

Proposal of the European Ombudsman for a friendly solution in her inquiry into complaint 1661/2011/(VIK)MMN against the European Commission

Solution - 03/10/2011

Case 1661/2011/LP - **Opened on** 03/10/2011 - **Recommendation on** 20/05/2014 - **Decision on** 27/07/2015 - **Institution concerned** European Commission (Critical remark) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The present case concerns a complaint by a parents' association of the European Schools against a decision by the European Commission to recover funds from the European Schools.
2. The Statute of the European Schools, adopted in 1957, was amended by a convention concluded between Member States and the EU in 1994. [2] According to the Statute of the European Schools, the purpose of the Schools is to educate together children of the staff of the EU institutions. Other children may also attend the European Schools under the conditions established by the Board of Governors. [3]
3. The Board of Governors is composed of representatives of each Member State, the Commission, the Staff Committee and the parents' associations. [4] It has decision-making powers in educational, budgetary and administrative matters. [5]
4. Under the implementing rules, there are three categories of pupils admitted to the European Schools: (i) children of the staff of the EU institutions (category I), (ii) children of staff of organisations or institutions which have concluded an agreement with the European Schools (category II) and (iii) children of private fee-paying parents (category III).
5. As regards students without a language section ('SWALS'), Article 16 of the decision of the Board of Governors of 28 and 29 April 1998 (the 'Board of Governors' decision of 1998') establishes the following: "*If one of the language sections of the European Schools corresponding to a category I or II pupil's mother tongue is not open in the School, this pupil has a right to tuition in the language which is his mother tongue (L1) [...].*" This same provision further establishes: "*The above provisions only apply to category III pupils if the course in*



question has already been created. "

6. In its meeting of 14-16 April 2010, the Board of Governors approved the discharge on the implementation of the 2008 budget (24 votes in favour, 4 abstentions and the Commission voting against).

7. On 29 April 2010, the Commission initiated recovery proceedings against several Schools for the period 2008 to 2010. In the Commission's view, the Schools concerned had been offering mother tongue language courses (L1) to SWALS in infringement of the Board of Governors' decision of 1998. The Commission contended that the Schools had been offering L1 courses to category III pupils without the presence of any category I or II pupils in the courses in question.

8. On 30 September 2010, the Secretary-General of the European Schools wrote to the Commission stating that the Commission's initiation of recovery proceedings was based on a restrictive interpretation of the Board of Governors' decision of 1998. The Secretary-General suggested that the Commission's interpretation could be adopted at the following meeting of the Board of Governors in December. However, the Secretary-General added that, in this event, it would be appropriate to close the existing courses progressively in order to protect the legitimate expectations of pupils and their parents and to avoid harmful situations for the pupils.

9. On 20 October 2010, the complainant wrote to the Commission arguing that the recovery proceedings, which were unilaterally initiated, were a serious threat to the governance of the European Schools. The complainant stressed that the Board of Governors was the ultimate decision-making body of the European Schools system.

10. On 22 November 2010, the Commission replied to the complainant. The Commission noted that it has a dual role within the European Schools, namely as a member of the Board of Governors and also as a provider of funds representing around 60% of the budget of the European Schools. It added that it is obliged to comply with the rules provided for in the EU Financial Regulation. [6] Thus, the Commission argued that it was obliged to initiate recovery proceedings since the courses in question were provided in infringement of the Board of Governors' decision of 1998.

11. On 26 January 2011, the complainant requested clarifications from the Commission regarding the reasons why, in its view, the courses in question were provided in infringement of the Board of Governors' decision of 1998.

12. On 9 February 2011, the Commission repeated that, in its opinion, the relevant courses had been provided in infringement of the applicable rules. It insisted that it was obliged to ensure that the budget of the European Schools is spent in accordance with the applicable rules.

13. On 9 August 2011, the complainant lodged the present complaint with the Ombudsman.

The subject matter of the inquiry



14. The Ombudsman opened an inquiry into the following allegations and claim:

Allegations

(1) The Commission lacked legal authority to seek reimbursement from the European Schools for mother-tongue classes for SWALS.

Supporting arguments:

The complainant argued that the Commission's decision to that effect was contrary to the European Schools' system of governance because the Commission was by-passing the Secretary-General and the Board of Governors of the European Schools.

(2) Even if the Commission could seek reimbursement from the European Schools for mother-tongue classes for SWALS, its decision contravened (i) the decision of the Board of Governors of the European Schools granting discharge for the 2008 budget, and (ii) the principles of legal certainty and legitimate expectations, as the Commission was, in essence, imposing budgetary cuts retroactively.

Claim:

The Commission should make a commitment to respect the decision(s) of the Board of Governors regarding such matters.

The inquiry

15. On 3 October 2011, the Ombudsman opened an inquiry into this case and requested the Commission to provide an opinion.

16. On 2 December 2011, the Commission submitted its opinion, which was forwarded to the complainant for its observations.

17. On 31 January 2012, the complainant submitted its observations.

18. On 7 May 2013, the Ombudsman made further inquiries.

19. On 12 July 2013, the Commission provided its reply to the Ombudsman's further inquiries, which was forwarded to the complainant for observations.

20. On 19 September 2013, the complainant submitted its additional observations.

The Ombudsman's analysis and provisional



conclusions

Preliminary remarks

21. In previous decisions [7] the Ombudsman has taken the view that the European Schools are not a Union institution or body, but that the Commission has a certain responsibility for their operation because it is represented on the Board of Governors and contributes largely to their financing.

22. Therefore, the present proposal for a friendly solution concerns only the Commission's behaviour, and not that of the European Schools since the latter are not an EU institution, body, office or an agency within the meaning of Article 228 TFEU. Thus, the Ombudsman's assessment will be limited to the Commission's allegedly wrong decision to seek reimbursement from the European Schools for mother-tongue courses offered for SWALS.

A. Allegation that the Commission lacked legal authority to seek reimbursement from the European Schools and the related claim

Arguments presented to the Ombudsman

23. According to the complainant, the Commission lacked the legal authority unilaterally to claim reimbursement for the courses in question. In the complainant's view, in so doing, the Commission by-passed the authority of the Secretary-General and of the Board of Governors, which is the ultimate decision-making body of the European Schools and had already decided the discharge of the 2008 budget. By acting in that manner, the Commission was undermining the European Schools' governance system.

24. The complainant further referred to Article 26 of the Statute of the European Schools, which provides that:

" The Court of Justice of the European Communities shall have sole jurisdiction in disputes between Contracting Parties relating to the interpretation and application of this Convention which have not been resolved by the Board of Governors. "

25. According to the complainant, it followed thereof, that, in case of disagreement, as in the present case, the Commission should have lodged an action before the Court of Justice (the 'Court') rather than claiming reimbursement unilaterally.

26. In its opinion, the Commission noted that it plays a dual role within the governance system of the European Schools, namely as a member of the Board of Governors and also as a financial contributor to the budget of the European Schools (56% in 2010). In this latter capacity,



pursuant to the EU Financial Regulation, the Commission has the obligation to ensure that all expenditure financed by the EU budget has a legal basis and is incurred according to the applicable rules (in this case the Board of Governors' decision of 1998).

27. Thus, according to the Commission, it must recover any EU funds which are not spent in compliance with the rules. It added that the Board of Governors and the Secretary-General do not need to be consulted if expenditure is incurred in breach of binding legal provisions. The Commission suggested that the fact that the discharge for the 2008 budget was approved by the Board of Governors did not affect the fact that the contested expenditure was incurred in breach of the Board of Governors' decision of 1998. In such circumstances, the Commission was obliged to initiate recovery proceedings.

28. In its observations, the complainant argued that the Commission committed an act of maladministration by unilaterally interpreting the applicable rules rather than trying to solve this issue within the context of the European Schools system or bringing an action before the Court. According to the complainant, the Commission itself would have deemed it unacceptable if a Member State had decided to deduct from its contribution to the European Schools' budget costs that it unilaterally regarded as illegal.

29. Thus, the complainant insisted that the Commission should make a commitment to respect the decisions of the Board of Governors on matters within its competence and to initiate Court proceedings if it deems that an illegality has occurred.

30. In its reply to the Ombudsman's further inquiries, the Commission said that its interpretation of the Board of Governors' decision of 1998 had not been formally contested by any of the contracting parties to the Statute of the European Schools. It noted that the complainant and the Secretary-General are not contracting parties and do not represent the Board of Governors. Therefore, Article 26 of the Statute of the European Schools was not applicable to the present circumstances.

31. Furthermore, the Commission said that it had sought to find a solution in the context of the European Schools' system by offering not to vote against the discharge of the 2008 budget in exchange for a commitment from the European Schools to observe the relevant rules in the future. However, since no such commitment was made, it voted against the discharge.

32. The Commission added that its power to initiate recovery proceedings from the European Schools derives from the Financial Regulation, which prohibits that expenditure incurred in violation of the applicable rules is borne by the EU budget.

33. In its additional observations, the complainant pointed out that the Board of Governors' decision of 2011 showed that the other contracting parties contested the Commission's interpretation of the Board of Governors' decision of 1998.

34. Moreover, the complainant insisted that the Commission is merely one of the members of the European Schools system and is not empowered to interpret unilaterally the rules adopted



by the Board of Governors. Thus, the Commission had abused of its position as a financial contributor by deciding not to refer the matter to the Court as provided for in Article 26 of the Statute of the European Schools.

35. Finally, the complainant put forward a new claim, namely that the Commission should return the funds it had recovered unilaterally.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

36. The Ombudsman notes that, pursuant to Articles 10 to 13 of the Statute of the European Schools, the Board of Governors is entrusted with the necessary decision-making powers in educational, budgetary and administrative matters. In particular, in educational matters, the Board of Governors determines which studies are offered and how they are organised (Article 11). Moreover, it approves the budget of the European Schools for each financial year (Article 13). The Secretary-General represents the Board of Governors and directs the Secretariat (Article 14).

37. Thus, it is clear that the Commission, acting on behalf of the EU, cannot be regarded as the ultimate decision-making body in educational and budgetary matters within the framework of the governance system of the European Schools.

38. The Ombudsman further notes that Article 3 of the EU Financial Regulation establishes that "*[t]he budget shall be established and implemented in compliance with the principles of [...] sound financial management which requires effective and efficient internal control [...]*". Furthermore, Article 27(1) of the EU Financial Regulation provides: "*Budget appropriations shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness.* "

39. Moreover, Article 48(1) of the EU Financial Regulation establishes the following: "*The Commission shall implement the revenue and expenditure of the budget in accordance with this Regulation, on its own responsibility and within the limits of the appropriations authorised.* "

40. The Ombudsman accepts that the Commission is obliged to ensure that EU resources are used in compliance with the relevant rules. Thus, since the Commission provided EU resources to the European Schools, it was obliged to ensure that those funds were used in accordance with the principle of sound financial management and that there was an adequate legal basis for the expenditure in question. In fact, the Commission would infringe EU law and the principles of good administration if it failed to take adequate measures to ensure that EU resources are properly used.

41. In this context, the Ombudsman must consider whether by initiating recovery proceedings against the European Schools the Commission acted in an appropriate manner.



42. The Ombudsman notes that Article 26 of the Convention makes it clear that the Court of Justice " *shall have sole jurisdiction in disputes between Contracting Parties relating to the interpretation and application of this Convention which have not been resolved by the Board of Governors* ". [8] Thus, it is not for any one of the contracting parties to act unilaterally when a dispute arises regarding issues of interpretation and application of the rules.

43. The Ombudsman is of the view that, where the Commission considered that certain European Schools were misusing public funds in breach of the rules (namely, the Board of Governors' decision of 1998) or that the Board of Governors itself had infringed such rules (in particular, by approving the discharge of the budget for 2008), it was obliged to act to protect the financial interests of the Union. However, in doing so, the Commission must act according to the relevant provisions of the Statute of the European Schools, to which it the EU is a party.

44. Thus, the Commission was required to raise the issue of the alleged misuse of the funds in with the Board of Governors, which is the ultimate decision-making body in educational and budgetary matters as far as the governance system of the European Schools is concerned (Article 10 of the Convention). This was even more the case in circumstances where the rules, alleged to have been infringed, were rules made by the Board of Governors itself. It is clear that the Commission did raise this issue with the Board of Governors.

45. By its adoption of the discharge of the 2008 budget, the Board made it clear that it did not share the Commission's view regarding the misuse of funds. In the circumstances, the Commission should either have respected this decision or referred the matter to the Court of Justice as provided for in Article 26 of the Statute of the European Schools. It should not have opted, unilaterally, to initiate recovery proceedings.

46. Accordingly, the Ombudsman's preliminary finding is that the Commission failed in this case to comply with the Statute of the European Schools and that this failure constitutes maladministration.

47. In light of the above, the Ombudsman makes the preliminary finding that the first allegation and the related claim are well-founded. She proposes to seek a friendly solution (see below), in accordance with Article 3(5) of the Statute of the European Ombudsman.

48. As regards the complainant's additional claim (point 35 above), the Ombudsman notes that it does not appear to have been brought to the attention of the Commission yet. It is thus inadmissible for lack of appropriate prior approaches. [9]

B. Allegation that the decision to seek reimbursement contravened the decision of the Board of Governors on the discharge of the 2008 budget and the principles of legal certainty and legitimate expectations



Arguments presented to the Ombudsman

49. According to the complainant, even if the Commission could seek reimbursement directly from the European Schools such decision would still be wrong since it would be in breach of (i) the decision of the Board of Governors on the discharge of the 2008 budget, and (ii) the principles of legal certainty and legitimate expectations, as the Commission was in essence imposing budgetary cuts retroactively.

50. As far as point (i) above is concerned, the complainant argued that the discharge of the 2008 budget was approved by the Board of Governors, with the sole opposition of the Commission. Thus, the Commission's decision to initiate recovery proceedings covering, *inter alia*, this period would be contrary to the decision of the Board of Governors on the discharge of the 2008 budget.

51. In relation to point (ii) above, the complainant contended that the Commission's decision was contrary to the principle of legal certainty because the Commission was calling into question expenditure which had already been approved by the Board of Governors. Moreover, the complainant added that the principle of legitimate expectations on the part of the students and the parents concerned was infringed.

52. With regard to point (i) above, the Commission noted that during the meeting of the Board of Governors of April 2010, as part of the analysis of the proposed budget for 2011, its representative explained that the Commission had noticed a sharp increase in the budget appropriations for SWALS. Upon examination of the matter, the Commission reached the conclusion that the decisions of the Board of Governors had not been correctly implemented by several schools. According to the Commission, the Court of Auditors had reached the same conclusion.

53. In relation to the 2008 budget, the Commission recognised that the discharge was approved in that meeting with 24 positive votes, 4 abstentions and the Commission voting against. However, in the Commission's view, a discharge covering expenditure which was incurred in breach of the rules did not render such expenditure lawful. Thus, since the expenditure was incurred illegally, as the Commission believed, it was obliged to recover it. Therefore, its decision to initiate recovery proceedings was not contrary to the principle of legal certainty since it resulted from the application of the rule of law (point (ii) above).

54. The Commission added that it sent letters with a view to issuing recovery orders to all the European Schools whose expenditure was not in compliance with the rules. However, it did not issue any recovery orders against the Schools (other than the school in Karlsruhe) since all the schools concerned took measures to correct the situation (except for the European School in Karlsruhe).

55. The Commission further said that it would ensure that the new rules adopted by the Board of Governors, which entered into force in September 2011, are correctly applied by all European Schools in the future.



56. As far as the alleged infringement of the principle of legitimate expectations is concerned, the Commission argued that no legitimate expectations can arise in relation to acts which are in breach of the law.

57. The complainant stated that the Board of Governors had not accepted the Commission's position that the provision of courses in question was in breach of the rules. The complainant stated that, at a meeting of the Board in 2011, it had asked the Board whether the provision of the particular courses was in breach of the rules. The complainant stated that the Board did not express the view that the courses had been provided in breach of the rules.

58. At the same meeting, the Board of Governors decided that category III pupils should no longer be admitted as SWALS under any circumstances. The complainant contended that this decision supports the view that the provision of the courses, up to that point, was in compliance with the rules, contrary to the Commission's contention.

The Ombudsman's preliminary assessment

59. The Ombudsman notes that the Commission decided not to issue any recovery orders against the European Schools (other than as regards the school in Karlsruhe). Furthermore, as of September 2011, new rules apply to SWALS, which differ from those in force during the period under consideration.

60. In view of her preliminary finding on the first allegation and the related claim, and in the light of her proposed friendly solution on that matter, the Ombudsman does not feel it necessary at this stage to take a position on the issues raised in the second allegation.

61. However, the Ombudsman reserves the right to revert to this issue depending on the Commission's reply to her proposal for a friendly solution.

C. The proposal for a friendly solution

Based on the Ombudsman's findings, the Commission could agree that, if such cases arise in future, it will not take unilateral action to recover funds from the European Schools. Instead, it will raise the matter with the Board of Governors and, if it decides to pursue the matter further, do so by way of a reference to the Court of Justice under Article 26 of the Statute of the European Schools.

Emily O'Reilly

Done in Strasbourg on 8 November 2013

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general



conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] Convention defining the Statute of the European Schools, OJ 1994 L 212, p. 3.

[3] See Article 1 of the Statute.

[4] See Article 8 of the Statute.

[5] See Articles 10 to 13 of the Statute.

[6] Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1 (the 'Financial Regulation'). This regulation has been now replaced by Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ 2012 L298, p. 1.

[7] See, for instance, the decision of the Ombudsman closing his inquiry into complaint 1088/2011/TN against the European Commission, point 13, and the decision of the Ombudsman closing his inquiry into complaint 11/2012/(ZV)AN against the European Commission, point 12.

[8] As an example in which the Court was called to exercise its jurisdiction concerning the interpretation and application of this convention, see, for instance, Case C-545/09 *Commission v United Kingdom*, judgment of 2 February 2012, not yet published in the ECR.

[9] Article 2(4) of the Statute of the Ombudsman.