

Decision of the European Ombudsman closing the inquiry into complaint 1661/2011/LP against the European Commission

Decision

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) |

The case concerned a complaint by a parents' association of the European Schools against the European Commission's decision to issue a recovery order against one of the European Schools. The Ombudsman inquired into the issue and found that the Statute of the European Schools did not empower the Commission to act unilaterally. Therefore, the Ombudsman made a friendly solution proposal, which the Commission refused. The Ombudsman then made a draft recommendation. The Commission did not accept the draft recommendation either. The Ombudsman has therefore decided to close the case with a critical remark.

The background

1. The Statute of the European Schools [1] establishes that, apart from children of the staff of the EU institutions (category I) and children of staff of organisations or institutions which have entered into an agreement with the European Schools (category II), children of private fee-paying parents (category III) may also be admitted to the European Schools. Regarding students without a language section ("SWALS"), [2] the Board of Governors' decision of 1998 provided that category III students would have the right to tuition in their mother tongue (L1) " *if the course in question has already been created* ".

2. In April 2010, the Board of Governors approved the discharge on the implementation of the 2008 budget, with the Commission voting against it on the grounds that the European Schools had been offering L1 courses to category III students without the presence of students from the other two categories. In the Commission's view, this was contrary to the Board of Governors' decision of 1998. Therefore, the Commission issued letters with a view to initiating recovery proceedings against the European Schools. All the schools, except the school in Karlsruhe, adopted corrective measures. The Commission thus started recovery proceedings against the school in Karlsruhe.

3. The complainant argued that, by acting unilaterally, the Commission was undermining the



European Schools' governance system. The Ombudsman opened an inquiry into the complainant's allegations that (1) the Commission lacked legal authority to seek reimbursement from the European Schools for mother-tongue classes for SWALS, and that (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 granting 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. The Ombudsman's inquiry also covered the complainant's claim that the Commission should make a commitment to respect the decision(s) of the Board of Governors regarding such matters. [3]

4. The Ombudsman found that the first allegation was well-founded and proposed to seek a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman. However, the Commission refused the proposed solution. The Ombudsman examined the Commission's opinion and the complainant's observations and concluded that the Commission's failure to comply with the Statute of the European Schools constituted maladministration. She therefore made a corresponding draft recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman.

5. As regards the second allegation, the Ombudsman did not feel it necessary to take a position, in view of her other findings in the draft recommendation. Therefore, this decision will focus on the first allegation and claim. [4]

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

The Ombudsman's draft recommendation

6. The Ombudsman made the following draft recommendation:

" The Commission should confirm that, if such cases arise in the 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 ."

7. In its opinion on the draft recommendation, the Commission repeated that the Board of Governors' decision of 1998 clearly limited the right to tuition in L1 courses to categories I and II pupils. The Commission insisted that this decision was the legal basis for expenditure and had to be interpreted strictly. Moreover, the Commission argued that this interpretation was confirmed by the new rules adopted by the Board of Governors in April 2011 (which



exceptionally allowed category III students to attend L1 courses only if they were enrolled in such courses before September 2011, in order to ensure pedagogical continuity) and by a later decision of September 2011, that did not allow category III students to participate in L1 courses, even if the organisation of these courses did not generate additional costs.

8. The Commission repeated that the measures adopted stemmed from its obligations under the EU Financial Regulation, [5] and stressed its obligation to ensure that the expenditure of the European Schools is implemented in an accurate and transparent manner. In the Commission's view, a failure to protect the financial interests of the EU budget in cases of irregularities concerning expenditure would be at odds with its responsibility as regards the EU contribution to the European Schools' budget.

9. The Commission further added that there is no provision in the Convention that would prohibit unilateral recovery. The Commission also argued that Article 26 of the Statute could not apply to the present case because, under that provision, a legal action by the Commission could have been directed against other Contracting parties, but not against a School or the Board of Governors. Moreover, in this case, no Member State, as a party to the Convention, had formally objected to the Commission's interpretation or decision to initiate recovery proceedings.

10. Finally, the Commission reiterated that it is committed to inform the Board of Governors in advance where, in cases of disagreement, it intends to take unilateral action to recover funds from the European Schools.

11. The complainant did not submit any observations on the Commission's opinion. Therefore, the Ombudsman assessed the case on the basis of the information at her disposal.

The Ombudsman's assessment after the draft recommendation

12. As the Ombudsman explained in her proposal for a friendly solution and her draft recommendation, according 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 light of these provisions, the Ombudsman took the view that the Commission could not be regarded as the ultimate decision-making body in educational and budgetary matters within the framework of the governance of the European Schools system.

13. The Ombudsman accepted that according to the EU Financial Regulation, the Commission has the obligation to ensure that EU resources are used in compliance with the relevant rules and to take adequate measures in that regard. However, the Ombudsman considered that the Commission had not acted in an appropriate manner when it unilaterally issued a recovery order against the European Schools. Indeed, the Ombudsman found that Article 26 of the Statute of the European Schools required the Commission to first raise the issue with the Board of Governors (as it did in this case) and, if the Board of Governors did not resolve the matter, to



either respect their decision or to refer the matter to the Court of Justice.

14. After examining the Commission's response to her draft recommendation, the Ombudsman finds the Commission's interpretation of the Convention to be contrary to its spirit. In its opinion, the Commission argued that there is no provision in the Convention that prohibits it from taking unilateral recovery measures and that Article 26 of the Statute could not apply to this case, as any legal action before the Court of Justice should be directed against other (opposing) Contracting parties to the Convention.

15. The Ombudsman notes that the Commission's strict interpretation of Article 26 would, *de facto*, render the Commission the ultimate decision-making body in educational and budgetary matters within the framework of the European Schools system. This cannot have been the intention of the Contracting parties. The Ombudsman further notes that the Member States are represented in the Board of Governors. It follows that there is nothing that could prevent the Commission, having failed to have an issue relating to the interpretation and application of the Convention resolved by the Board of Governors, to rely on Article 26 and bring an action before the Court of Justice against those Member States that have supported the said decision by the Board of Governors.

16. In the present case, the Ombudsman finds that, contrary to what the Commission has argued, the Board of Governors' decision of April 2011 to allow Category III pupils to attend L1 classes, if they were enrolled before 1 September 2011, clearly shows that the Board of Governors did not endorse the Commission's decision to adopt unilateral retroactive measures that could compromise the principle of pedagogical continuity for these pupils. [6]

17. Therefore, the Ombudsman maintains her view that the Commission's position that it is entitled to take unilateral action to recover funds from the European Schools is contrary to the Statute of the European Schools, which confers on the Board of Governors the competence to take decisions in educational, budgetary and administrative matters.

18. Since there are no remaining practical steps open to the Ombudsman in relation to this complaint, she will close the case with a critical remark.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The Commission erred by taking unilateral action to recover funds from the European Schools. This amounted to maladministration.

The complainant and the European Commission will be informed of this decision.



Emily O'Reilly

Strasbourg, 27/07/2015

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

[2] The European Schools provide teaching in the official languages of the EU, which explains the existence of different "language sections".

[3] Note that the Ombudsman's inquiry only concerned the Commission's behaviour as part of the Board of Governors and not that of the European Schools. The Ombudsman has consistently maintained that the European Schools are not an EU institution, body, office or agency within the meaning of Article 228 TFEU.

[4] 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 and the draft recommendation available at:

<http://www.ombudsman.europa.eu/cases/correspondence.faces/pl/54349/html.bookmark>

[5] 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 L 298, p. 1.

[6] The decision indicated that " *from 1 September 2011, Category 3 pupils shall learn as L1 the language of the section in which they are enrolled. Category 3 pupils who were enrolled before 1 September 2011 and who learned as L1 a language different from that of the section can continue with the same L1 up to the end of their schooling in order to ensure pedagogical continuity* ".