

COMPLAINTS BOARD OF THE EUROPEAN SCHOOLS

Reasoned Order of 28 October 2020

In the case registered with the Registry of the Complaints Board under No **20/42**, the subject of which is an appeal lodged on 23 July 2020 by [...], a student at the European School, [...] during the 2019-2020 school year, represented by Ms Widmaier, lawyer, the appeal seeking to obtain annulment of the decision of the Chairman of the European Baccalaureate Examining Board of 9 July 2020, rejecting her administrative appeal and thus confirming the final mark achieved in the 2020 Baccalaureate, and to obtain the upgrading of her final mark to 87.26/100 and the issuing, without delay, of a Baccalaureate diploma showing this upgraded final mark,

Mr Michel Aubert, member of the Complaints Board, designated by the Chairman of the Complaints Board to give a ruling, by way of a reasoned order, as provided for by Article 32 of the Rules of Procedure, which states: *“Where the Complaints Board is manifestly lacking in jurisdiction to hear a complaint or where a complaint is manifestly inadmissible or manifestly unfounded in law, a ruling may be given, without continuing the proceedings, by way of a reasoned order made by the Chairman or by the rapporteur designated by him.”*

assisted by Ms Nathalie Peigneur, registrar, and by Mr Thomas van de Werve d’Immerseel, legal assistant,

handed down the following order, the grounds for and the operative part of which appear below, on 28 October 2020,

Facts of the dispute and arguments of the applicant party

1.

[...] was a student in secondary year 7 at the European School, [...] during the 2019-2020 school year was thus supposed to take the end-of-year examinations to be awarded the European Baccalaureate (hereinafter referred to as the EB).

2.

In the context of the COVID-19 health crisis and of suspension of attendance at *in situ* lessons with effect from 16 March 2020, the Board of Governors of the European Schools (hereinafter referred to as the BGES) adopted the decision '*Consequences of COVID-19 - Risk Assessment and proposed Actions*', the terms of which were approved at the meeting of 15 to 17 April 2020 (document 2020-03-D-44-en-1).

For the EB examinations, the following was thus agreed:

"For the 2020 European Baccalaureate session, the BGES approved cancellation of the marks for the written and oral examinations and award of the final mark based on A and B marks only.

Furthermore, the results would be moderated whenever there was a statistically significant divergence in the distribution of final marks in relation to previous years. The BGES agreed to allow Baccalaureate candidates to request to sit all the cancelled written and oral examinations in autumn 2020. Once the examinations session started the final mark achieved previously would no longer be valid.

Candidates who so preferred would be able to request to repeat year 7.

The BGES mandated the Office of the Secretary-General to amend the 'Arrangements for Implementing the Regulations for the European Baccalaureate' applicable for the 2020 European Baccalaureate session accordingly and to submit the amendments made to the BGES for approval by written procedure."

On 29 May 2020, at an extraordinary meeting, the Board of Inspectors (Secondary) approved the principle of the so-called 'moderation' of marks method to allow account to be taken of past statistics, and by his decision of 15 June 2020, the Chairman of the Baccalaureate Examining Board determined the arrangements for applying this method.

The amendments to the Regulations for the European Baccalaureate (hereinafter referred to as the REB) and to the Arrangements for Implementing the Regulations for the European Baccalaureate (hereinafter referred to as the AIREB) were approved by written procedure initiated on 11 May and completed on 27 May 2020 (2020-04-D-20-en-2).

In its application, the Chairman of the Examining Board approved, on 19 June 2020, the 'moderation' method proposed by an expert, involving application of a gradual moderation formula to all students, with the exception of those who had achieved the highest mark and those who had scored under 60 marks, with a limit of 1.5 marks. It was pursuant to that moderation rule that the applicant's final mark in the EB was downgraded.

3.

On 22 June 2020, [...] received notification of her definitive results in the EB. After application of the moderation method she achieved an overall final mark of 85.80 /100, i.e. a 1.46/100 reduction on her pre-moderation mark (which was 87.26/100).

4.

On 2 July 2020, the applicant lodged an administrative appeal with the Chairman of the EB Examining Board seeking to have the final mark re-assessed and to obtain a diploma showing the pre-moderation mark.

The administrative appeal was rejected as inadmissible and unfounded by decision

of 9 July 2020 of the Chairman of the EB Examining Board.

On 23 July 2020, the applicant lodged an appeal in summary proceedings (20/42 R) – which was dismissed by order of 08 September 2020 – and this appeal in the main proceedings on the substance of the case, requesting the following:

- a) the cancellation of the 'moderation' method applied to the final mark and award of an upgraded final mark, of 87.26 /100;
- b) the issuing, without delay, of a Baccalaureate diploma showing this upgraded final mark;
- c) an order that the defendant should pay the legal and other costs of the proceedings.

5.

The applicant considers her appeal to be admissible on account of her right to an effective remedy against a decision vitiated by an irregularity that lessens her chances of embarking upon the university studies of her choice.

She argues that the so-called 'moderation' method is illegal and irregular in both its principle and the arrangements for its adoption and application:

- the adoption by the BGES of decision 2020-04-D-20-en-2, providing for the so-called moderation rule, lacks a legal basis, not conforming to several principles of European Union law applicable to the European School system;
- the method is vitiated by external illegality in so far as the decision of the BGES was not published on the website of the Secretary-General of the European Schools, was not incorporated into the AIREB, despite several amendments made thereto, and as the mere mention thereof in Annex IV to those Arrangements is inadequate, as is mention of an 'expert's report' in a Communication of 23 June from the Office of the Secretary-General of the European Schools. Consequently, it is contended that the fact that the Chairman of the Examining Board merely refers thereto in his contested

decision lacks methodological clarification and a definition of the measures for implementing the 'moderation' method;

- the method, and its conditions of application, were decided by a non-competent authority, namely the Board of Inspectors (Secondary) (hereinafter referred to as the BIS), which has only a supervisory role, instead of by the Chairman of the Examining Board.

The applicant goes on to list several pleas to which there was no response in the decision of the Chairman of the Examining Board:

- a breach of the procedure for assessment of students for the Baccalaureate applicable in the European Schools, by allowing a reduction in marks on the basis of statistical data from previous years and of other students' results, without consideration of each student's own merits;
- a lack of transparency and of clarity in the moderation method as decided by the BIS, since it was not publicised;
- an infringement of the principle of proportionality of the measures for implementing the moderation method in relation to the aims that it was sought to achieve, in that they disadvantage students whose results might have been better without this method;
- an infringement of the duty to inform the persons concerned, so that they can check whether the moderation method has been applied properly;
- an infringement of the general principle of legal certainty, in so far as the moderation method was applied before the persons concerned were informed, by a decision of the BGES made public on 25 June 2020, i.e. three days after notification of the Baccalaureate results, thus infringing the principle of non-retroactivity;
- an infringement of the general principle of meeting legitimate expectations, in so far as instead of marking according to the regulations in force previously,

the applicant was surprised to find that the B1 mark had been doubled and that the 'moderation' method had been applied;

- an infringement of the principle of equal treatment, in that the moderation method was applied to students with different average marks, something which discriminated against 2020 EB candidates in relation to the previous years' candidates and to candidates in national schools;
- an infringement of the rights of the defence, in so far as the persons concerned were not informed in time and fully about the procedure that was to be applied to them;
- the disputed decision of the Chairman of the Examining Board is incomprehensible, contradictory and incomplete, thus infringing the general principle of good administration, implying the need for transparency and coherence.

Findings of the designated judge rapporteur

6.

This appeal is one of a series of cases in which the applicants, all 2020 European Baccalaureate candidates, requested, raising comparable pleas, cancellation of the final mark awarded to them pursuant to the moderation rule.

In view of the influx of appeals with the same subject, putting forward the same arguments, and most of which were lodged by the same lawyer (Ms Widmaier), only six of them were investigated in order to ascertain the European Schools' position, which can be regarded as common to all these appeals.

In two of these cases in particular, decisions were taken by a panel of Complaints Board judges, after investigations and under the conditions laid down under Article 19 of the Rules of Procedure, in view of the health situation; they have since been published on the Complaints Board's website; the decisions in question are 20/56

(published in French) and 20/40 (published in French and in English).

7.

In case 20/40, the Complaints Board, sitting as a panel, ruled as follows:

8.

This appeal was lodged in the context of the various emergency measures adopted by the BGES in its decision of 15-17 April 2020, in order to adapt the organisational arrangements for the end of the 2019-2020 school year to the constraints arising from the global health crisis caused by the spread of the coronavirus. As far as the 2020 EB session is concerned, the BGES approved cancellation of the marks for the written and oral examinations and award of the final mark on the basis of the A and B marks alone. It was also decided that the results would be moderated whenever there was a statistically significant divergence in the distribution of final marks in relation to previous years. It allowed Baccalaureate candidates to request to sit all the cancelled written and oral examinations in autumn 2020 or to repeat year 7.

9.

On 15 June 2020, at the meeting of the BIS and as proposed by the latter, the Chairman of the EB Examining Board approved the system of moderation of the results (hereinafter referred to as 'moderation').

10.

The appeal lodged by the parents of [...] concerns the application of moderation and must be regarded as seeking annulment of the overall mark that was awarded to their daughter in the 2020 EB, solely in so far as that mark is lower than the one that she would have achieved if the said moderation had not been applied.

The appeal's admissibility

11.

The procedure for lodging an appeal with the Complaints Board to contest the decision of the Chairman of the EB Examining Board is laid down in Article 66 of the General Rules of the European Schools (GRES), paragraph 2 of which provides that *"The European Baccalaureate examination may be the subject of an administrative appeal under the conditions laid down in Article 12 of the [AIREB](...)." According to the said Article 12 of the AIREB: "1. Complaints and appeals concerning the European Baccalaureate examinations must be made through the Director of the School attended by the candidate to the Chairman of the Examining Board, by any candidate who claims that a procedural irregularity was prejudicial to him, or by his legal representative if he is a minor. (...)." .*

12.

The Complaints Board has ruled that, like any applicant, an EB candidate can be entitled to lodge an appeal against the results of this examination only if he/she has an interest in bringing an action in this connection. That is thus the case in particular when he/she has failed to be awarded this diploma or when, although he/she has passed the Baccalaureate examinations, the marks achieved do not allow him/her to be admitted to the university of his/her choice (for example, decision handed down on 26 September 2016, in case 16/44, point 10). Those two situations cannot, nevertheless, be restrictive in nature and it is up to the Complaints Board to check, in each specific case, whether the applicant (or his/her legal representatives) can successfully argue that he/she has suffered a sufficiently adverse effect of such a nature as to justify the interest that he/she/they invoke(s) to contest a decision relating to the EB.

13.

Furthermore, Article 12 of the AIREB must be interpreted in the light of the fact that, by the BGES' decision on the consequences of the Covid-19 pandemic taken at its meeting of 15-17 April 2020, the latter derogated, on account of the exceptional circumstances of the pandemic, from the obligation to organise the EB written and

oral examinations provided for in the REB, by cancelling the examinations in question and by adopting particular and unprecedented arrangements for assessing the value of candidates' work, allowing them, however, to be awarded the EB diploma in conditions as comparable as possible with those of the EB in previous school years. Article 12 of the AIREB must therefore be interpreted in such a way as not to deprive a candidate (or his/her legal representatives) of the possibility of lodging an appeal effectively against any individual decision concerning him/her relating to the EB organised in exceptional circumstances (see, to that effect, by analogy, the decision of the Board of 1 September 2020, in case 20/22, point 17).

14.

In this particular case, it is an established fact that the applicants' daughter passed the Baccalaureate with a final overall mark of 82.20/100. It has not been established, as matters stand, that she might have been deprived, because of this mark, of the opportunity to gain admission to the university of her choice. The fact remains, however, that this mark is lower than the mark of 83.7/100 that she ought to have achieved if the moderation adopted by the BGES in its decision of 15-17 April 2020 had not been applied.

15.

Now this difference, albeit slight (see, to that effect, the decision of the Complaints Board of 17 October 2016, case 17/49, point 15), must be considered to be, in itself, prejudicial to the interests of the applicants' daughter, since it results from application to the mark reflecting appraisal by her teachers of the value of her personal work of a deduction determined on the basis of statistics completely unrelated to that appraisal. On the day of registration of their appeal, there was therefore a risk that such a difference might deprive the applicants' daughter of the best chance of meeting the criteria for selection of candidates applying to higher education institutions.

16.

In that context, the applicants must be allowed to assert their right to effective legal

protection against such a measure, with a view to retaining the possibility of their daughter's achieving a better mark more accurately reflecting the result of her academic work.

It follows that this appeal, in so far as it contests that difference, must be regarded as admissible.

Admissibility of the pleas raised

17.

It should be pointed out that pursuant to Article 12.2. of the AIREB, a complaint or an appeal relating to the EB may only concern a procedural irregularity. In accordance with that article and with the settled and consistent case law of the Complaints Board, what is meant by procedural irregularity is any infringement of a rule of law relating to the procedure provided for by the texts governing the EB, including the measures taken in that connection by the BGES and by the BIS (see decision of 7 April 2016, case 16/09).

18.

One of the pleas relating to the procedure that is raised by the applicants is based on the finding that in this particular case, their right of defence in proceedings that might result in an individual decision adversely affecting them was infringed, as the right of the persons concerned to be fully informed in time, so that they could check the correction application of the moderation method, was disregarded. However, no such right is laid down by the texts governing the EB.

19.

Furthermore, albeit that the applicants seem thus to assert the right to be heard beforehand, as referred to in Article 41-2 of the Charter of Fundamental Rights of the European Union, it should be pointed out that fundamental rights, such as respect for the rights of the defence, do not appear as absolute prerogatives (CJEU, 15 June 2006,

Dokter, C-28-05, point 75). Now, in view of the particular nature of an individual decision such as that which is involved for an examining board in awarding a mark to a candidate that cannot, *a priori* and objectively, be considered by this examining board to adversely affect this candidate, it cannot be a mandatory requirement for the candidate to be consulted or heard prior to the issuing of this mark. Since an EB candidate who considers that the mark awarded to him/her is unfavourable has the possibility of contesting the said mark, pursuant to Article 66 of the GRES, before the Chairman of the EB Examining Board, then, if need be, as is the case here, before the Complaints Board, there cannot be infringement of the very substance of the rights of the defence guaranteed by the Charter of Fundamental Rights of the European Union. As a result, the plea can only be rejected.

20.

In the other pleas that they raise, the applicants do not contend that the measures taken by the BGES and the BIS concerning the 2020 EB were not respected. They claim, on the other hand, that those measures, on the basis of which their daughter's overall mark was limited to 82.20/100, are themselves illegal. If they thus avail themselves of the possibility of raising a plea of illegality, such a plea is admissible, as is clear from the settled and consistent case law of the Complaints Board.

21.

However, this plea of illegality can be raised effectively only within the limits determined by Article 12 of the AIREB, i.e. that the illegality invoked can result solely from a procedural irregularity and not from an infringement, fundamentally, of a rule of law.

22.

Moreover, and in this connection, it should be noted straightaway that organisation of the Baccalaureate examinations constitutes in substance a decision of a pedagogical nature, on the same basis as the content of the examinations or marking, a decision of a pedagogical nature that the Complaints Board, in accordance with settled and

consistent case law, cannot review for annulment purposes (see decision of the Board of 31 May 2017, handed down in case 17/07, point 13).

23.

Now the decision of the BGES of 15-17 April 2020, like those of the BIS and of the Chairman of the EB Examining Board of 15 June 2020, to apply moderation, on the basis of which the applicants' daughter's overall mark in the EB was determined, establish the conditions for the EB's organisation in 2020, in view of the constraints arising from the global health crisis caused by the spread of the coronavirus. They therefore constitute decisions of a pedagogical nature that fall outside the power to review the legality of acts conferred on the Complaints Board within the limits set by the aforementioned Article 27 of the Statute of the European Schools.

24.

It follows therefrom that only the pleas raised by the applicants relating to the procedure followed by the European Schools to implement the general provisions that resulted in application of the moderation system, and in determination accordingly of the overall mark in the EB contested in this particular case, are admissible.

There is no alternative but to reject all the other pleas.

Validity of the procedural means

(...)

As regards the belated approval and publication of the method of determining moderation

29.

The applicants contend that that the derogation from the REB and from the AIREB (2020-04-D-20-en-2), adopted as a follow-up to the decisions taken by the BGES at its meeting of 15-17 April 2020, is not dated and was only published on the European

Schools' website on 25 June 2020, after the communication, on 22 June 2020, of the EB results. It was also after 22 June 2020 that the method of calculating moderation was made public. Those provisions are, therefore, not enforceable in so far as they determine the moderation mechanism.

30.

It is true that publication of an act of a regulatory nature can be regarded as a general principle of law whose aim is to bring the act in question to the attention of its addressees, against whom it is then enforceable. Such publication, which is inseparable in principle from the act's entry into force, constitutes a formality aimed at meeting legal certainty requirements.

31.

In this connection, whilst it must be acknowledged that failure to publish an act of a regulatory nature, which is an irregularity extraneous to that act, has no impact on its actual validity, on the other hand, this irregularity renders it entirely unenforceable against its addressees (see such an approach in the decision of the CJEU, 11 December 2007, *Skoma-Lux*, C-161/06, points 57 *et seq.*)

32.

In the European Schools' legal order, the Convention defining the Statute of the European Schools does not contain any provision on the publication of decisions of general application adopted by the BGES. As provided for by Article 12.5 of the Statute of the European Schools, the BGES drew up its own Rules of Procedure, which refer to the publication of documents on the ES' website ("<http://www.eurasc.eu>" www.eurasc.eu) (Article 9) by the Secretary-General (Article 15) within 15 days following the meeting and their entry into force on the date determined by the decision or, if no date is indicated, on the day after their adoption (Article 14).

33.

The BGES' contested decision was adopted in the particular context, recalled in point 8 above, of a health crisis, involving a situation of *force majeure*. This obliged the BGES to take urgent measures since the *"decision to suspend lessons 'in situ' has had a considerable impact on the teaching and learning in the European Schools up to now and will have an even more significant impact on the teaching and learning and also on the different assessments/examinations until the end of the 2019/20 school year."* (Statement of the grounds accounting for the BGES' Decision, meeting of 15-17 April 2020, 2020-03-D-44-en-1).

34.

Representatives of the parents (Interparents) and of the students (COSUP) were present at that meeting of 15-17 April and they were therefore aware of the measures envisaged for the different scenarios (resumption of lessons or otherwise, possibility of organising examinations or otherwise). In concrete terms, for the EB, it was decided, in scenario 2, which ultimately materialised, to cancel the oral and written examinations, to calculate the mark in a new way and to apply a moderation criterion whenever the difference in the distribution of final marks in comparison with previous years was statistically relevant, *"in order to avoid that [sic] pupils would be marked too generously or too harshly or unlikely in the context of previous results, moderation could be applied, subject by subject, but across all the System, when statistically relevant. Moreover, moderation could be applied in order to make the overall distribution of marks consistent with previous years. Moderation could also be further applied to the final marks, in order to make the overall distribution of final marks consistent with other years."*

35.

In these particular and exceptional circumstances, the absence of publication of the BGES' decision cannot have the serious consequences, possible in a normal situation, that would result from nullity of the acts, called for by the applicants, which would produce its effects not only on application of the moderation criterion but also on the entire content of the decision, including the method of calculation of the pre-

moderation EB mark (that the applicants are not contesting), as candidates or their parents were aware of the principle of this method, even though the actual formula approved by the Chairman of the EB Examining Board, after consultation with the BIS, was not known. In these circumstances neither the publication nor even the formal approval of the BGES' decision after communication of the marks had an impact and did not deprive the persons concerned of the possibility of lodging an appeal with full knowledge of all the relevant information, including the moderation criterion calculation formula. The plea must therefore be disregarded.

As regards the competence of the moderation decision-makers

36.

It should be pointed out firstly, that Article 11 of the Convention states that " In educational matters, the Board of Governors shall determine which studies shall be undertaken and how they shall be organised. In particular, following the opinion of the appropriate Board of Inspectors, it shall: (...) 4) arrange for examinations to be held as a means of certifying the work done in the School; it shall lay down rules for the examinations, appoint examining boards and award diplomas. It shall ensure that the papers for the examination are set at such a level as to give effect to the provisions of Article 5."

37.

In accordance with those provisions, it was indeed, on the one hand, up to the BGES, as it did in its decision of 15-17 April 2020, to take all necessary steps to adapt, in a hurry, the organisational arrangements for the end of the 2019-2020 school year to the constraints arising from the global health crisis caused by the spread of the coronavirus and, consequently, to derogate from the REB by cancelling the EB written and oral examinations, whilst maintaining award of the diploma on the basis of a final mark determined with reference solely to the A and B marks. It was also competent, against that background, to decide that the results would be moderated whenever there was a statistically significant divergence in the distribution of final marks in relation

to previous years. It is important to reiterate, in this connection, that the validity of the grounds that justified such moderation is related to considerations of a pedagogical nature which, as stated in point 23 above, cannot be subject to review by the Complaints Board.

38.

As follows, on the other hand, from the aforementioned provisions of Article 11 of the Convention, and from those of Article 17, the BIS was competent to intervene, in the form of an opinion, in the process of devising measures, as a matter of urgency, derogating from the REB, the principle of which had been established by the BGES in its decision of 15-17 April 2020.

39.

It should be pointed out secondly, that in accordance with Article 5.2. of the AIREB, the Chairman of the EB Examining Board ensures, inter alia, quality control of the organisation of the EB and guarantees standardised assessment (moderation) of the EB written examinations. And, in accordance with the third paragraph of Article 5.1. of the AIREB, the Inspectors representing each country on the BIS assist the Chairman, in their capacity as Vice-Chairmen. It is clear, therefore, from the combination of those provisions, that it was indeed up to the Chairman of the EB Examining Board ultimately to decide whether the conditions for implementation of moderation were fulfilled and subsequently to resort to it in accordance with the arrangements that he approved after they had been examined by his Vice-Chairmen meeting as members of the BIS. Hence, it was without encroaching on the powers of the Chairman of the EB Examining Board that, at its meeting of 15 June 2020, the BIS expressed a favourable opinion on the moderation arrangements proposed by the designated expert and found that the Chairman of the EB Examining Board endorsed those arrangements.

As regards the regularity of the decision-making procedure

40.

With respect, firstly, to insufficient consultation, according to the applicants, of the teachers' representatives and of the parents' and students' representatives, the Complaints Board can only find, as emerges from the documents in the file, that those representatives were given the opportunity to comment in particular on the principles that were adopted by the BGES in its decision of 15-17 April 2020 for the purpose of organising the 2020 EB. It does not appear, moreover, that the interventions of the members of the BIS, in their capacity as Vice-Chairmen to the Chairman of the EB Examining Board, in the decision-making process that resulted in implementation of the contested moderation, fall within the scope of Article 11 of the Rules of Procedure for the Boards of Inspectors (2016-09-D-7-en-4) and ought, on that basis, to have been communicated to those representatives. In any event, such a communication, of a purely informative nature and extraneous to the BIS' decision, could not be an essential procedural requirement in nature, disregard for which would in itself result in that decision's irregularity.

41.

With respect, secondly, to the plea based on the lack of an explanation and of a justification for the moderation method in the disputed decision of the BGES of 15-17 April 2020, which can be understood as a plea based on the absence of a statement of the grounds for the said decision, it should be pointed out that compliance with the requirement for such a statement of the grounds is assessed in relation in particular to the nature of the act in question and of the context into which it fits.

42.

Now, with regard to a provision of a regulatory nature such as the one that is concerned here, it is important to remember that it was adopted in exceptional circumstances requiring, in the interests of EB candidates, the adoption, as a matter of urgency, of measures designed to compensate for cancellation of the usual written and oral examinations and to allow, nevertheless, those candidates to be awarded a diploma equivalent in value to that of the EB in previous school years. In such a context, the mere fact that the justification for use of a system of moderation of the

marks does not appear in the actual body of the text of the decision of 15-17 April 2020 but in a preparatory document appended thereto and to which the decision expressly refers does not affect the regularity of the procedure for adoption of the said decision.

43.

It follows from all of the above considerations that none of the pleas raised by the applicants can be accepted and that this appeal must, consequently, be dismissed.

8.

Adopting the grounds set out above, this appeal should be dismissed.

ON THESE GROUNDS, the designated judge rapporteur

H A S D E C I D E D A S F O L L O W S :

Article 1: The appeal lodged by Ms [...], registered under No 20/42, is hereby dismissed.

Article 2: Notification of this decision will be given as provided for in Articles 26 and 28 of the Rules of Procedure.

M. Aubert

Brussels, 28 October 2020

pp. The Registry,
Nathalie Peigneur