed, however, that the legal framework in that case differed from that of the main proceedings in which the rules applicable *ratione temporis*

are the 2014 Rules. The 1996 Rules, which were applicable at the time, provided only for the possibility of bringing, in limited cases, administrative proceedings against the Class Council's decisions on repeating a year, but did not provide for the possibility of bringing an appeal before the Complaints Board.

- 17 That said, the abovementioned judgment of the Court of 11 March 2015, C-464/13 and C-465/13, is useful for the purposes of interpreting the first sentence of the first subparagraph of Article 27(2) of the Convention. In that judgment it was held that, although the act adversely affecting a part-time teacher (a contract limiting the duration of the employment relationship) was not adopted by the Board of Governors or the Administrative Boards but by the headteacher of the school (as provided for in points 1 and 3 of the Conditions of Employment for Part-time Teachers, which refers to Article 80 of the Regulations for Members of the Seconded Staff, which reserves to the Complaints Board exclusive jurisdiction to rule on 'any dispute between the management organs of the School and members of staff regarding the legality of an act adversely affecting them'), an interpretation of the abovementioned provisions in accordance with the international law of treaties leads to the conclusion that the Complaints Board has exclusive jurisdiction to rule on the act concerned having adverse effect, inasmuch as the judicial practice [of the Complaints Board] concerning the 'dispute between the management organs of the European schools and members of staff' has developed to that effect.
- 18 That conclusion was reached in that judgment, it being pointed out that the 'wording' of Article 80 'differs' from that of the first sentence of the first subparagraph of Article 27(2) of the Convention.
- 19 It is appropriate to categorise the aforementioned judicial practice 'as establishing the agreement of the parties on the matter of the interpretation of the first sentence of the first subparagraph of Article 27(2) of the Convention ... That same practice is therefore liable to override the wording of Article 27(2) of the Convention, which must therefore be read as not precluding the acts of the management organs of the European schools from, in principle, being regarded as covered by Article 27(2) of the Convention defining the Statute of the European schools.'
- 20 It follows from the judgment of the Court of 11 March 2015, C-464/13 and C-465/13, that such an interpretation does not affect the right to effective legal protection, as the Complaints Board satisfies all the requirements which must be met in order for a body to be recognised as 'a court or tribunal' for the purposes of Article 267 TFEU ('in particular that it is established by law, is permanent, its jurisdiction is compulsory, its procedure is *inter partes*, it applies rules of law and it is independent, with the exception of the requirement that it be a court or tribunal of one of the Member States'; paragraph 72, which refers to the judgment in *Miles and Others*) and, under Article 47 of the Charter of Fundamental Rights of the European Union, 'the principle of effective judicial protection does not afford a right of access to a second level of jurisdiction but only to a court or tribunal' (paragraph 73).

- 21 In the light of the above judgment and the 2014 Rules, and after recalling that, in the main proceedings, the decision on repeating a year is a matter for the Class Council and may be appealed before the Secretary-General (whose decision may be appealed before the Complaints Board, the court of first and final instance), the referring court observes that the possibility of an appeal as provided for in Article 67 of the 2014 Rules — the French text of which is worded as follows: [*‘Les décisions administratives (...) peuvent faire l’objet d’un recours contentieux (...)’* (‘... administrative decisions ... may be the subject of a contentious appeal’)] — should not be understood as leaving the parties concerned the alternative avenue of seeking judicial remedy before a national court. The General Rules of the European Schools are laid down by the Board of Governors and determine the conditions and the detailed rules relating to appeals before the Complaints Board, to which jurisdiction in the matter in question is reserved.
- 22 Also relevant is the documentation filed by the School, such as the various rulings of the Complaints Board on appeals against certain decisions on repeating a year, and the Complaints Board’s 2007 activity report; this shows that new avenues of appeal against decisions on repeating a year were introduced in the 2005 Rules and that there has been a gradual extension of the Complaints Board’s jurisdiction over appeals, whereas previously that jurisdiction was limited to appeals by teaching staff.
- 23 The practice of bringing appeals before the Complaints Board against decisions on repeating a year is confirmed by the order of the General Court of the European Union of 18 June 2020, *JT v Secretary-General of the European Schools*, T-42/20 (ECLI:EU:T:2020:278); this concerned a case relating to an appeal by a student of the ‘RheinMain GmbH’ European School against the decision of the 2019 European Baccalaureate Examining Board on failure to obtain the baccalaureate. In that order, the General Court, while declaring that it lacked jurisdiction to decide on the above appeal, stated that it could be brought, once the administrative procedure had been exhausted, exclusively before the Complaints Board, as a court or tribunal adjudicating at first or second instance in a case such as the present.
- 24 The referring court requests, pursuant to Article 105 of the Rules of Procedure of the Court of Justice, that the reference for a preliminary ruling be decided under an expedited procedure on account of the importance of education to the student’s personal development and the international significance of the dispute.