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LEGAL ANALYSIS OF THE BUDGETARY PROCEDURE 2018

BOARD OF GOVERNORS

Meeting on 17, 18 and 19 April 2018

I. Introduction

At its meeting on 4 – 6 April 2017 the Board of Governors endorsed the Budgetary Committee's proposal and decided to approve the preliminary draft 2018 budget of the European Schools and the Office of the Secretary-General (document 2017-02-D-25-en-3).

The preliminary draft 2018 budget included

- a contribution of the EU Commission of € 199.219.313
- and
- a contribution of the European Patent Office (EPO) of € 22.842.665.

In connection with the approval of the preliminary draft 2018 budget the Board of Governors approved in line with Article 12.4 b) of the Convention defining the Statute of the European Schools (hereafter: the 'Convention') with two-third majority the creation of a total of 16 posts (see for the details document 2017-02-D-26-en-3).

The European Commission voted against the following 4.5 posts:

Schools	Posts requested
Brussels IV	0.5 Nurse
Frankfurt	0.5 Nurse
	1 Caretaker
	0.5 Secretary
Luxembourg I	0.5 Nurse
OSG	0.5 Assistant Human Resources
	1 Accountant
Total	4.5 posts

The European Patent Office voted against the 1,5 posts linked to the Office of the Secretary-General (OSG) as EPO is contributing not only to the Budget of the ES Munich, but also to the budget of the OSG. For the details see the 'Decisions of the Enlarged Meeting of the Board of Governors of the European Schools (doc. 2017-04-D-2-en-2).

By letter of 23 May 2017 the Secretary-General of the European Schools reminded the Director DG HR C 2 in the EU Commission being in charge of the European Schools that despite the fact that the EU Commission did vote against 4.5 posts the EU draft budget should reflect the preliminary draft budget approved by the Board of Governors in April 2017.

DG HR informed the Secretary-General of the European Schools by letter of 5 July 2017 that the Draft Budget 2018 of the Commission, including the EU contribution to be paid to the European Schools, had been adopted on 30 May 2017.

The contribution to be paid to the European Schools would amount to € 198.948.111. This amount would correspond to a shortfall of € 275.153 in relation to the Commission contribution approved by the Board of Governors. This shortfall would correspond to the estimated costs of the 4.5 posts which had not received support of the EU Commission in the meeting of the Board of Governors in April 2017.

By letter of 28 July 2017 DG HR informed the Secretary-General that the Commission had adopted its Draft Budget 2018 on 30 May 2017.

In the same letter the decision of the Commission to reduce the contribution to the budget of the European Schools by the amount corresponding to the 4.5 disagreed posts was confirmed.

According to DG HR this approach would be covered by Article 13.2 of the Convention of the European Schools which reads as follows:

“The Board of Governors shall, by no later than 30 April of each year, establish and estimate of revenue and expenditures of the Schools for the following financial year and forward it forthwith to the Commission, which shall, on that basis, establish the necessary forecasts in the preliminary draft general budget of the European Communities.”

According to DG HR *“it stems from Article 13.2 of the Convention defining the Statute of the European Schools that, although the Commission cannot disregard and propose an amount having no connection with the one approved by the Board of Governors, the Commission and the Budgetary Authority enjoy a discretionary power in proposing and approving the appropriate amount for the European Union contribution in favour of the European Schools”.*

This would also be confirmed by Article 13.4 of the Convention which states that *“the Board of Governors shall finally adopt the budget of the Schools before the start of the budgetary year and shall adopt it if necessary to the contributions of the European Communities and of the organisations or institutions referred to in paragraph 3.”*

In the same letter DG HR also underlined that the Commission had clearly stated *“in full transparency”* its position and had informed the Budgetary Authorities about the cut linked to the 4.5 posts which had not found the support of the Commission in the Board of Governors. In this sense the Budgetary Authority would have *“all the information to exercise its discretionary power to take the final decision on the adopted budget”* when finally adopting the EU 2018 Budget by the end of November 2017.

In order to fulfil the legal obligations laid down in Article 13.4 of the Convention of the European Schools and Article 14.3 of the Financial Regulations the Secretary-General of the European Schools informed the Budgetary Committee already at its meeting in November 2017 about the potential discrepancy between the budget approved in April 2017 and the final EU contribution and proposed in line with the

provisions referred to a revised draft budget for the financial year 2018 corresponding with the envisaged reduced EU contribution.

More precisely, the Secretary-General of the European Schools proposed to reduce the budget of the three schools concerned and the Office of the Secretary-General by the amount corresponding to the 4.5 posts.

However, the Secretary-General also proposed that the 4.5 posts, whose creation had been approved by the Board of Governors by two-third majority, could be maintained.

These proposals were contested by the EU Commission, but did find the support of the majority of the members of the Budgetary Committee and were forwarded to the Board of Governors.

In this context the Secretary-General also informed the members of the Budgetary Committee that also EPO intends, in contradiction with the position taken by the EPO representative in the Board of Governors in April 2017, to reduce its contributions to the 2018 budget.

Based on this information the Budgetary Committee mandated the Office of the Secretary-General to conduct a legal analysis with respect to the procedure followed by the European Commission and the EPO (see Conclusions and Decisions of the Budgetary Committee – doc. 2017-11-D-18-en-2).

By letter of 15 November 2017 the president of the EPO informed the Secretary-General of the European Schools that the EPO contribution will amount to € 22.340.000. The final decision of EPO of 13 December 2017 was confirmed by letter of 20 December 2017.

With respect to the EU contribution DG HR informed the Estonian Presidency and the Secretary-General by letter of 4 December 2017 that the Budgetary Authority had adopted on 30 November 2017 the Budget of the European Union for the 2018 budgetary year.

With regard to the credits related to the 4.5 posts, whose creation was disapproved by the Commission in the Board of Governors in April 2017, DG HR stressed that the EU Budgetary Authority followed the proposal of the Commission and did not put back the required credits. Therefore, the EU contribution would not include the corresponding amount.

In its meeting on 5 – 7 December 2017 the Board of Governors approved with two-third majority the amended 2018 budget.

In this context the Board also decided - against the vote of the EU Commission - that it would be up to the authorising officers concerned to decide whether or not to fill the posts which were not supported by the EU Commission in April 2017 (see Decisions of the Enlarged Meeting of the Board of Governors – doc. 2017-12-D-17en-3).

Based on these facts this document provides a legal analysis with respect to the budgetary procedure followed by the European Commission and the EPO as requested by the Budgetary Committee in November 2017.

II. Legal analysis

Following the mandate given by the Budgetary Committee the Office of the Secretary-General mandated one of its lawyers in Brussels and an expert in international law to analyse the procedure followed by the European Commission and the European Patent Office.

The findings of the consulted lawyers can be summarized as follows:

1. General observations

Article 13 of the Convention of the European Schools and Article 14 of the Financial Regulations do foresee a three-step-approach for the adoption of the budget of the European Schools:

- Step 1: Drawing up of a preliminary draft budget in line with Article 13.2 of the Convention of the European Schools;
- Step 2: adoption of the contribution of the EU Commission and the EPO under their budgetary procedures;
- Step 3: final adoption of the budget of the European Schools in accordance with Article 13.4 of the Convention of the European Schools.

If the contribution decided by the budgetary authorities of the EU and the organisations referred to in Article 13.3 of the Convention differs from the preliminary draft budget approved by the Board of Governors, the Board has to adapt the final budget for the European Schools before the start of the budgetary year (see Article 13.4 of the Convention).

In addition, Article 14.3 of the Financial Regulations states:

“If the amount of the contributions from the organisations referred to in paragraph 1 is different from the amount entered in the draft budget, the Board of Governors, on the initiative of the Secretary-General, shall take the appropriate steps and shall adopt the budget at the latest by 15 May of the financial year concerned.”

These two provisions reflect the power of the EU- and EPO budgetary authorities to finally decide about the contribution to the budget of the European Schools.

In general, this power of the budgetary authorities is not contested.

2. Binding effect of the decision of the Board of Governors

It has to be clarified if and to what extent the EU Commission and the EPO are bound by the decisions taken by the Board of Governors with two-third majority on the preliminary draft budget.

a) Budgetary procedure of the EU Commission

It needs to be further analysed, whether – as stated by the EU Commission in the letter of 28 July 2017 – besides the budgetary authorities also the EU Commission “enjoy(s) a discretionary power in proposing and approving the appropriate amount for the European Union contribution in favour of the European Schools”.

In other words, it needs to be analysed whether the EU Commission was entitled to reduce the contribution by the amount corresponding to the disagreed 4.5 posts or whether the EU Commission was ‘bound’ with respect to its proposal forwarded to the EU budgetary authority by the decision taken by the Board of Governors with two-third majority.

The EU Commission stated in the letter of 28 July 2017 that the EU Commission was not entirely bound by the decision of the Board and “considered not adequate to include [the provisions for the contested 4.5 posts] in its 2018 Draft Budget of the European Union”.

In order to answer the question whether the EU Commission had the right to ignore the fact that - besides the EU Commission and partly EPO - all other Members of the Board of Governors had voted in favour of the disputed posts, Article 12.4 b) and 13.2 of the Convention of the European Schools need to be recalled.

(1) Creation of posts – Article 12.4 of the Convention of the European Schools

Article 12.4 of the Convention of the European Schools reads as follows:

“In administrative matters, the Board of Governors shall:

.....

- 4. (b) determine each year, on a proposal from the Secretary-General, the administrative and ancillary staff requirements.*

The decision concerning the administrative posts has to be taken by two-thirds majority in accordance with Article 9.1 of the Convention of the European Schools.

This requirement was fulfilled concerning the disputed administrative 4.5 posts. All members of the Board of Governors with a voting right – with the exception of the representative of the EU Commission and the representative of EPO - voted in favour of the 4.5 posts.

As a result, the initial assumption can be made that the EU Commission, as the European Union’s representative, is not at any rate authorised to call into question the creation of the 4.5 posts in the 2018 budget.

(2) Budgetary procedure – Article 13.2 of the Convention of the European Schools

It has to be clarified whether, the EU Commission has the right, to reduce in its proposal to the EU budgetary authorities the proposed contribution to the budget of the European Schools. To answer this question, Article 13.2 of the Convention of the European Schools needs to be interpreted.

As already stated earlier Article 13.2 of the Convention of the European Schools reads as follows:

*“The Board of Governors shall, by no later than 30 April of each year, establish and estimate of revenue and expenditures of the Schools for the following financial year and forward it forthwith to the Commission, **which shall, on that basis**, establish the necessary forecasts in the preliminary draft general budget of the European Communities.”*

The crucial question is, whether the phrase ‘*which shall, on that basis*’ obliges the EU Commission to include in its draft budget exactly the amount which corresponds with the amount that had been approved by the Board of Governors with the necessary two-third majority.

The wording ‘*on that basis*’ makes clear that the amount approved by the Board of Governors shall be the basis, and not any other calculation or estimation, by the Commission or a third party.

If the EU Commission would be free to include into the EU preliminary draft budget any other amount than the one decided upon by the Board of Governors, the decision of the Board of Governors would be downgraded to a non-binding recommendation to the EU Commission.

This would be inconsistent with the role of the EU Commission as a delegation in the Board of Governors with defined voting rights. The voting rights of the other delegations in the decision under Art 13.2 of the Convention of the European Schools on the other hand would lose their relevance as the EU Commission could always take its own position or any other figure as a basis for the preliminary draft general budget of the European Communities.

The Convention of the European Schools foresees that the EU Commission, as a Member of the Board of Governors, can always exercise its voting rights. In the discussion in the Board of Governors it can line out in detail its point of view and convince the other delegations of the validity of its arguments. But at the end of the procedure the Convention of the European Schools foresees that a decision is taken by a two third majority, which is binding for all the Members of the Board of Governors.

According to Article 26 of the Vienna Convention on the Law of the Treaties (hereafter: ‘Vienna Convention’) a treaty is binding upon the parties and must be performed by them in good faith.

It cannot be inferred from the wording of Article 13.2 of the Convention of the European Schools that the EU Commission has discretionary power with respect to entry or adjustment of the Schools' budget estimate in the Union's preliminary draft general budget.

In contractual practice of public international law, discretionary power is granted, through the application of concepts which are clearly discernible, that the body or person concerned has a degree of discretion with respect to a decision to be taken by it/him/her. This typically happens through use of the word 'may' ('kann' or 'peut') as are to be found in Articles 2.1, 3.1 and 10, second sentence of the Convention of the European Schools. In the case of the procedure to be followed by the EU Commission, as laid down in the first sentence of Article 13.2 of the Convention of the European Schools, to enter the budget estimate in the Union's preliminary draft general budget, an unequivocally substantiated concept as regards the Commission's discretionary power is, however, missing.

Looking at this in another way, if the EU Commission were to be allowed the possibility of changing at its own discretion the budget estimate decided by the Board of Governors in entering it in the Union's preliminary draft general budget, it would be allowed de facto to wield an arbitrary right to undermine the budget estimate approved by the Board of Governors.

In substance this would come near to a veto. This is not, however, what is foreseen by the wording of the Convention of the European Schools.

According to Article 9 of the Convention of the European Schools decisions of the Board of Governors shall be adopted by two-thirds majority save in cases where unanimity is required. Moreover, the Convention limits the cases of a defacto 'veto' to those referred to in Article 9.1 a) and b) of the Convention of the European Schools. The budgetary procedure laid down in Article 13 of the Convention of the European Schools is not mentioned.

Even if the approach of the EU Commission is not to be seen as a formal veto, as the decision by the Board of Governors was not impeded, the decision was in substance invalidated. Such conduct of a party to the Convention of the European Schools is not in line with the principle of loyalty and acting in good faith.

Consequently, the procedure followed by the EU Commission in entering the appropriations required for the Schools in the Union's preliminary draft general budget appears flawed. Taking into consideration the procedure laid down in the second clause of the first sentence of Article 13.2 of the Convention of the European Schools, the EU Commission had to include, without reduction, the appropriations estimated by the Board of Governors in the Union's preliminary draft general budget.

b) Budgetary procedure of the EPO

Amongst the organisations which do not belong to the Union, the European Parent Organisation has a special status. The European School, Munich was set up through the Supplementary Protocol of 15 December 1975 to the Protocol of 13

April 1962 on the Setting-up of European Schools, which was still in force at the time, to provide schooling for officials of the EPO. The Convention of the European Schools cancelled and replaced the Protocol, but the Supplementary Protocol was unaffected (Article 34 of the Convention of the European Schools). Under Article 2 of the Supplementary Protocol, the EPO has a seat on the Board of Governors and a vote on all questions affecting the European School, Munich.

The EPO contributes to the operating costs of the European School, Munich pursuant to the Agreement of 7 November 1977 concluded between it and the Board of Governors and also, on a pro rata basis, to the costs of the Office of the Secretary-General. Article 2 of the Agreement lays down that the level of the EPO's contribution is established by the difference between the total amount of the budget of the European School, Munich as determined by the Board of Governors and the sum of the School's specific revenue.

In the meeting of the Board of Governors in April 2017 the representative of EPO had voted in favour of the draft budget 2018 and the contribution foreseen for the EPO. Only the 1.5 administrative posts linked to the OSG were contested.

Based on these facts it can be stated that the EPO acted against its previous commitment and undermined by reducing its contribution the decision of the Board of Governors which was taken by two-third majority with the consent of the EPO representative in the Board of Governors.

This contradicts with the obligation laid down in Article 26 of the Vienna Convention which obliges the contracting parties to act in good faith.

3. Conclusion

According to the legal analysis provided by the consulted lawyers the budgetary procedure followed by the EU Commission and EPO was not in line with the Convention of the European Schools.

One of the legal experts highlighted that - independently from the mandate given by the Budgetary Committee - these concerns need to be addressed because unopposed acceptance of the EU Commission's interpretation of the Convention of the European Schools and the EPO's measure, should they not be consistent with the wording and the purpose of the provisions governing the contribution obligations of the Union and of the EPO, may become significant for the future interpretation and application of the Convention of the European Schools and of the Supplementary Protocol.

In this context Article 31 of the Vienna Convention needs to be recalled which reads as follows:

"1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
- 3) *There shall be taken into account, together with the context:*
- a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - c) *any relevant rules of international law applicable in the relations between the parties.*
- 4) *A special meaning shall be given to a term if it is established that the parties so intended.”*

Consequently, in accordance with Article 31.3 (a) and (b) Vienna Convention, the acceptance of a possible interpretation violating Article 13 of the Convention of the European Schools and the EPO's obligations under the Supplementary Protocol may prejudice the future application of both instruments; in international treaty law, the boundaries between interpretation and amendment of a treaty are fluid. Objection precludes acquiescence, acceptance tacit approval.¹

III. Conclusions of the Budgetary Committee

The Budgetary Committee took note of the legal analysis.

IV. Proposal

The members of the Board of Governors are invited to discuss the 'legal analysis' including the three annexes and decide how to proceed.

¹ *Graf Vitzthum*: in: *Graf Vitzthum/Proelß* (ed.), *Völkerrecht* (Public International Law) 7th ed., p.51; see also *Klabbers*, *International Law*, p.57.

Legal analysis provided by Dr. Kunz-Hallstein:

Legal Opinion

**on the question of the budget decisions relating to the European Schools of the
European Union and of the European Patent Organisation
for the financial year 2018**

I. Issue, legal grounds and facts

1. These legal opinion takes a position on the decisions of the budgetary authorities of the European Union ('Union') and of the European Patent Organisation ('EPO'), which rejected the budget proposals of the European Schools ('Schools') for the creation of 4.5 new posts in the financial year 2018.
2. The European Schools are an international organisation. It has a functional relationship with the European Union as the legal successor to the European Community, which came into being in place of the European Communities and which on 21 June 1994 acceded to the Schools' foundation agreement, the Convention defining the Statute of the European Schools ('Statute').

Nevertheless, the Schools remain formally separate, as an independent subject of international law, from the Union and its Member States. For that reason, the Statute of the Schools and the secondary organisational law enacted on the basis of the Statute – which is here the Financial Regulation (FR) – are subject to international law and more particularly to international treaty law, as primarily codified in the Vienna Convention on the Law of Treaties (VCT) (Art. 5 VCT).

3. Under the Convention a treaty is binding upon the parties to it and must be performed by them in good faith (Art. 26 VCT); the Statute and the secondary organisational law are interpreted in accordance with the rules of the Convention (Art. 31 *et seq.* VCT). Accordingly, terms, *inter alia*, used in the multilingually enacted Statute have the same meaning (third paragraph of Art. 33 Statute, Art. 33 VCT). No party can invoke its internal law as justification for its failure to perform a treaty (Art. 27 VCT).

Those principles are recognised in particular in the case law of the European Court of Justice.²

4. Contracting Parties to the European Schools as an organisation are the Member States of the European Union and the latter itself. The Contracting Parties are represented on the Board of Governors of the Schools, the organisation's plenary and legislative body, by one representative each of the Member States, one member of the EU Commission and one representative each of the teaching staff and of the parents (Art. 8 Statute).
5. The Schools' budget is financed by contributions from the members and from organisations which do not belong to the Union but which are associated with the organisation, and also by the Schools' own revenue.

The Member States pay their contributions primarily through continuing payment of the salaries of the teaching staff seconded by them. The Union's contribution is supposed to cover the difference between the total expenditure of the Schools and the total of other revenue (Art. 25(2) Statute). This is expressed as follows in the French version of the Statute:

... qui vise à couvrir la différence entre le montant global des dépenses des écoles et le total des autres recettes.

The corresponding English version reads:

...which is intended to cover the difference between the total amount of expenditure by the Schools and the total of other revenue.

6. Amongst the organisations which do not belong to the Union, the European Parent Organisation has a special status. The European School, Munich was set up through the Supplementary Protocol of 15 December 1975 to the Protocol of 13 April 1962 on the Setting-up of European Schools, which was still in force at the time, to provide schooling for officials of the EPO. The Convention defining the Statute of the European Schools cancelled and replaced the Protocol, but the Supplementary Protocol was unaffected (Art. 34 Statute). Under Art. 2 of the Supplementary Protocol, the EPO has a seat on the Board of Governors and a vote on all questions affecting the European School, Munich.

The EPO contributes to the operating costs of the European School, Munich pursuant to the Agreement of 7 November 1977 concluded between it and the Board of Governors and hence also, on a pro rata basis, to the costs of the General Secretariat. Art. 2 of the Agreement lays down that the level of the EPO's contribution is established by the difference between the total amount of the budget of the European School, Munich as determined by the Board of Governors and the sum of the School's specific revenue.

² ECJ, Judgment C-464/13, 465/13 – *Oberto and O'Leary*, paragraph 33 *et seq.*, with further documentary evidence.

7. The EU's financial contribution to the total budget of the European Schools as an organisation predominates, accounting for almost 60% of the entirety of other revenue.
8. In accordance with Art. 13 of the Statute, adoption of the Schools' budget takes place as follows:

According to the Schools' Financial Regulation, the Secretary-General places the preliminary draft of the Schools' total budget before the Board of Governors at the beginning of each year (Art. 12 FR). The Board of Governors then approves the budget estimate for the coming year by a two-thirds majority of its members. It forwards this forthwith to the Commission which [German version] "*auf dieser Grundlage die erforderlichen Mittel im Vorentwurf des Gesamthaushalts der [Europäischen Union] veranschlagt*" (first sentence of Art. 13(2) Statute). The corresponding provisions in the French and English versions of the Statute read as follows:

... qui établit sur cette base les prévisions nécessaires dans l'avant-projet de budget général de l'[Union Européenne].

... which shall, on that basis, establish the necessary forecasts in the preliminary draft general budget of the [European Union].

In accordance with the second sentence of Art. 13(2) of the Statute, the budgetary authority of the European Union fixes the amount of the European Union's contribution under its budgetary procedure. In accordance with Art. 13(4) of the Statute, the Board of Governors finally adopts the budget of the Schools before the start of the budgetary year and *adapts it if necessary* ["*erforderlichenfalls*" in German] *to the contributions of the European Union and [...].*"

The French and English versions of the Statute translate the term "*erforderlichenfalls*" as "*si nécessaire*" and "*if necessary*" respectively.

9. In a formal sense, therefore, in the final analysis, the EU's budgetary authority decides on the level of the contribution to be paid to the Schools by the Union.
10. The same applies to the contributions of organisations or institutions belonging to the EU with whose contributions the bulk of a school's budget is financed (Art. 13(4) Statute). These organisations include the European Union Intellectual Property Office (EUIPO), which contributes to the budget of the European School, Alicante, and the European Central Bank, with contributions to the budget of the European School, Frankfurt.
11. No corresponding provision is discernible for the European School, Munich. According to Art. 4 of the Supplementary Protocol, the budget estimate for the European School, Munich is merely forwarded to the EPO.

12. For the year 2018, the Schools adopted the budget estimate with the required two-thirds majority. The proposal includes the creation of 4.5 new posts, breaking down into 1.5 posts intended for the Secretary-General's secretariat and 3 posts for the Schools. The total expenditure earmarked amounts to €275 153. The Commission representative voted against the Board of Governors' related decision; the EPO representative voted against the planned 1.5 posts for the General Secretariat on the basis of the pro rata co-financing of its budget.
13. It can be learned from the Commission's letter of 4 December 2017 (p.2 end), that it had already opposed the creation of the posts on the Board of Governors.

In that letter the Commission informed the Chair of the Board of Governors and the Secretary-General of the Schools in addition that the budgetary authority of the Union had complied with the Commission's proposal and had reduced the Union's contribution by the sum of €275 153. In an earlier letter of 28 July 2017, the Commission acknowledged that it had not established forecasts for creation of the posts and the appropriations earmarked for that purpose in the Union's preliminary draft general budget. It justified this legally with the consideration that Art. 13(2) of the Statute gives its discretionary power with respect to the proposal; at the same time the regulations of the Union's budgetary authority give it discretionary power with respect to final approval of the Union's contribution to the Schools' budget. The Commission thus already bases its procedure for estimating the appropriations considered necessary by the Board of Governors on its interpretation of the wording of Art. 13(2) of the Statute.

The EPO likewise reduced the budget estimate concerning it.

14. According to the Statute of the Schools, the Secretary-General represents the Board of Governors and is responsible to it (Art. 14 Statute). This includes his/her power and obligation to follow up on doubts, in relation to the Statute, about adoption of the budget and to communicate them to the Board of Governors. In the case to be evaluated here, the Secretary-General is concerned that the Commission's interpretation of Art. 13 of the Statute might in practice grant the latter power of veto in budgetary matters against a decision of the Board of Governors. There are the same doubts about reduction in the proposal made by the EPO for the European School, Munich.
15. The legal examination focuses on whether the Commission's procedure regarding the estimate of the appropriations requested by the Board of Governors and the ensuing decision of the EU's budgetary authority to reduce the requested budget items are in line with the provisions of Art. 13 and Art. 25(2) of the Statute. As regards the EPO's decision, its consistency with Art. 3 of the Supplementary Protocol and Art. 2 of the Agreement between the EPO and the Board of Governors need to be examined.

II. Legal opinion

16. The questions asked require a legal assessment if only because unopposed acceptance of the Commission's interpretation and the EPO's measure, should they not be consistent with the wording and the purpose of the provisions governing the contribution obligations of the Union and of the EPO, may become significant for the future interpretation and application of the Statute and of the Supplementary Protocol.

17. Art. 31 VCT lays down:

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

Consequently, in accordance with Art. 31(3(a) and (b) VCT, the acceptance of a possible interpretation violating Art. 13 of the Statute and the EPO's obligations under the Supplementary Protocol may prejudice the future application of both instruments; in international treaty law, the boundaries between interpretation and

amendment of a treaty are fluid. Objection precludes acquiescence, acceptance tacit approval.³

18. For the legal assessment, the assumption made is that the budget items amounting to €275 153 related to the creation of posts for the administrative and ancillary staff and the teaching staff of the Schools. According to the Statute, the Board of Governors alone decides on the creation of the administrative and ancillary staff posts required (Art. 12(4) Statute). Its decision on the creation of 4.5 posts is the basis of the budget proposal. The Board of Governors took that decision by a two-thirds majority in accordance with the Statute (Art. 9 Statute); it therefore binds in principle the European Union, represented by the Commission, and the European Patent Organisation, even though both representatives on the Board of Governors voted against the decision; the overriding principle of *pacta sunt servanda* (Art. 26 VCT) in international public law is applicable.

As far as the Commission is concerned, it should be emphasised in this connection that on the Board of Governors of the European Schools as an organisation and in respect of implementation of the latter's decisions, the Commission does not have the extensive competences and powers of Art. 17 of the Treaty on European Union and of Art. 314 of the Treaty on the Functioning of the European Union; for the Schools, the Commission only has the powers conferred on the Union under the provisions of the Statute.

19. As a result, the initial assumption which can be made is that the Commission, as the European Union's representative, is not at any rate authorised to call into question after the event the creation of 4.5 posts. The same applies to the EPO.
20. Thus, the decisive question in the final analysis remains whether for determination of the Union's contribution, something different can result from the fact that in accordance with the first sentence of Art. 13(2) of the Statute, the Commission establishes the forecasts, for the appropriations required for the posts, "on the basis" of the budget estimate decided by the Board of Governors, in the preliminary draft general budget of the EU and that the budgetary authority, in accordance with Art. 13(2) of the Statute, "fixes the amount of its contribution." The Commission infers from this, as explained in its letter of 28 July 2017, on the one hand, to propose to the budgetary authority that the Board of Governors' budget estimate be reduced; on the other, it draws from this the budgetary authority's discretion to approve the budget estimate. On that basis, the Commission – as can also be gathered from the letter of 28 July 2017 – did not enter the sum of €275 153 in the Union's preliminary draft general budget forwarded to the budgetary authority. It thus changed the Board of Governors' budget estimate and did this obviously, on the ground that creation of the posts was not required – *que la Commission ne considère pas justifiées* (that the Commission does not consider justified).

³ Graf Vitzthum: in: Graf Vitzthum/Proelß (ed.), *Völkerrecht* (Public International Law) 7th ed., p.51; see also Klabbers, *International Law*, p.57.

21. It certainly cannot, however, be inferred from the wording of Art. 13(2) of the Statute either that the Commission has discretionary power with respect to entry or adjustment of the Schools' budget estimate in the Union's preliminary draft general budget or that the budgetary authority has discretionary power with respect to fixing of the Union's contribution for the Schools.

In contractual practice of public international law, discretionary power is granted, through the application of concepts which are clearly discernible, that the body or person concerned has a degree of discretion with respect to a decision to be taken by it/him/her. This typically happens through use of the words '*kann*', '*may*' or '*peut*', as are to be found in Article 2(1), 3(1) and 10, second sentence of the Statute; moreover, discretionary power can also be inferred from other appropriate types of wording in a treaty, such as the one in Art. 12(4)(a) of the Statute, according to which the Board of Governors "shall ensure" a [fair] allocation of teaching staff posts. In the case of the procedure to be followed by the Commission, as laid down in the first sentence of Art. 13(2) of the Statute, to enter the budget estimate in the Union's preliminary draft general budget, an unequivocally substantiated concept as regards the Commission's discretionary power is, however, missing. Looking at this another way, if the Commission were to be allowed the possibility of changing at its own discretion the budget estimate decided by the Board of Governors in entering it in the Union's preliminary draft general budget, it would be allowed *de facto* to wield an arbitrary right to veto the budget estimate decided by the Board of Governors. That is not, however, what is foreseen by the wording of the Statute.

22. In addition, there is the fact that any discretionary power granted to the Commission in cases of dispute is not replaced or superseded by the European Court of Justice as the body responsible for settlement of disputes, although with respect to the procedure used and to any factual and legal errors, it might be monitored. In this respect it is important in the present case that in accordance with Art. 12(4) of the Statute, the Board of Governors, alone and ultimately, decides which staff the organisation and the individual schools require to perform their tasks. Hence, it is factually its decision on creation of 4.5 new posts which is the "basis" of the Commission's entry in the Union's preliminary draft general budget; the Commission is bound by this; it can no longer call this decision into question subsequently in the procedure for the setting of the Schools' budget.

Consequently, the procedure followed by the Commission in entering the appropriations required for the Schools in the Union's preliminary draft general budget appears flawed;⁴ taking into consideration the procedure laid down in the second clause of the first sentence of Art. 13(2) of the Statute, the Commission had to include, without reduction, the appropriations estimated by the Board of Governors in the Union's preliminary draft general budget.

23. The question of the discretionary power of the budgetary authority is more difficult to assess.

⁴ In public international law literature, reference is made to the special significance of procedural questions for the setting the budget of international organisations. See *Klabbers, An Introduction to International Institutional Law*, 2nd. Ed. 2009, p.116.

The reason is that on the one hand, in accordance with the second sentence of Art. 13(2) of the Statute, it fixes the European Union's contribution. In line with this the wording of Art. 13(4) of the Statute and of Art. 14 of the Financial Regulation underlies the finding that in principle, the Union's contributions may differ from the Schools' budget estimate, something which can subsequently induce the Board of Governors to adjust the Schools' budget to match any reduced contributions.

On the other hand, accession to the Statute of the European Schools obliges the Union to fulfil the contractual obligations involved in good faith (Art. 31(1) VCT). These include the obligation to make it possible for the organisation to perform its educational duties and it is for that very purpose that the Union pays its contribution to the Schools' budget (Preamble to the Statute, second recital). According to the wording of Art. 25(2) of the Statute, this is "*bestimmt*" (*qui vise à couvrir / which is intended to cover*) to cover the total amount of expenditure by the Schools, taking account of their revenue.

For this reason, unlimited discretionary power for the Union with respect to the fulfilment of its financial contractual obligations vis-à-vis the Schools is also precluded; such discretionary power cannot at any rate be inferred from Art. 13(4) of the Statute. This is, however, precisely what the Commission's position appears to be, when in its letter of 28 July 2017, it explains that the budgetary authority takes the *final decision on the amount of the Union Contribution*.

If the discretionary power of the Union's budgetary authority is nevertheless accepted, its decision is at any rate marred by the procedural irregularity committed by the Commission as its organ. If the budgetary authority's decision is legally open to attack, it is not at any rate "*erforderlich*" / "*nécessaire*" / "*necessary*" for the Board of Governors to adapt the budget, within the meaning of Art. 13(4) of the Statute, until the matter has finally been settled.

24. The question of how far the powers of the budgetary authority might go in differing from the Schools' budget estimate when it comes to determining the Union's contribution can remain unanswered here. In public international law literature, it is suggested, with regard to the significance of the principle of performance of a treaty in good faith (Art. 26 VCT), that a critical examination resulting in a reduction in a budget estimate might come into consideration in cases of "budgetary concealment", i.e. when it is sought on an organisation's part to finance a disputed project discreetly through other budget items.⁵ There is obviously no such comparable case here. All that needs to be assessed is whether the budgetary authority, as a European Union body, was authorised, as explained in the letter of 4 December 2017, to refuse to make available the €275 153 for the staff posts decided by the Board of Governors. That cannot, however, be answered in the affirmative on account of the procedurally improperly omitted entry of that budget item in the Union's preliminary draft general budget by the Commission.

Moreover, the Union is a member of the organisation and when the Board of Governors' budget estimate was drawn up, it was represented by its organ, the Commission; it is therefore – as mentioned – contractually bound by the decision taken by the Board of Governors in accordance with the Statute to increase the Schools' staffing requirements by 4.5 posts. With its organ's decision not to approve

⁵ See *Klabbers, op.cit.*, p.117.

the amount required for that purpose, the budgetary authority is making use in this matter of a right of veto against the decision of the Board of Governors on staff planning, something which is not expressly provided for in that respect by the Statute. There are no other discernible reasons which might justify the decision; the Union could not anyway invoke its own budgetary law in this respect (Art. 27 VCT).

25. The aforementioned considerations apply *a fortiori* to the European Patent Organisation's conduct. According to Art. 2 of the Agreement between the EPO and the Board of Governors, the level of the contribution to be paid by the EPO corresponds to the difference between the total amount of budget expenditure determined by the Board of Governors and the sum of the revenue is of no relevance here. In accordance with Art. 8 of the Agreement, the budget determined by the Board of Governors and the revenue and expenditure account approved by it were indeed supplied to the EPO, but there is no provision for examination of the necessity of the planned expenditure by the EPO; the contribution obligation is absolute and unconditional.

26. In the final analysis, there are, therefore, doubts in terms of the Statute in respect of the following:
 - the procedure used by the Commission of entering a changed budget estimate compared with that of the Board of Governors in the Union's general budget and consequently at the same time against.

 - the decision taken on that basis by the Union's budgetary authority, in so far as it refused to provide the funds requested for the creation of posts for the Schools decided by the Board of Governors.

There are also legal doubts about the European Patent Organisation's refusal to pay the costs which it should defray of 1.5 new posts.

27. According to Art. 26 of the Statute, disputes between the Contracting Parties relating to the interpretation and application of the Statute should be settled by the Board of Governors. It is therefore recommended that the Secretary-General present any concerns or misgivings which he might have to the Board of Governors. Should a settlement not be possible, the Contracting Parties can in principle call upon the European Court of Justice.

For the EPO, there is no corresponding arrangement in either the Supplementary Protocol or the Agreement concluded with the Board of Governors. It is reasonable to assume, however, that the Board of Governors is also competent to settle a budget dispute with the EPO.⁶ The competence of the European Court of Justice might, on the other hand, not be justified. Here international arbitration between the Schools and the EPO might if necessary be agreed.

⁶ See *Schermers/Blokker*, International Institutional Law, 5th.ed., 2011, § 1109

28. Based on the arguments put forward here, a critical assessment of the decisions of the Union and of the European Parent Organisation is in any event appropriate, in order to preclude an undesirable precedent-setting effect.

Legal analysis provided by EPO:



LEGAL ANALYSIS OF THE BUDGETARY PROCEDURE WITHIN THE EUROPEAN SCHOOLS

Executive Summary

1. The Office of the Secretary-General (OSG) of the European Schools commissioned a “Legal Analysis of the budgetary procedure within the European Schools”, which claims that the EPO’s decision to deviate from its commitment to the preliminary draft budget was in violation of the Convention of the European Schools (“Convention”) and that the EPO had not been acting in good faith.
2. The purpose of the following Legal Note by the EPO is to outline the budgetary procedure of the European Schools as foreseen by the Convention and the Financial Regulation of the European Schools (“Financial Regulation”) and the EPO’s involvement in the budgetary procedure.
3. Articles 13.3. and 13.4. of the Convention establish a mechanism that foresees the possibility of a deviation from the preliminary draft budget by one of the contributing organizations and requires the Board of Governors “to adapt the final budget to these contributions”.
4. Moreover, Article 23 of the Financial Regulation foresees that after completion of its own budgetary procedures, the EPO shall communicate the amount of its contributions to the European Schools. If the amount of the contributions from the EPO is different from the amount entered in the draft budget, the Board of Governors shall take the appropriate steps.
5. The contention that the EPO has not been acting in good faith cannot be shared, since the EPO followed the procedure foreseen by the Convention and the Financial Regulation.
6. A submission of this dispute to the European Court of Justice (ECJ) by the OSG is legally not possible, since the ECJ has no jurisdiction on such recourse. According to the Convention recourse to the ECJ is limited to disputes between Contracting Parties to the Convention. Neither the European Schools nor the EPO are Contracting Parties to the Convention.

I) Factual background

1. At its meeting on 4-6 April 2017 the Board of Governors of the European Schools endorsed the Budgetary Committee's proposal and decided to approve the preliminary draft 2018 budget of the European Schools and the OSG.
2. The preliminary draft 2018 budget included, *inter alia*, a contribution of the EPO of € 22.842.665.
3. The preliminary draft 2018 budget also included the creation of a total of 16 posts. While the EPO had agreed to its contribution for the European School in Munich ("ESM"), it voted against the foreseen 1,5 posts at the OSG as part of the overall budget of the European Schools.
4. By letter of 15 November 2017 the President of the EPO informed the Secretary-General of the European Schools that the EPO contribution will amount to € 22.340.000.
5. The decision of the EPO's budgetary authority of 13 December 2017 that the EPO's contribution will amount to € 22.340.000 was confirmed by letter of 20 December 2017.
6. At the beginning of 2018 the OSG commissioned a "Legal Analysis of the budgetary procedure within the European Schools", which claims that the EPO's decision to deviate from its commitment to the preliminary draft budget was in violation of the Convention and that the EPO had not been acting in good faith.

II) Legal analysis

a) Contribution to the budget of the European Schools by the EPO

1. According to Article 25.3 of the Convention the budget of the European Schools shall be financed by, *inter alia*, contributions from non-Community organizations with which the Board of Governors has concluded an Agreement. In 1977, such an agreement was concluded with the EPO ("European School Agreement").
2. Article 6 of the European School Agreement stipulates that the EPO has a seat and a vote on the Board of Governors of the European Schools in respect of any questions concerning the ESM.
3. Article 2 of the European School Agreement foresees that the EPO contributes to the running costs of the ESM by an annual contribution.

b) Budgetary procedure of the European Schools

4. According to Article 13.1(b) of the Convention the Board of Governors adopts the budget of the Schools for each financial year.

5. In a first step, according to Article 13.3 of the Convention the Board of Governors forwards the estimate of revenue and expenditure to the contributing organizations such as the EPO, so that they may determine the amount of their contributions.
6. According to Article 13.4 of the Convention the Board of Governors finally adopts the budget of the Schools before the start of the budgetary year, but has to adapt it if necessary to the contributions of the contributing organizations such as the EPO.
7. Procedurally, the Financial Regulation provides in Article 23 that after completion of its own budgetary procedures, the EPO shall communicate the amount of its contributions to the budget of the Schools. If the amount of the contributions communicated is identical to that provided for in the preliminary draft budget, the budget shall be deemed to be adopted. If, however, the amount of the contributions from the EPO is different from the amount entered in the preliminary draft budget, the Board of Governors, on the initiative of the authorising officer of the European Schools, shall take the appropriate steps and shall adopt the adapted budget by 15 May of the financial year concerned at the latest.

c) Position of the EPO

8. The contention that the EPO has not been acting in good faith cannot be shared.
9. Articles 13.3. and 13.4. of the Convention establish a mechanism that foresees the possibility of a deviation from the preliminary draft budget by one of the contributing organizations and requires the Board of Governors "to adapt the final budget to these contributions". Furthermore, the Financial Regulation provides in Article 23 that after completion "of its own budgetary procedures", the EPO shall communicate the amount of its contributions to the European Schools.
10. The EPO followed the procedure foreseen by the Convention and the Financial Regulation.
11. Moreover, while the EPO agreed to its contribution for the ESM, it specifically contested the 1,5 posts of the OSG as part of the total budget of the European Schools. Hence, the EPO already indicated in the meeting for the preliminary draft budget that it was not entirely in agreement with the foreseen draft budget.

d) Jurisdiction of the European Court of Justice

12. The deputy Secretary-General of the OSG, after having been indicated that the EPO considered itself in line with the wording of the Convention, raised the possibility of submitting the diverging legal opinions on the interpretation of the Convention of the European Schools to the European Court of Justice (ECJ) for clarification.

13. According to Article 26 of the Convention the ECJ has 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.
14. The Preamble to the Convention summarizes "Contracting Parties" as "The High Contracting Parties, Members of the European Communities and the European Communities." Aside from the European Communities, the Contracting Parties of the Convention are thus the States which ratified the Convention.
15. The EPO is not a Contracting Party to the Convention. Moreover, the European Schools, even though they are established by the Convention, are themselves not a Contracting Party to the Convention either.
16. Hence, a dispute between the European Schools and the EPO concerning the different interpretations of the obligations of the EPO under the Convention is not a dispute between two Contracting Parties. Therefore, Article 26 of the Convention is not applicable.
17. The European School Agreement does not contain a dispute resolution clause which could possibly be invoked to submit a dispute to the ECJ either.

Letter of EU COM of 28 July 2017:





EUROPEAN COMMISSION
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HUMAN RESOURCES AND SECURITY
Directorate HR.E – Legal Affairs & Partnerships
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Gentile Segretario Generale,

Subject: EU Draft Budget 2018 including the requested EU contribution to the European Schools system; your note dated 23 May 2017 (ref.: 2017-L-25/JEB/GM/hm)

Dear Secretary-General,

I acknowledge receipt of your abovementioned note questioning the amount of the EU contribution that has been included in the Draft Budget 2018 of the Commission.

Firstly, please let me inform you that the Commission adopted its Draft Budget 2018 on 30 May 2017, including the EU contribution to be paid to the European Schools system.

With regard to the rejected creations of post, we need to make a distinction between :

- o the posts rejected by the Board of Governors in the framework of adoption of the estimate of revenue and expenditure for 2018, representing an EU contribution of 498.205 €;
- o the posts (4.5 posts representing an EU contribution of 275.153 €¹), which were supported by the majority of members of the Board of Governors in the framework of adoption of the estimate of revenue and expenditure for 2018, but rejected by the Commission (and EPO partially).

On the latter, as mentioned in the Board of Governors meeting, the Commission disapproved their creation because, in spite of the very restrictive budgetary context, 15.5 new posts had already been approved by the Board of Governors (representing an additional EU contribution of 1,1 mio €).

¹ 275.153 of which 114.000 € for the Central Office and 161.153 € for the Schools

As a result, the concerned EU contribution of 773.358 € (= 498.205 € + 275.153 €) was indeed not included in the credits requested for the European Schools in the Draft Budget 2018 adopted by the College of Commissioners and submitted to the EU Budgetary Authority.

Pursuant to paragraphe 2 of Article 13 of the Convention, "*the Commission ... shall on th[e] basis [of the estimate of revenue and expenditure] establish the necessary forecast in the preliminary draft budget of the European Communities*".

It stems from the aforementioned provision that, although the Commission cannot disregard and propose an amount having no connection with the one approved by the Board of Governors, the Commission and of the Budgetary Authority enjoy a discretionary power in proposing and approving the appropriate amount for the European Union contribution in favour of the European Schools.

This is confirmed by paragraph 4 of the aforementioned provision which states that " *[t]he Board of Governors shall finally adopt the budget of the Schools before the start of the budgetary year and shall adapt it if necessary to the contributions of the European Communities and of the organizations or institutions referred to in paragraph 3.* "

It follows from the above provision that the final decision on the amount of the Union Contribution is taken by the European Union Budgetary Authority. The amount of the contributions communicated by the European Commission (and the EPO) can be either identical or different with that provided in the European Schools estimate of revenue and expenditure.

Pursuant to Article 14 of the European Schools Financial Regulation, in the first case, the European Schools Budget is then formally adopted whereas in the second case, the Board of Governors, on the initiative of the Secretary-General, shall take appropriate steps in order to adjust its budget to the Union Contribution as established by the European Union Budgetary Authority in the framework of the budgetary procedure.

In the present situation, the Commission considered not adequate to include in its 2018 Draft Budget of the European Union and subsequently finance expenses which are not conducive in its view. It is the Commission's view that it is its duty and its obligation to take the appropriate measures to protect the financial interests of the European Union in the current political and economic context.

You will notice that the Commission has, in full transparency, strictly applied these rules and that on the Working Documents VI * (i.e. one of the Annex of the DB 2018, pages 233/234 and in the detail of credits requested by the Schools concerned and the Secretary-General Office), the Commission clearly stated its position: please refer to the footnote explaining the rejection. For instance, the footnote for the Central Office is the following: "*Le montant de la contribution de l'UE ne correspond pas au montant (12.476.906 EUR) repris dans le Projet de Budget des Ecoles européennes pour l'année 2018, adopté par le Conseil Supérieur lors de la réunion du 04-06 avril 2017. Compte tenu du contexte de restrictions budgétaires, la Commission a opéré une réduction de 114.000 EUR correspondant à la création de postes additionnels par le Conseil Supérieur, que la Commission ne considère pas justifiés*" so that the Budgetary Authority will have all the information to exercise its discretionary power to take the final decision on the adopted budget.

Finally, you refer in your letter to an Ombudsman recommendation following a recovery of funds from the European Schools, which is completely different. In that case, the Commission exercised its own power and has issued a recovery order against a school that created courses in breach of the applicable rules and illegally executed an expenditure. In the case at hand the Commission has made a proposal that the Budgetary Authority can either uphold or dismiss and replace it with other figures.

I hope that this clarifies this issue.

Yours sincerely,

Cou vive cordialite


Marco Umberto MORICCA

Copy: Mrs M. Saude, Head of Unit DG HR.E.4
Mrs C. Vlassis, Head of Unit DG HR.R.1
Mr J. Escudero Bustamante, Head of Unit Accounting ESSG

* http://ec.europa.eu/budget/library/biblio/documents/2018/DB2018_WD06_en.pdf

