

INTERPARENTS

Guidance for administrative appeals against the Bac 2019/20 results

You will find below legal and administrative guidance on administrative and contentious appeals against Bac 2020 results. The advice given does not constitute professional legal advice nor does it free parents and pupils from making all necessary verifications on the legal and administrative aspects of their appeals by consulting the [official texts published on the website of the Office of the Secretary-General of the European Schools \(OSGES\)](#) as well as the relevant [case-law](#) (judgments are in French, with summaries in English and German).

Important practical and procedural reminders:

- Administrative appeals need to be lodged at the latest ten (10) calendar days from the date of notification of Bac results, which occurred on Monday 22 June – therefore the deadline is on Thursday July 2;
- The administrative appeal must be sent in writing to the Director of the School, who will transmit it to the OSGES; article 12.3 of the [Arrangements for Implementing the Regulations for the European Baccalaureate](#) (AIREB) indicates that the administrative appeal can be sent by e-mail with read receipt, by registered letter or deposited at the school (make sure in that case to get a receipt);
- The administrative appeal may only concern procedural irregularity – therefore, any complaint based on the new changes to the Bac scheme must be framed as a procedural irregularity;
- If the pupil is 18 at the date of the signature of the administrative appeal, s/he must sign it – it will be rejected otherwise;
- The administrative appeal will be considered by the Secretary-General but formally decided by the Chairman of the Baccalaureate Examination Board;
- Should the administrative appeal be rejected, a contentious appeal is possible before the [Complaints Board of the European Schools](#) in Brussels, within fifteen (15) calendar days from the day of notification of that rejection;
- In order for a parent or pupil to have legal standing before the Complaints Board, it is not necessary that the pupil has failed the Bac or that the grades prevent him/her from entering their university of choice – a difference between the preliminary mark and the final mark, for instance after moderation, is sufficient to have standing (see Complaints Board's decision in [case 16/49](#), para. 15);
- **Very important:** you may not add new legal or factual grounds between the administrative and contentious appeal; you may however elaborate or detail your reasoning, or address points raised in the rejection decision;
- You may be assisted by a lawyer before the Complaints Board;
- The Complaints Board has to decide the case within six months of the date of registration of the contentious appeal, which means that a contentious appeal could be decided by January or February 2021 – it is therefore important to not only launch a contentious appeal but also a request of suspension of enforcement or other interim measures (see articles 34 and 35 of the [Rules of Procedure](#) for the Complaints Board) if you wish for an interim decision before September;

- If you lose your contentious appeal, you may be condemned to pay the costs of the OSGES (but the Complaints Board sometimes waives the losing party from paying those costs);
- If you win your contentious appeal, the OSGES may be condemned to pay your costs – if you wish for that to be the case, the contentious appeal needs to state that and state an estimation of legal costs you might face;
- If you win your appeal against the Bac results, the Chairman of the Bac Examination Board *“will assess on a case by case basis the need for the candidate to retake the examination”* (article 12.4 AIREB); however, it is disputable to what extent this provision would offer a redress under the specific circumstances of the 2020 European Baccalaureate.

On the substance of the administrative appeals:

We do not presume to cover all the specific cases where parents or pupils would consider lodging an administrative appeal. This guidance does in no way exonerate parents or pupils from invoking grounds specific to their case.

This guidance only covers the grounds that could be relied upon to challenge the Bac results on basis of the changes decided by the European Schools Board of Governors’ [decision 2020-04-D-20-en-2](#) *“Derogation to the General Rules and to the Arrangements for Implementing the Regulations for the European Baccalaureate (Applicable for the Year 2020 European Baccalaureate session) – Linked to COVID-19 circumstances”*.

This guidance is not thought as a template to be replicated but as advice given to parents or pupils, to be adapted as may be required in each case.

A- Grounds against “moderation”, for parents and pupils only challenging the “moderation” of the Bac results

Presentation of the “moderation system” on the basis of publicly available documents: [decision 2020-04-D-20-en-2](#) introduced the possibility to resort to moderation *“whenever the difference in the distribution of final marks in comparison to previous years is statistically relevant”*; in practice, a *“moderation”* of 1,5 points (out of 100) was applied, as explained in the document *“Moderation of Bac results”* sent out on June 23 on behalf of the Deputy Secretary-General of the European Schools, with the effect that the Bac results of most pupils (the detailed figures are not known) have been downgraded with up to 1,5 points out of 100.

While this downgrading of pupils’ Bac grade may seem modest, and while it was not applied if the effect would have been that a pupil would have failed the Bac, it has affected the practical opportunities for many pupils to study at their university of choice, in two different ways:

- Getting a preliminary mark, which allowed entry into university of choice, knocked down just below the minimum requirement after *“moderation”*;
- In university systems where selection is based on competition on the basis of Bac results, having a worse position in that competition due to *“moderation”*.

Below are, in bullet points, the main legal grounds on which an administrative appeal could stand:

- The principle of moderation, while adopted by the Board of Governors through [decision 2020-04-D-20-en-2](#), constitutes a procedural irregularity in that it lacks legal basis and does not comply with several general principles of EU law, which apply to the European Schools system (see in this vein [case 07/14](#), para. 18);
- **No legal basis:** the principle of “*moderation*” is only mentioned in the background (p. 2) and annex IV of AIREB in [decision 2020-04-D-20-en-2](#), each time without any definition or practical implementation mechanism; the mere mention of the principle in an annex is therefore unable to prevail over the detailed calculation of Bac marks foreseen in the revised article 6 of AIREB. The Board of Governors’ decision on principle to adopt “*moderation*” contained no detailed implementation or calculation method, nor were any implementing powers to determine such methods delegated to OSGES or any other body of the European Schools system. Preliminary Bac marks can therefore not be based on a “*moderation method*” not mentioned in article 6 AIREB nor outlined therein nor in its annexes, and thus lacking legal basis.
- **Irregular intervention of Board of Inspectors:** The Board of Inspectors in effect decided, based on an expert statistician’s report, on the “*moderation*” of Bac results. It thus acted outside its area of competence as defined by articles 15 to 18 of the [Convention defining the Statute of the European Schools](#), and encroached on the prerogative of the Chairman of the Bac Examination Board to decide on “*moderation*” as per article 5.2 AIREB, a provision left unchanged by [decision 2020-04-D-20-en-2](#). Irrespective of this, the Board of Inspectors would not seem to have the skills necessary to make an assessment of statistical data. Preliminary Bac marks can therefore not be based on a “*moderation method*” adopted in violation of procedural rules.
- **“Moderation” in violation of the “The Assessment Policy in the European Schools”** (Ref.: 2011-01-D-61-en-4): the “*moderation*” applied is not in conformity with the European Schools’ assessment policy, which indicates that one of the aims of assessment is “*to provide a record of each pupil’s achievements at the European Baccalaureate*” based on the principles of validity, reliability and transparency. No derogation has been sought from that binding policy decision. This implies that individual students see their final mark reduced on statistical grounds only, without any consideration of the individual academic merit of each student.
- **Breach of the principle of proportionality:** while the Covid-19 pandemic rendered changes in the Bac exams inescapable, the Board of Governors overstepped its margin of appreciation by going further than was mandated in order to cater for the scrapping of written and oral exams. In particular, the “*moderation*” system, though never outlined in any legally binding text, devised did not include, to the extent made public, any device to exempt from “*moderation*” pupils for whom it would imply no longer fulfilling the minimal requirement for entering the university of choice, contrary of the professed aim (see OSGES document 2020-03-D44-en1 “*Consequences of COVID-19 - Risk Assessment and proposed Actions*”, p. 14: “*the risk that the graduates will face any disadvantage when applying to a University, in particular in EU Member States and the United Kingdom, needs to be limited*”). Furthermore, the aims pursued – maintaining the reputation of the European Schools and of the European Baccalaureate and “*and thus, most important, not affecting the credibility of the diploma delivered to the EB candidates*” (see document “*Moderation of Bac results*”, p. 5) were speculative and failed to take into account that Member States as well as the UK are legally

bound to recognise the 2020 European Baccalaureate diploma, in accordance with article 5 of the 1994 [Convention defining the Statute of the European Schools](#). The average preliminary Bac marks did furthermore not warrant a “*moderation*”, considering that average Bac 2020 grade is 81,26, lower for instance than the average Bac rate at the Frankfurt school in 2019 (83.43) or that of linguistic sections that same year - SV (84.31), CS (82.22), EL (82.50), HU (82.50), DA (82,36) and PL (81.05). Thus, by failing to take into consideration the extraordinary Covid-19 circumstances also affecting national exams, ignoring the legally binding recognition owed by Member States and the UK to the 2020 European Baccalaureate, and basing “*moderation*” on speculative considerations, the “*moderation*” put in place had a disproportionately adverse effect on the university or study choice of individual pupils in a way widely exceeding the Board of Governors’ margin of appreciation.

- **Breach of duty to provide grounds** (article 41.2.c of the [EU Charter of Fundamental Rights](#)): the method of “*moderation*” used and the expert report mentioned in the public document published on Tuesday June 23 “*Moderation of Bac results*” (p. 3) have not been rendered public, and thus do not allow parents and pupils to determine how “*moderation*” was applied in their case and the extent to which it was applied in accordance with the “*moderation method*” adopted but not made public by the OSGES. Leaving aside the lack of legal basis for “*moderation*”, parents and pupils are therefore to verify the correct implementation of the method in their specific case.
- **Breach of the general principle of legal certainty**: Leaving aside the lack of legal basis, “*moderation*” was applied according to change in the AIREB not made public before May 28, the day before last teaching day of the S7 school year, thus with a retroactive effect. The fact that “*moderation*” applied to grades acquired before the entry into force of [decision 2020-04-D-20-en-2](#) and that the “*moderation method*” has never been made public means the pupils and parents were not in a position to have a clear and precise understanding of how “*moderation*” might work, and the extent to which marks could be downgraded, in violation of the principle of legal certainty.
- **Breach of the general principle of legitimate expectations**: Pupils started the year under Bac marking rules that changed dramatically less than three months from the end of the school year, through the Board of Governors’ decision of principle of mid-April, formalised by [decision 2020-04-D-20-en-2](#) made public only on May 28. Not only were grades already acquired during the 1st semester (A1+B1) accounting for 80% of the total Bac grade (instead of roughly 33% under the system in place at the beginning of school year 2019/20), but the higher weighting afforded to subjects passed in written and oral exams in June was discarded and all subjects were unweighted (i.e. given equal importance). The “*moderation*”, unforeseen as a corrector of the overall Bac results in the normal Bac regulations, compounded this breach of pupils’ legitimate expectation.
- **Breach of the principle of equal treatment**: Pupils of schools and sections with much lower average grades than the average Bac grades are targeted as well as those of schools and sections with higher average Bac grades. The figures for 2020 are not yet public, but based on 2019 figures pupils of EEB 4 (Laeken), with an average grade of 76,53, are subject to “*moderation*” to the same extent as pupils of schools with a higher average, the same situation being that of linguistic sections such as FR (76,28) or NL (75,69). By treating equally schools and sections obviously not contributing to inflated grades and others, the “*moderation*” principle breaches the principle of equal treatment.

- Pupils and parents appealing against the application of “*moderation*” would be advised to word their request as aiming at the annulment of the application of “*moderation*” to the preliminary Bac results.

B- Grounds against the modified weighting of grades

Pupils not affected by “*moderation*” but rather by the modified weighting of grades may rely on breach of the principles of legal certainty and legitimate expectation.

- Pupils and parents are advised to make a detailed calculation of how the weighting changes affected their marks, by comparing the revised Bac marking scheme with the one in place at the beginning of school year 2019/20;
- Breach of the general principles of legitimate expectation and of legal certainty (for further developments, see above) by:
 - a. Increasing the share of 1st term grades from ca. 33% in the normal system to 80% under the revised 2019/20 system;
 - b. Unweighting the subjects, which were previously weighted in a way which gave prominence to subjects which were passed at written or oral exams.