

Draft recommendation of the European Ombudsman in her inquiry into complaint 1661/2011/(VIK)MMN against the European Commission

Recommendation

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(6) of the Statute of the European Ombudsman [1]

The background

1. This 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 [6] ('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 with 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.

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. He proposed 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.

10. On 22 November 2010, the Commission replied to the complainant 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 was obliged to initiate recovery proceedings since the courses in question were provided in infringement of the Board of Governors' decision of 1998.

The inquiry

13. 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.

(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.

16. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. The Ombudsman also made further inquiries after receiving the reply of the Commission.

17. On 8 November 2013, the Ombudsman made a proposal for a friendly solution. In its reply of 20 January 2014, the Commission rejected the Ombudsman's friendly solution. On 28 February 2014, the complainant submitted its observations. [7]

The Ombudsman's analysis and conclusions

Preliminary remarks

18. In previous decisions [8] 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.

19. This draft recommendation 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.

20. As regards the complainant's second allegation (i.e., 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), the Ombudsman does not feel it necessary at this stage to take a position, in view of her other findings in this draft recommendation. Therefore, this draft recommendation focuses only on the first allegation and claim.

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

The Ombudsman's friendly solution proposal



- 21.** When proposing the friendly solution, the Ombudsman took into account the arguments and opinions put forward by the parties. In particular, the Ombudsman noted 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 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).
- 22.** Thus, it was 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.
- 23.** The Ombudsman further noted that Article 3 of the EU Financial Regulation [9] 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.*"
- 24.** Moreover, Article 48(1) of the EU Financial Regulation provides that "*[t]he 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.*"
- 25.** The Ombudsman accepted that the Commission is obliged to ensure that EU resources are used in compliance with the relevant rules. 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.
- 26.** In this context, the Ombudsman had to consider whether, by initiating recovery proceedings against the European Schools, the Commission had acted in an appropriate manner.
- 27.** The Ombudsman noted 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*". [10] Thus, it is not for any of the contracting parties to act unilaterally when a dispute arises regarding issues of interpretation and application of the rules.
- 28.** The Ombudsman was 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.
- 29.** However, in doing so, the Commission was required to raise the issue of the alleged misuse of the funds 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). It was clear that the Commission did raise this issue with the Board of Governors.

30. In the discharge of the 2008 budget, the Board of Governors made it clear that it did not share the Commission's view regarding the misuse of funds. In such 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 unilaterally decided to initiate recovery proceedings.

31. Accordingly, the Ombudsman concluded that the first allegation and the related claim were well-founded and made the following friendly solution proposal:

" 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. "

The Ombudsman's assessment after the proposal for a friendly solution

31. In its reply to the friendly solution proposal, the Commission repeated that, in order to protect the financial interests of the EU, it must be able to take all appropriate measures (including issuing recovery orders) if EU funds are used irregularly.

32. The Commission also stated that it took notice of its obligation to act in line with the relevant provisions of the Statute of the European Schools, to which the EU is a party, and expressed its commitment to make all reasonable efforts to solve issues within the context of the European Schools system.

33. In its observations, the complainant expressed its dissatisfaction with the Commission's refusal to accept the Ombudsman's friendly solution proposal.

34. The Ombudsman regrets the Commission's refusal to accept the proposal for a friendly solution. Moreover, the Ombudsman is disappointed with the Commission's succinct reply.

35. In essence, the Commission confirms that it will continue launching recovery orders if it identifies budgetary concerns. Although the Commission stated that it takes note of its obligation to respect the Statute of European Schools and committed itself to informing the Board of Governors in advance in the event of any future disagreement that might lead to recovery proceedings, it failed properly to address the argument put forward by the Ombudsman. In fact, the Commission declined to acknowledge that, where its reasonable efforts to resolve issues within the context of the European Schools' system fail, it should



comply with Article 26 of the Statute of the European Schools instead of launching recovery orders unilaterally.

36. In light of the above, the Ombudsman finds that the Commission's failure to comply with the Statute of the European Schools constituted an instance of maladministration. She therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

The draft recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

The Commission should confirm 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, in the event that a solution is not found, instead of taking unilateral action, the Commission will refer the matter to the Court of Justice, which under Article 26 of the Statute of the European Schools has 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.

The Ombudsman considers it useful to draw the Commission's attention to the fact that if the Commission were not to accept her draft recommendation, she would consider whether a special report on this matter should be submitted to the European Parliament.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 July 2014.

Emily O'Reilly

Done in Strasbourg on 20 May 2014

[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] The European Schools provide teaching in the official languages of the EU, which explains the expression 'language section'.

[7] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's friendly solution proposal available at:

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54349/html.bookmark>
[Link]

[8] 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.

[9] 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.

[10] 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.