

ETH Board

Ms [REDACTED], President

Haldeliweg 15

8092 Zurich

FINAL REPORT

Administrative enquiry in the Department of Physics (D-PHYS) at ETH Zurich

commissioned by the

Board of the Swiss Federal Institutes of Technology

28 June 2019

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MANAGEMENT SUMMARY

On 8 April 2019, the President of the ETH Board commissioned BDO to conduct an administrative enquiry in the Department of Physics (D-PHYS) at ETH Zurich as defined in Art. 27a ff. of the Government and Administration Organisation Ordinance (GAOO; SR 172.010.1). Evidence pursuant to Art. 12 of the Federal Act on Administrative Procedure (VwVG; SR 172.021) was used to determine the facts of the case. The enquiry was conducted between 8 April and 24 June 2019. The present report consequently refers to the state of knowledge pertaining on the 24 June 2019 (closing date). No further investigative actions took place after that date. The report is based on the interviews conducted and the documents submitted by the respondents, as well as the documents made available by ETH Zurich. Within the framework of the administrative enquiry, answers were sought to selected questions (see Section 2) regarding the following allegations:

Allegation of the non-transparent distribution of funds in the Department of Physics (D-PHYS)

BDO concludes that there are clear rules on the distribution of funds, and that these were correctly followed. The rules are lawful, appropriate and sufficiently transparent. The amendment to the relevant Rules of Procedure (*Geschäftsordnung*) in 2013 constitutes a clarification of the rules on transparency. Through the formulation of "level-appropriate transparency" (*stufengerechte Transparenz*) no one is excluded from the process of fund distribution in an arbitrary or discriminatory manner. However, transparency regarding the allocation of funds is limited and should be increased from the perspective of "good governance". Nevertheless, no discrimination or arbitrariness is evident with regard to the distribution of funds. The process of distributing the funds follows clear rules.

Allegation of constant discrimination by the D-PHYS management

The principles and rules for appointing members of the departmental executive committees are recorded in a transparent manner. BDO assesses that the organisation of the management and supervision is lawful, appropriate, comprehensible and up-to-date. In the interests of "good governance", however, election proposals should be supplemented by a requirements profile and a list of the candidates' qualifications and experience relevant to the performance of the position in question. Moreover, BDO has not found any evidence suggesting that individual members of D-PHYS are openly and directly excluded, or consistently and improperly kept out of senior roles within D-PHYS, and thus constantly discriminated against.

Allegation of corruption and abuse of office and power at ETH Zurich

With regard to the allegation of corruption and abuse of office and power at ETH Zurich, it can be stated that the complainant has distanced herself from the publicly levelled allegations of criminal activity. BDO has found no signs that would indicate that the offence of corruption or abuse of office has been committed in the criminal sense.

BDO has produced this report to the best of its knowledge on the basis of the evidence available to us. The findings, conclusions and recommendations contained in this report are based on the facts available to us up to the closing date (24 June 2019). In addition, it should be noted that events or actions subsequent to the above date could lead to different outcomes, the effects of which are not described in the present report.

ABBREVIATIONS

| | |
|-----------------------|--|
| APA | Federal Act on Administrative Procedure (Administrative Procedure Act) of 20 December 1968 (SR 172.021) |
| Art. | Article |
| BDO | BDO AG |
| CHF | Swiss Franc |
| D-PHYS | Department of Physics |
| e.g. | for example |
| em. | Emeritus |
| ETH | The domain of the Federal Institutes of Technology, including the Institutions of ETH Lausanne, ETH Zurich, PSI, EMPA, EAWAG and WSL |
| ETH Zurich | Federal Institute of Technology, Zurich |
| Financial Regulations | Financial Regulations of ETH Zurich, dated 1 January 2019 |
| Framework Concept | Framework Concept for the Distribution of Funds in the Department of Physics, adopted at the Department Conference on 13 December 2013 (<i>Rahmenkonzept für die Mittelverteilung im Departement Physik - verabschiedet am 13. Dezember 2013</i>). |
| GAOO | Government and Administration Organisation Ordinance of 25 November 1998 (SR 172.010.1) |
| G-Money | D-PHYS funding pot for small one-off applications in special situations (E-Money as of 2019) |
| i.e. | that is |
| IPA | Institute for Particle Physics and Astrophysics |
| IQE | Institute for Quantum Electronics |
| ITP | Institute for Theoretical Physics |
| lit. | letter |
| LSSP | Laboratory for Solid State Physics |
| no. | number |
| OO | Organisation Ordinance of the Federal Institute of Technology, Zurich (<i>Organisationsverordnung ETH Zurich vom 16. Dezember 2013</i>) |
| p. | page |
| para. | paragraph |

| | |
|------------------|--|
| Prof. | Professor |
| Reference Chairs | Basic amounts specified in the Framework Concept for the professorial chairs per year and institute, grouped by CHF for staff and equipment as well as floor space |
| RoP D-PHYS | Rules of Procedure of the Department of Physics (<i>Geschäftsordnung des Departements Physik vom 27. Mai 2016 (Stand 01. Oktober 2017)</i>) |
| SCC | Swiss Criminal Code of 21 December 1937 (version: 1 March 2019) (SR 311.0) |
| SNSF | Swiss National Science Foundation |
| TCHF | Thousands of Swiss Francs |
| VPFC | Vice President for Finance and Controlling |
| VPHRI | Vice President for Human Resources and Infrastructure |
| VPRCR | Vice President for Research and Corporate Relations |

1 BACKGROUND AND CONDUCT OF THE ENQUIRY

1.1 Background

On 11 October 2018, a complainant submitted to the ETH Board a complaint against the responsible persons of ETH Zurich in respect of inadequate/insufficient governance; on 19 October 2018, the President of the ETH Board confirmed that the complaint had been received (on 17 October 2018).

On 16 November 2018, the President of the ETH Board wrote to the complainant stating in summary that the ETH Board exercised overall supervision of the institutions of the ETH Domain, that ETH Zurich and more specifically the ETH Appeals Commission was responsible for dealing with the claim relating to employment law brought by the complainant, that the ETH Board would not comment on third-party proceedings and that ETH Zurich was to be invited to make a statement on the complainant's allegations relating to the methods of allocating financial resources between the institutes and on the transparency of the allocation of resources in the Department of Physics (D-PHYS) at ETH Zurich, subject to disclosure of the relevant extract from her complaint.

In a letter dated 5 December 2018, the complainant declined to allow the relevant extract from her complaint to be disclosed, because she wished to remain anonymous in order to protect her privacy and from a fear of being exposed to potential harassment and disadvantage.

In a letter dated 11 December 2018, the President of the ETH Board confirmed to the complainant that ETH Zurich, as explicitly desired by the complainant, was to be invited to make a statement only in an abstract form that would not allow any conclusions to be drawn about the complainant.

On 20 December 2018, the President of the ETH Board then invited ETH Zurich to make a statement on accusations contained in a complaint regarding alleged inadequate/insufficient governance (abstractly formulated enquiry in accordance with the complainant's letter dated 5 December 2018).

On 19 February 2019, within the deadline, ETH Zurich issued a statement on the questions raised, attaching excerpts from a final report entitled "Finanzanalyse Professur ██████████ (D-PHYS)" [Financial analysis of professorial chair of ██████████ (D-PHYS)] of 17 July 2018.

On 22 March 2019 the complainant commented publicly in the online magazine ██████████ regarding a request by ETH Zurich to the ETH Board for the dismissal of a professor. In this interview, she made serious allegations of a general nature against ETH Zurich - including corruption, sexism and abuse of office and power - some of which went beyond the matters contained in the complaint. In the view of the President of the ETH Board, the complainant has, by making her allegations against ETH Zurich, voluntarily given up her anonymity.

The ETH Board exercises a supervisory function over the ETH Domain (Art. 25 para. 1 lit. f Federal Act of 4 October 1991 on the Federal Institutes of Technology, ETH Act). The President of the ETH Board settles complaints in the form of a Presidential Decree or letter, unless further handling of the matter by the ETH Board is required (Art. 15 para. 1 lit. f of the Rules of Procedure of 17 December 2003 of the Board of the Swiss Federal Institutes of Technology). At an extraordinary meeting on 29 March 2019, the ETH Board decided to arrange an external investigation into the allegations contained in the complaint of 11 October 2018 as well as the additional accusations made by the complainant

in the [REDACTED] interview on 22 March 2019, within the framework of an administrative enquiry in the Department of Physics D-PHYS at ETH Zurich.

1.2 Brief

On 8 April 2019, BDO was commissioned to conduct an administrative enquiry in the Department of Physics D-PHYS at ETH Zurich pursuant to Art. 27a ff. of the Government and Administration Organisation Ordinance (GAOO; SR 172.010.1) with the aim of investigating the allegations made by the complainant.

An administrative enquiry pursuant to GAOO is a supervisory instrument serving to clarify particular facts, events, processes and organisational conditions within a particular area of the administration. There is no obligation to judge whether employees have acted culpably. An administrative enquiry is not directed at specific individuals (Art. 27a para. 2 GAOO). It is neither a criminal investigation nor a disciplinary enquiry.

1.3 Procedural principles

Articles 27a to 27j GAOO apply by analogy to the proceedings. In this connection we used our own discretion to decide

- ▶ which kinds of evidence pursuant to Art. 12 APA should be gathered in the present proceedings;
- ▶ which persons employed at ETH Zurich were to be questioned. The persons questioned were released from the duty of professional secrecy by means of a letter from the President of ETH Zurich dated 18 April 2019;
- ▶ which information and documentation was to be made available;
- ▶ how to ensure that the persons affected by the proceedings had the right to a fair hearing (Art. 27g para. 5 GAOO) and a right to inspect files (Art. 27g para. 4 GAOO).

1.4 Limits

The administrative enquiry covers the period from 1 January 2013 to 24 June 2019.

All other current or concluded proceedings of the ETH Board and/or ETH Zurich are outside the scope of this administrative enquiry. This applies in particular to the proceedings in relation to [REDACTED], as confirmed by the ETH Board in a letter of 5 June 2019 on the basis of its decree of 8 April 2019.

1.5 Organisation of work

Impartial experts, internal or external to the respective administrative unit, may be appointed to conduct an administrative enquiry. In the present case, the ETH Board appointed BDO as an organisation external to the relevant administrative unit. Within BDO, the investigation was conducted by the following specialists in the fields of law, finance and governance:

- ▶ [REDACTED], lic. oec. HSG (Lead Investigator and Project Manager)
- ▶ [REDACTED], MScBA (Deputy Lead Investigator, sub-task "governance")
- ▶ [REDACTED], Diplom-Wirtschaftsmathematikerin (sub-task "distribution of funds")
- ▶ [REDACTED], lawyer (sub-task "criminal law")

The investigation team was assisted by other interviewers and a number of minute-takers in the course of the primary data collection.

1.6 Work of the independent investigating body

BDO was responsible for conducting an administrative enquiry pursuant to Articles 27a to 27j GAOO. Within the framework of the administrative enquiry, answers were sought to selected questions (see Section 2) regarding the following allegations:

- ▶ Allegation of the non-transparent distribution of funds in the Department of Physics (D-PHYS)
- ▶ Allegation of constant discrimination by the D-PHYS departmental management
- ▶ Allegation of corruption and abuse of office and power at ETH Zurich

As the investigating body, BDO performed the work with sufficient certainty to ensure that a conclusion can be drawn on the above-mentioned matters within this framework. Taking into account all considerations of risk and materiality, appropriate investigative actions were carried out in order to obtain adequate and suitable evidence. The selection of the investigative procedures was at the investigating body's due discretion. Evidence pursuant to Art. 12 APA was used to establish the facts of the case. No witnesses were examined in the course of the administrative enquiry. ETH Zurich granted BDO full access to the files and documents necessary for the proper execution of the administrative enquiry. In addition, BDO obtained further information regarding the matters covered by the enquiry, through collecting primary data.

The following activities were carried out in the course of our administrative enquiry:

Inspection of files

The inspection covered the examination of internal and external records and documents on paper, in electronic format or in other media. The examination of records and documents provided evidence exhibiting varying degrees of reliability, depending on the type and source.

The documents used for the administrative enquiry are listed in Appendix 1: File Directory.

Interviews

Interviews were used to collect financial and non-financial information from competent persons at ETH Zurich. All interviews were conducted on the basis of individually adapted interview guidelines. The interviews were carried out by two interviewers and a minute-taker. When determining the composition of the interviewing team, care was taken to ensure that the members had the necessary specialist skills and also that the team included both women and men. The applicable rules of procedure were explained to the interviewee at the interview. The persons involved in the administrative enquiry had the right to be legally represented and assisted. The interview transcripts were signed by the interviewees and by BDO.

In the Presidential Decree of 8 April 2019 it was stated that, at a minimum, the complainant, the members of the Executive Board of ETH Zurich and the respective members of the departmental management of D-PHYS in recent years (i.e. 2013-2019) should be heard in connection with the administrative enquiry. Other interview partners could be chosen by BDO. This selection was made on the basis of the investigation files. The following criteria were thereby decisive:

- ▶ Main organisation: Professors from all the organisational units of D-PHYS (including the independent professorships)
- ▶ Heads of Institute: Current and former heads of the institutes
- ▶ Gender: All female professors at D-PHYS were interviewed with the exception of [REDACTED] [REDACTED] (owing to simultaneous proceedings being conducted by the ETH Board)
- ▶ Age: Younger/older professors
- ▶ Seniority: Long-standing/recently appointed professors
- ▶ Nationality: Swiss/foreign professors
- ▶ Position: Professors who have not yet held a departmental management position
- ▶ Position: Department Coordinator, Department Controller

Most of the interviews were conducted on the premises of ETH and BDO in Zurich (one second interview took place in writing, and one interview by Skype). The advantage of collecting data by this method is that people are generally very willing to provide information and key matters can be recorded accurately. BDO purposely gave the interviewees the opportunity to substantiate their statements, which provided a wider perspective and resulted in additional information being given. Further documentation was requested in respect of important statements relating to the enquiry, where such documentation was not already available at that time. As consequence, the findings include the results from the collection of primary data, supported by objective basic principles.

Summary of interviews conducted

| First name/last name | Function | Date |
|----------------------|--|---|
| Prof. Dr. [REDACTED] | Professor at [REDACTED] | 17.04.2019, 22.06.2019 (second interview conducted in writing) |
| Prof. Dr. [REDACTED] | Professor at [REDACTED] | 23.04.2019 |
| Prof. Dr. [REDACTED] | Department Coordinator D-PHYS, adjunct professor at [REDACTED] | 23.04.2019 |
| Prof. Dr. [REDACTED] | Professor at [REDACTED], former Head of Department D-PHYS | 23.04.2019 |
| Prof. Dr. [REDACTED] | Tenure track assistant professor at [REDACTED] | 23.04.2019 |
| Prof. Dr. [REDACTED] | President of the Strategy Commission D-PHYS, professor at [REDACTED] | 23.04.2019 |
| Prof. Dr. [REDACTED] | Vice President for Human Resources and Infrastructure | 23.04.2019 |
| Prof. Dr. [REDACTED] | Professor at [REDACTED], former Head of Department D-PHYS | 24.04.2019 |
| Prof. Dr. [REDACTED] | Head of [REDACTED], professor at [REDACTED] | 24.04.2019 |
| Prof. Dr. [REDACTED] | Adjunct professor at [REDACTED] | 24.04.2019 |
| [REDACTED] | Department Controller D-PHYS | 25.04.2019 |
| Prof. Dr. [REDACTED] | Adjunct professor at [REDACTED] | 25.04.2019 |
| Prof. Dr. [REDACTED] | Vice President for Research and | 25.04.2019 |

| | Corporate Relations | |
|----------------------|---|---------------------------------|
| Prof. Dr. ██████████ | Head of Department D-PHYS, Professor at ██████ | 25.04.2019, 15.05.2019 |
| Prof. Dr. ██████████ | Professor at ██████, former member of the Strategy Commission D-PHYS | 25.04.2019 (Skype interview) |
| Prof. Dr. ██████████ | Emeritus professor at ██████ | 26.04.2019 |
| Prof. Dr. ██████████ | Rector | 26.04.2019 |
| Prof. Dr. ██████████ | Deputy Head of Department D-PHYS, professor at ██████ | 29.04.2019 |
| Prof. Dr. ██████████ | Head of ██████, professor at ██████ | 29.04.2019 |
| Prof. Dr. ██████████ | Professor at ██████ | 29.04.2019 |
| Prof. Dr. ██████████ | Tenure track assistant professor at ██████ | 30.04.2019 |
| Prof. Dr. ██████████ | Member of the departmental manage- ment D-PHYS, professor at ██████ | 02.05.2019 |
| Prof. Dr. ██████████ | Assistant professor at ██████ | 02.05.2019 |
| Prof. Dr. ██████████ | Independent professor at D-PHYS, for- mer Head of Department D-PHYS | 09.05.2019 |
| Dr. ██████████ | Vice President for Finance and Con- trolling | 22.05.2019 |

Analytical investigative procedures

Analytical investigative procedures consist of evaluating information by analysing plausible relationships between financial and non-financial data. In addition, analytical investigative procedures cover the necessary investigations of observed variations or relationships that are not consonant with other relevant information or diverge from the expected parameters. The findings were systematically examined for any inconsistencies between the various documents and statements.

The investigation was conducted between 8 April and 24 June 2019. The present report consequently refers to the state of knowledge pertaining on the 24 June 2019 (closing date). No further investigative actions took place after that date.

Evaluation

BDO undertook an independent evaluation of procedures and processes connected with the distribution of funds, appointments to executive committees and how the latter exercise their functions.

The information obtained from primary and secondary data collection was subjected to thorough analysis and appraisal. It was then presented in the form of condensed statements. The evaluation standard was defined by the criteria set out in the question formulated by the ETH Board, the relevant legal provisions and "good governance" criteria.

Production of the report

The present report is based on the interviews conducted and the documents submitted by the respondents, as well as the documents made available by ETH Zurich. As the in-

investigating body, BDO produces a written report containing conclusions on the facts obtained. Investigative actions were conducted to obtain evidence, the actions being sufficient and appropriate in type, duration and scope to the particular situation and other relevant circumstances of the task, and are described in the present report; the evidence thus obtained was appropriate and sufficient in quantity to reduce the risk of error in the statements and conclusions to an acceptably low level. The facts of the case are expressed positively, e.g.: "According to our evaluation, the distribution of resources complies with the Organisation Ordinance of ETH Zurich and the Rules of Procedure of D-PHYS". Taking into account considerations of materiality regarding the scope of the primary data collections, a number of the findings can only be expressed with a limited degree of certainty; for example: "Based on our work as described in this report, no matters became known to us that lead us to believe that the distribution of resources does not comply in all material respects with the Organisation Ordinance of ETH Zurich and the Rules of Procedure of D-PHYS".

As the result of the administrative enquiry, BDO submits the present report to the commissioning body, together with all the investigation files as set forth in the list of documents (Annex 1). The report answers the questions posed in response to the complainant's allegations, especially those relating to complaints of abuses in the allocation of funds, discrimination against female professors in D-PHYS, and misconduct by the management bodies at D-PHYS and by other responsible persons at ETH Zurich (see Section 2).

This English report was translated in its entirety from the German original. If documents or people are cited in this report, the German original text is given first, followed by a translation to English. Documents for which an official English translation exist were cited directly in English language.

2 QUESTIONS INVESTIGATED AND FINDINGS

This section is divided according to the allegations to be investigated, stating the respective questions investigated in accordance with the Presidential Decree of 8 April 2019. The specific existing situation is briefly described on the basis of the above-mentioned investigative actions, and the relevant findings as well as the conclusion to the question under consideration are documented.

2.1 Allegation of the non-transparent distribution of funds in D-PHYS

2.1.1 *Question 1: Does D-PHYS have binding rules and criteria regarding the comprehensible and transparent distribution of the financial resources for research and teaching?*

If yes: What are these rules and criteria and have they been correctly applied by the departmental management when allocating funds within D-PHYS since the beginning of 2013?

If no: On what basis have the financial resources for research and teaching at D-PHYS been internally allocated by the departmental management since the beginning of 2013?

Clear rules exist for the distribution of funds at D-PHYS, and these are followed. However, transparency is limited and should be increased from the perspective of “good governance” and in the context of level-appropriate transparency.

Description of the existing situation

The principles of “self-dependent management of resources” (*eigenverantwortliche Mittelbewirtschaftung*) and subsidiarity apply at ETH.¹ The rules of the Executive Board accordingly apply to D-PHYS, and the department also has to organise itself using its own Rules of Procedure. The Rules of Procedure of the departments must be approved by the President of ETH Zurich. This is to ensure that they are consistent with ETH regulations.

Professorial chairs at ETH receive funds from three sources:²

- a) Basic funding
(Basic funding offering stability for the long-term funding of the chair)
- b) Additional funding
(To be applied for directly from the Executive Board; or funding from the President)
- c) Project-related third-party funds
(Obtained directly by the individual chairs)

¹ Art. 31.1, Organisation Ordinance of ETH (“OO”) and rules on responsibilities in the OO overall.

² Section 6: Use of budget, financial regulations of ETH Zurich (“Financial Regulations”).

Additional funding and project-related third-party funds are not distributed by D-PHYS and therefore do not form part of this enquiry. Additional funding is mentioned only to a limited extent in relation to transparency.

For ETH as a whole, out of total funding flows of CHF ██████████ in 2016, CHF ██████████ was used for basic funding and CHF ██████████ for additional funding via the Executive Board and ETH Board, while CHF ██████████ originated from third-party funding. The central units, including the technology platforms, received CHF ██████████ from the Executive Board and from third-party funding. Basic funding therefore accounts for the majority of the funds that the professorial chairs receive from the Executive Board.³

Of the total amount of CHF ██████████ available for basic funding, D-PHYS received a basic working budget of approximately CHF ██████████ for the year 2019, compared with CHF ██████████ in 2018. Financial resources are distributed in accordance with Art. 8.2 d) of the Rules of Procedure of D-PHYS (*Geschäftsordnung des Departements Physik*)⁴:

"Art. 8: Aufgaben der Departementskonferenz

8.2 Sie hat die in Art. 46 Abs. 2 OV genannten Aufgaben. Insbesondere hat sie die folgenden Aufgaben:

d) sie definiert das Rahmenkonzept für die Verteilung der Mittel gemäss Art. 4 Abs. 1 und 2 unter Beachtung des in Art. 31 Abs. 4 Bst. A OV festgehaltenen Grundsatzes;"

[Art. 8: Tasks of the Department Conference

8.2 It has the tasks specified in Art. 46 para. 2 OO. It has the following tasks in particular:

d) It defines the framework concept for the distribution of resources in accordance with Art. 4 paras. 1 and 2 in compliance with the principle set forth in Art. 31 para. 4 lit. A OO;]

and further:

"Art. 4: Mittelzuteilung und Transparenz

4.1 Das Departement übernimmt die interne Verteilung der Mittel, die durch die ETH Zürich im Rahmen des Grundauftrags zur Verfügung gestellt werden. Dies umfasst Personal- und Sachmittel sowie Räume; Letztere vorbehältlich einer entsprechenden Vereinbarung gemäss Art. 11b Abs. 4 OV.

4.2 Die Zuteilung der Mittel nach Abs. 1 an die Organisationseinheiten und Forschungseinrichtungen des Departements sowie an die Departementsbetriebe obliegt dem Ausschuss. Der Ausschuss trifft seine Entscheidungen mit einfachem Mehr."

³ According to "Understanding the system of ETH's financial governance" for the year 2016.

⁴ Quoted from RoP D-PHYS, in the version of 27 May 2016 (status as at 1 October 2017).

[Art. 4: Distribution of resources and transparency

4.1 The department is responsible for the internal distribution of the resources made available by ETH Zurich as part of its basic mandate. This covers staff and equipment as well as premises; the latter is subject to an agreement to this effect in accordance with Art. 11b para. 4 OO.

4.2 The distribution of the resources pursuant to para. 1 to the department's organisational units and research facilities and to the departmental services is the responsibility of the Executive Committee. The Executive Committee makes its decisions by simple majority.]

The Framework Concept for the Distribution of Resources in D-PHYS (*Rahmenkonzept zur Mittelverteilung im Departement Physik*) as mentioned in Art. 8.2 d) was adopted by the Department Conference of 13 December 2013. The key aspects are:⁵

"Die fünf Institute ASTRO, ITP, IPP, IQE, LFKP und die Betriebe des Departements erhalten vom Departement Mittel, d.h. Räume, Personalmittel, Betriebsmittel und andere finanzielle Mittel. Über die Aufteilung dieser Ressourcen entscheidet der Ausschuss des Departements, wobei strategische Gesichtspunkte und das Prinzip Last und Leistung, entsprechend der Geschäftsordnung des Departementes (Art. 8 Abs. 2 Bst. d) und der Organisationsverordnung der ETH Zürich (Art. 31 Abs. 4 Bst. a) berücksichtigt werden. Dabei wird der unterschiedlichen Struktur der einzelnen Institute Rechnung getragen, auch im Sinne einer angemessenen Kontinuität"

"Im Rahmen der alle 7 Jahre periodisch stattfindenden Evaluation des Departements wird durch die Peers überprüft, ob die Institute und Professuren ihre Aufgaben in Lehre und Forschung sowie im administrativen Bereich erfüllen. Liegen Last und Leistung der Professuren auf hohem internationalen Niveau, orientiert sich die Mittelverteilung an die Institute an folgenden Referenzprofessuren, deren Grösse jährlich angepasst wird (siehe auch Senior-Scientist Regelung):

ITP: ■ k PA + ■ k OK 1), ■ qm

ASTRO: ■ k PA + ■ k OK, ■ qm

IQE und LFKP: ■ k PA + ■ k OK, ■ qm

IPP: ■ k PA + ■ k OK, ■ qm"

[...]

"Das Departement verfügt über flexible Mittel in Form von Personalmitteln, Betriebsmitteln, Overhead und Forschungsreserven, sowie eventuell Raumreserven. Diese Mittel werden auf Antrag an das Departement und nach Entscheidung des Ausschusses des Departements für Notfälle oder zusätzliche ausserordentliche Leistungen in Forschung und Lehre auf zeitlich befristeter Basis vergeben. Über kleinere Beträge kann der Vorsteher des Departements entscheiden."

⁵ Underlining by BDO.

[The five institutes ASTRO, ITP, IPP, IQE, LSSP and the departmental services receive resources from the department: i.e. premises, funding for staff, funding for equipment and other financial resources. The department's Executive Committee decides how to allocate these resources, taking account of strategic considerations and the principle of "load and performance", in accordance with the department's Rules of Procedure (Art. 8 para. 2 lit. d) and the Organisation Ordinance of ETH Zurich (Art. 31 para. 4 lit. a). The differing structure of the individual institutes is taken into account, including from the perspective of an adequate continuity.

As part of the evaluation of the department which takes place every seven years, its peers examine whether the institutes and professorial chairs are fulfilling their tasks in teaching and research as well as in administration. If the load and performance of the professorial chairs are on a high level internationally, the allocation of resources to the institutes is based on the following Reference Chairs, the size of which is adjusted annually (see also Senior Scientist Regulations):

ITP: ■■■ k PA (staff funding) + ■■ k OK (equipment funding 1), ■■■ m²

ASTRO: ■■■ k PA + ■■■ k OK, ■■■ m²

IQE and LSSP: ■■■ k PA + ■■■ k OK, ■■■ m²

IPP: ■■■ k PA + ■■■ k OK, ■■■ m² "

[...]

The department has flexible resources in the form of funding for staff, equipment, overheads and reserves for research, and possibly spare floor space. These resources are allocated to the department on request and following the decision of the department's Executive Committee for emergencies or additional exceptional activities in research and teaching, for a fixed period of time. The Head of Department is empowered to make a decision on smaller amounts.]

Transparency regarding the distribution of financial resources is set forth in Art. 4.6 RoP D-PHYS:

"Art. 4: Mittelzuteilung und Transparenz

4.6 Das Departement sorgt für Transparenz bei der Mittelverteilung und Mittelverwendung. Dabei ist die Information über die Verteilung der Mittel auf die Institute gemäss Art. 4 Abs. 2 allen Professoren zugänglich, diejenige über die Verteilung der Mittel auf die Professuren in den Instituten gemäss Art. 4 Abs. 3 ist den Mitgliedern des jeweiligen Institutes offenzulegen."

[Art. 4: Distribution of resources and transparency

4.6 The department ensures transparency in the distribution and use of resources. Information about the distribution of resources to the institutes in accordance with Art. 4 para. 2 is available to all professors, and information about the distribution of resources to the professorial chairs in the institutes in accordance with Art. 4 para. 3 must be disclosed to the members of the respective institute.]

a) The basic funding of the professorial chairs

At ETH the financial year is the same as the calendar year. The Executive Board communicates with the departments while drafting its budget: at the end of the first quarter, the Executive Board holds talks with the departments in order to prepare the following year's budget, which is approved in autumn. The budget for each department is drawn up with reference to the professors' planning and any infrastructure projects. The Head of Department signs a budget agreement each year for the budget that the department receives from the Executive Board. The Head of Department is also responsible for ensuring that the department does not generate a deficit and he must account to the Executive Board annually for the use of funds.⁶

At D-PHYS level, the documentation for the budgeting process is prepared by the Department Controller. The "Reference Chairs" listed in the Framework Concept act as the starting point:⁷

Reference Chairs:

- ITP: ■■■ k PA + ■■ k OK, ■■■ m²
- ASTRO: ■■■ k PA + ■■■ k OK, ■■■ m²
- IQE and LSSP: ■■■ k PA + ■■■ k OK, ■■■ m²
- IPP: ■■■ k PA + ■■■ k OK, ■■■ m²

In the above table, ITP, ASTRO, IQE, LSSP and IPP refer to the institutes of D-PHYS. The first figures refer to the annual basic amount in TCHF for staff (PA) and equipment (OK). The floor space in square metres (m²) per professorial chair is then stated. The staff resources do not include the salaries of the professors, but refer to the agreed number of positions assigned to the professorial chair. Additional positions must be financed from third-party funds.

The budget is based on the figures for the previous year. Adjustments are made on the basis of inflation, changes in the social insurance contributions for employees (due to factors such as age distribution) and other salary costs, as well as changes in teaching or operational activities and similar situations. Cuts may also be made if the university's overall budget has been reduced. The proposed budget is discussed first with the Head of Department and then with the Heads of the Institutes and finally accepted by the Executive Committee (*Ausschuss*).⁸

The decisions of the Executive Committee are recorded in minutes that are promptly e-mailed by the Department Coordinator to all professors of D-PHYS and made available on the shared data storage system.⁹

The professors subsequently receive a communication from the respective Head of Institute about the resources allocated to their professorial chair. This is usually sent by e-

⁶ Art. 10, Financial Regulations.

⁷ Framework Concept for the Allocation of Resources in the Department of Physics, adopted at the Department Conference on 13 December 2013 ("Framework Concept").

⁸ Transcript ■■■■■■■■■■, page 4.

⁹ The Executive Committee usually meets on Monday and the Department Conference on the following Friday. The minutes of the Executive Committee are distributed before the Department Conference.

mail. When necessary, explanations regarding matters such as changes in the social security costs of the employees may be obtained from the department management.¹⁰ At institute level, resources are distributed via the members of the institute who participate in the resources,¹¹ but as a rule the amounts do not deviate from the figures per professorial chair as discussed in the Committee. The Institute for Theoretical Physics is an exception, because it uses a shared funding pool.

The initial resources of a professorial chair are first assigned at the time of the appointment by the President of ETH Zurich. This initial assignment is guaranteed for the first five years.

The Framework Concept's above-mentioned "flexible resources" refer to "G-Money". Guidelines¹² have been drawn up at D-PHYS on this subject to define the purpose and application process for this funding pot. "G-Money" means the portion of the budget made available by the Executive Board for basic funding which is not directly allocated to the professorial chairs or other institute operations. Here, the emphasis is on short-term support in special situations; in principle, it is not supposed to be used to increase the amount of staff funding for a professorial chair. The professors can submit applications for G-Money to the Executive Committee of D-PHYS. The decision on such applications is communicated to the applicant only.

b) Additional funding

Applications for additional funding should be addressed directly to the Executive Board. These comprise:¹³

- Start-up funding
(Initial assignment of resources to a professorial chair, by the President)
- Equipment funding
(Assessed by a committee/Executive Board unit)
- Internal research funding
(Assessed by a committee/Executive Board unit)
- Internal funding of teaching
(Assessed by a committee/Executive Board unit)
- Fund for stopgap positions
(e.g. temporary positions to cover maternity leave or lengthy absence owing to illness)

¹⁰ Transcript [REDACTED], page 5.

¹¹ Art. 4.3, RoP D-PHYS.

¹² "Instructions D-PHYS/allocation personal-reserves and deficit-handling, decided at the Ausschuss meeting of May 16th 2008, revised September 24, 2012"; further details in "Instructions D-PHYS/E-Money, decided at the Ausschuss meeting of 10 December 2018".

¹³ Art. 60, Financial Regulations.

- Damage repair fund
(straightforward repair/replacement of equipment, such as following water damage in the lab)

The President of ETH is also authorised to approve funding.

c) Project-related third-party funds

Third-party funds must be applied for and administered by the professors themselves. Such funds are not considered in this administrative enquiry.

Significant findings

a) The basic funding of the professorial chairs

The interviewees uniformly confirmed that they were familiar with both the Framework Concept for the Distribution of Resources and the process for allocating resources, i.e. the competence of the Executive Committee and the other methods of distribution within the institute. In a few cases, the existence of the Framework Concept was known, but not the specific amounts for the Reference Chairs. Furthermore, the interviewees confirmed that resources are distributed in the manner described above. BDO was also able to trace the process in the documentation on the budgeting process for the year 2019. The interviewees also confirmed that they receive and can inspect the minutes of the Executive Committee.

According to the information received, the resources distributed to a professorial chair may differ from the Reference Chairs by only 10-15%.¹⁴

As regards the allocation, the Framework Concept refers to strategic factors on the one hand and to the principle of "load and performance" (*Last und Leistung*) on the other. This principle of "load and performance" is not explained further in the internal regulations, nor could the interviewees define it clearly. Some of the interviewees were not familiar with the principle of load and performance in relation to the allocation of resources.

In the opinion of the interviewees, "load" apparently covers the number of doctoral students, post-docs and students supervised by the chair, and also the teaching provided by the chair, including lectures for other departments, as well as membership of committees and the assumption of official roles. They said this was illustrated by the Reference Chairs. According to the interviewees' statements, there are many dimensions to the concept of "performance" and it is difficult to grasp. In their view, "performance" can be measured by the number of citations in journals, for example, although the number of citations also depends on the particular branch of research, which is why peer review is regarded as an accepted criterion. The interviewees also felt that the amount of third-party funding obtained can be a measure of "performance". On the other hand, they did not think that awards and prizes result in a higher allocation of resources. The interviewees unanimously state that quantifying the principle of load and performance presents a

¹⁴ Transcript Prof. Dr. ██████, page 3; transcript Prof. Dr. ██████, page 4.

challenge. They also feel that the very different characteristics of the individual institutes is another challenge (basic lectures for other departments, varying (financial) cost of research for theoretical as opposed to experimental physicists, different number of PhD students supervised etc.). There is also consensus that professors who work at ETH can generally be assumed to provide an excellent standard of research and teaching, and thus a similarly excellent performance. Because of this consensus, the Reference Chairs are accepted by the professors as the key to the allocation of resources.

Of the strategic factors mentioned in the Framework Concept for the Distribution of Resources that ought to be taken into account when allocating resources, it is possible, for example, to envisage the development of new ideas or the creation of a new research area, for which additional employees need to be recruited and funded at a later date. Since Reference Chairs which primarily reflect the status quo are used as a basis when allocating resources, BDO has come to the opinion that strategic and future-oriented factors are not sufficiently taken into account in the allocation of resources. In some cases, the basic funding has been adjusted because a professorial chair has undergone a change of focus.¹⁵

As regards communication and transparency in respect of the distribution of resources, reference should be made to the Executive Committee minutes and the minutes of the Professors' Conference and the Department Conference. Although the minutes of the second meeting in the autumn term mention the finalisation of the budget for the following year and the total amount of the budget provided for D-PHYS, these minutes do not present the figures by institute, which are shown only in the presentation at the Professors' Conference. The interviewees note that the Head of Institute communicates the distribution of resources per chair by e-mail; this states the amount allocated but gives no further explanation.

All the interviewees regard "G-Money" as a helpful means of bridging short-term funding needs in a straightforward way. A typical use of "G-Money" is extending the contracts of doctoral and postdoctoral students by a few months to enable them to conclude their research, and making additional purchases for projects. Neither the applications submitted nor the amount of "G-Money" drawn by the individual professorial chairs are transparent, because neither the applications nor the decisions are communicated. The distribution of the funds available each year as "G-Money" is not disclosed in the department.¹⁶

As a study conducted by the Department Controller has shown, the chairs made very varying use of this funding pot, which is intended for emergencies.¹⁷ This also indicates that the rules on G-Money are interpreted differently by the professors and this is not compensated for by the Executive Committee during the decision-making process.

¹⁵ There are a variety of research funding programmes and funding opportunities through the Swiss National Science Foundation and other foundations. There is also the Executive Board's Innovedum fund, which promotes innovation in teaching.

¹⁶ One exception was the presentation of the use of "G-Money" in recent years as part of the discussion of the revised concept of "E-Money" at the Professors' Conference in September 2018.

¹⁷ Analysis submitted by Prof. Dr. ██████ entitled "Ausschüttungen PA/BM/OH-total".

b) Additional funding

The provision of additional funding from the Executive Board was not investigated further, because the present administrative enquiry relates to the funding distributed by D-PHYS (not the funding distributed by the Executive Board committees).

The VPFC commissioned a schedule of the funding issued by the President of ETH¹⁸ to professorial chairs in D-PHYS. Only a small amount of additional funding was mentioned, the reasons for which are comprehensible.

Conclusion

Rules on the distribution of resources and on transparency in this connection are set forth in the RoP D-PHYS. The Department Conference approved a Framework Concept for implementing the distribution of resources, and this contains clear rules, based on the Reference Chairs described therein, for the distribution of the major portion of the available budget - the basic funding.

The distribution of funds to the professorial chairs complies with the provisions enshrined in the Rules of Procedure in regard to basic funding and meets the agreed transparency requirements.

However, the distribution of resources in accordance with the principle of load and performance, as required by the Framework Concept, and the regard for strategic considerations, are implemented to only a limited extent:

- The principle of load and performance is difficult to quantify and was not familiar to all the interviewees. In the view of most of the interviewees, the methodology for allocating funds is not a contradiction to the principle of load and performance because of the comparable load and performance of the professors, and the differently endowed Reference Chairs.
- BDO was unable to discern that strategic factors are taken into account, apart from efforts to support younger professors and the occasional use of "G-Money" (now "E-Money") in special situations. It would be advisable to take systematic account of new research areas and the expansion of subject areas, for example.

The distribution of resources for the basic funding of the professorial chairs can be regarded as transparent for all participants because it is based on the Reference Chairs, and the amounts fixed may not deviate more than 10-15%.

The Executive Committee records resolution minutes. These set forth the department's total budget, but not the budget allocation to the individual institutes. An explanation of the budget or the changes is missing. This makes it more difficult to achieve transparency and understanding regarding the distribution of resources. The additional information given by the Head of Institute in respect of the professorial chairs is also very sparse, and does not permit deductions to be made regarding the amount received or the changes that have occurred since the previous year due to factors such as changes in

¹⁸ Including the predecessor of the current President of ETH.

salary costs that are dependent on the age distribution of the chair's staff. The interviewees confirm that there is transparency regarding the distribution of resources at their respective institutes.

The distribution of resources from the G-Money pool is not transparent, because no information is given regarding the applications submitted or the Executive Committee's decisions. Although rules on the use of the G-Money pool do exist, they have not been uniformly interpreted by department members in the past. Nor did the Executive Committee's approval process compensate for any asymmetries. The rules for drawing on this pool were specified in more detail in the revised version on "E-Money", in accordance with the Executive Committee meeting held on 10 December 2018.

There are clear rules regarding additional funding from the Executive Board, and committees have to approve applications. The amount of the funding received by the individual chairs is not disclosed within the department. Although the basic funding accounts for most of the resources that a professorial chair receives from the Executive Board, the additional funding makes a significant contribution which is not disclosed, representing around 20% of the basic funding (at ETH level).

There are no written rules on any direct funding agreements that may be made with the President of ETH. Where available, these too are credited directly to the chairs, so there is no transparency either for the departmental management or for the members of the department in this regard.

The Executive Board controls the distribution and use of resources to a very limited extent. This is in keeping with the principle of self-dependent management of resources by the departments and allows the scope that the departments, in the opinion of the interviewees, require.¹⁹ In the course of the enquiry, BDO found no indications that it might be necessary for the Executive Board to exercise stronger control of the distribution of resources.

In summary, it can be stated that there are clear and precise rules on the distribution of resources and that these are mostly complied with, but transparency is limited and should therefore be increased for reasons of good governance and in the context of level-appropriate transparency.

- 2.1.2 *Question 2: Are the applicable rules and methods and/or the rules and methods actually applied (particularly the decision-making process and decision-making responsibilities, the flow of information and accountability practices, and the right of inspection and appeal) and the criteria for distributing resources lawful, appropriate and sufficiently transparent to the professors affected? Do the procedures applied in respect of the distribution of resources for teaching and research at D-PHYS comply with the principles of good governance?*

The rules on the distribution of resources at D-PHYS are lawful, appropriate and sufficiently transparent. The rules essentially comply with the requirements of "good governance".

¹⁹ Transcript Prof. Dr. [REDACTED], page 4.

Description of the existing situation

The regulations relating to the distribution of resources were outlined in Section 2.1.1 in connection with Question 1, with a description of how they are implemented. The relevant legal provisions are considered below.

Significant findings

1. *On the lawfulness of the rules*

An evaluation of the lawfulness of the existing regulations on the distribution of resources in D-PHYS must be based on the regulations of ETH. In the present case, these are:

- Organisation Ordinance of ETH Zurich (*Organisationsverordnung ETH Zürich*; OO)²⁰
- Financial Regulations of ETH Zurich²¹

Standards of the Federal Finance Administration²², such as the "Summary of the 37 principles" (*37 Leitsätze*)²³ on the corporate governance of the Confederation, and the "OECD Guidelines on Corporate Governance of State-Owned Enterprises"²⁴, as well as federal legislation such as the ETH Act²⁵ and the Ordinance on Finance and Accounting at the ETH Domain (*Verordnung über das Finanz- und Rechnungswesen des ETH-Bereichs*)²⁶, apply to ETH as an institution. For the purposes of this administrative enquiry, it is assumed that the ETH regulations comply with the overarching rules and laws.

The Rules of Procedure of each department are issued by the President of ETH after they have been examined by Legal Services. For this reason, it may in principle be assumed that the rules on the distribution of resources in D-PHYS are lawful.

The OO regulates the distribution of resources as follows:

- "Art. 6 Budget, Finanzkompetenzen

6.1 Der Präsident/die Präsidentin entscheidet über das Budget und teilt die Mittel wie folgt zu:

b. den Departementen zur Grundfinanzierung; diese Mittel sind Teil einer jährlichen Vereinbarung des Präsidenten/der Präsidentin mit den Departementen."

²⁰ Ordinance on the Organisation of the Federal Institute of Technology, Zurich (Organisation Ordinance ETH Zurich), of 16 December 2003 ("OO").

²¹ Financial Regulations of ETH Zurich, of 1 January 2019.

²² See also (available in German, French and Italian only): https://www.efv.admin.ch/efv/de/home/themen/finanzpolitik_grundlagen/cgov/grundlagen.html

²³ The Confederation's Corporate Governance Guidelines (in German), version of 31.8.2015; see: https://www.efv.admin.ch/dam/efv/de/dokumente/finanzpolitik_grundl/cgov/37%20Leits%C3%A4tze.pdf.download.pdf/CG_Leitsaetze_d.pdf, published by the Federal Department of Finance (FDf); accessed on 17 June 2019.

²⁴ OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, published by the Organisation for Economic Co-operation and Development (OECD), see: https://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en, accessed on 17 June 2019.

²⁵ Federal Act of 4 October 1991 on the Federal Institutes of Technology, version of 1 May 2017 (<https://www.admin.ch/opc/en/classified-compilation/19910256/index.html>).

²⁶ See (available in German, French and Italian only): <https://www.admin.ch/opc/de/classified-compilation/20141734/index.html>, of 5 December 2014 (version of 1 May 2017); accessed on 17 June 2019.

- "Art. 31 Mittelbewirtschaftung
 - 31.1 Das Departement bewirtschaftet die ihm zugeordneten Budgets eigenverantwortlich.*
 - 31.4 Das Departement regelt in der Geschäftsordnung:*
 - a. die Art und Weise der internen Mittelzuteilung, unter Berücksichtigung von Last und Leistung;*
 - b. die Zuständigkeiten."*

- "Art. 56 Aufgaben des Departementsvorstehers/der Departementsvorsteherin
 - 56.2 Er/sie überwacht den Vollzug der Beschlüsse der Departementsorgane und sorgt für die zweckmässige Verwendung der dem Departement zugesprochenen Mittel sowie die Einhaltung der budgetären Vorgaben. Dazu verfügt er/sie über die erforderlichen Weisungsbefugnisse. Die Einzelheiten regelt das Finanzreglement.*
 - 56.3 Über die Verwendung der dem Departement zugeordneten Budgets einschliesslich einer aktiven Reservebewirtschaftung legt er/sie dem Präsidenten/der Präsidentin Rechenschaft ab."*

- [Art. 6 Budget, financial competencies
 - 6.1 The President decides on the budget and allocates the financial resources as follows:
 - b. to the departments for basic funding; these resources form part of an annual agreement between the President and the departments.

- Art. 31 Management of resources
 - 31.1 The department is self-dependent in managing the budget distributed to it.
 - 31.4 In its Rules of Procedure, the department regulates:
 - a. the manner in which resources are allocated internally, taking into account load and performance;
 - b. the responsibilities.

- Art. 56 Tasks of the Head of Department
 - 56.2 He/she monitors the implementation of the decisions of the departmental bodies and ensures the budget allocated to the department is used properly and the budgetary requirements are met. To this end, he/she has the necessary powers of authority. The details are governed by the Financial Regulations.
 - 56.3 He/she accounts to the President for the use of the budget allocated to the department, including the active management of reserves.]

The OO makes no reference to transparency in relation to the distribution of resources in the department.

As already mentioned in Section 2.1.1, the Head of Department signs a budget agreement annually. BDO has inspected the budget agreement for D-PHYS for the year 2018. The rules on responsibility for the budget state that D-PHYS manages the resources autonomously. The RoP D-PHYS provide for the autonomous management of resources.²⁷

As already described in Section 2.1.1, the RoP D-PHYS state that the Executive Committee is responsible for allocating the resources to the institutes²⁸ and the Department Conference defines a framework concept for the distribution of resources.²⁹ The Framework Concept refers explicitly to the distribution of resources according to the principle of load and performance and also refers to the relevant Art. 31.4.a OO.³⁰ As stated in the Conclusion to Section 2.1.1, the use of Reference Chairs in relation to the distribution of resources does not contradict the principle of load and performance.

The tasks of the Head of Department and his deputy are set forth in Art. 18 RoP D-PHYS. Paragraphs 18.c and d in particular reflect the requirements placed on the Head of Department by the OO as regards the distribution of resources. Statements on the expedient use of the resources are not directly formulated in the RoP D-PHYS.

The Financial Regulations, version of 1 January 2019, set forth the requirements regarding the distribution of resources to the departments in the following articles:

- Art. 10 Heads of academic departments

"1 Within the framework of the budget allocated to their department, heads of academic departments have the following specific duties, competencies and responsibilities:

a. Together with the Vice President for Finance and Controlling, they agree the annual basic budget for their department.

b. They ensure the budget allocated to their department is used properly and the budgetary requirements are met. To this end, they have the necessary powers of authority and may institute the measures described in Art. 103 of the Regulations. They are accountable to the President as to how the basic budget allocated to their department is used. Accounts are rendered through the Vice President for Finance and Controlling in accordance with the budget agreement.

c. As part of the budget discussions, they report on any changes in reserves in accordance with the department's internal regulations in accordance with Art. 96

²⁷ See RoP D-PHYS, translated from the German version:

- Art. 4.1: "The department is responsible for the internal allocation of the resources [...]";
- Art. 4.3: "The allocation of an organisational unit's resources between its members and its research facilities is the responsibility of that organisational unit";
- Art. 8.2 d: "it [the Department Conference] defines the Framework Concept for the Allocation of Resources [...]";
- Art. 18 d: "he [the Head of Department] monitors the management of all the resources [...]";
- Art. 24.2 a: "it [the Executive Committee] is responsible for budgeting and for distributing the resources [...]";
- Art. 24.2 b: "it [the Executive Committee] ensures that it allocates the resources in compliance with the budget".

²⁸ RoP D-PHYS, Art. 4.2

²⁹ RoP D-PHYS, Art. 8.2 d

³⁰ Framework Concept for the Allocation of Resources, adopted at the Department Conference on 13 December 2013 ("Framework Concept").

and 101 of these Regulations as well as on any changes in the third-party budgets and supplemental budgets.

f. They receive financial information in connection with negotiations being carried out by the President on the appointment of professors and are consulted by the President in this regard; they also receive financial information in the event of professors being promoted."

- Art. 20 Accountability of Budget Officers

"The Budget Officer³¹ is accountable for the proper use of and compliance with the following budgets in his responsibility centre:

a. basic budgets at the cost centre to the head of department;

b. supplemental budgets to the responsible Executive Board member;

c. third-party budgets to the donor and ETH Zurich."

- Art. 65 Self-dependent management of resources

"65.1 Academic departments are self-dependent in managing the budgets allocated to them."³²

The Financial Regulations make no reference to transparency in relation to the distribution of resources within the department. The requirements of the Financial Regulations relating to the distribution of resources at department level provide a more detailed description of the points already included in the OO. The statements on the lawfulness of the departmental rules as regards the provisions of the OO apply by analogy to the Financial Regulations.

The tasks, competencies and responsibilities of the controller of an academic department, as listed in Art. 18 of the Financial Regulations, are not listed in the RoP D-PHYS, but they are consistent with the information received.³³ The Budget Officer's control obligations as specified in Art. 21 of the Financial Regulations are not mentioned separately in the RoP D-PHYS. The Financial Regulations may in fact be regarded as a higher-level directive. Overall, the rules on the distribution of resources can be judged to be lawful and in accordance with the rules of ETH Zurich.

2. On the appropriateness of the rules

According to the Rules of Procedure of D-PHYS, resources must be allocated in accordance with the Framework Concept adopted by the Department Conference. According to this Framework Concept³⁴, the distribution of the financial resources should follow the

³¹ Art. 19 of the Financial Regulations defines Budget Officers as full professors, assistant professors, associate professors, heads of service/administrative departments, heads of non-departmental teaching and research facilities and Executive Board members.

³² Here the Financial Regulations refer to Art. 31.1 of the OO

³³ Transcript ██████████, page 3f.; transcript Prof. Dr. ██████████, page 6f.

³⁴ Framework Concept for the Allocation of Resources in the Department of Physics, adopted at the Department Conference on 13 December 2013.

principle of load and performance and take account of strategic considerations. The differing structures of the institutes need to be considered. Adequate continuity should also be ensured.

According to the university guidelines, financial resources should be allocated in such a way as to enable the university to offer excellent teaching and research. A further objective is the effective transfer in the form of spin-offs and knowledge transfers by graduates working in industry. Since the funds used are from tax revenues, they must be utilised effectively.³⁵

As stated in Section 2.1.1, the Reference Chairs used when deciding how to distribute the resources reflect the principle of load and performance and the differing structures of the institutes. On the other hand, strategic considerations are taken into account in the basic funding only to a limited extent. Since the amounts for the Reference Chairs may only be adjusted slightly with the passage of time and a change in the resources allocated to a professorial chair mainly results from a change in salary costs, the basic funding of a chair exhibits considerable stability. This is also expressed in the departmental budgeting process, which uses the figures for the previous year as a basis.

In the opinion of BDO, and based on the available documentation, resources are allocated in line with university guidelines. The "culture of enablement" (*Ermöglichungskultur*)³⁶ at ETH is implemented by means of the basic funding with the aid of the Reference Chairs, which are designed to cover the basic needs of each individual chair, supplemented by "G-Money" for emergencies. The objective of the effective transfer of knowledge can be achieved only through excellent teaching and research and by enabling knowledge to be passed on: i.e. by fostering an appropriate culture at the university.

Overall, the rules on the distribution of resources are judged to be appropriate.

3. On the transparency of the rules

The professors at D-PHYS are familiar with the rules regarding the process and standards according to which the resources are distributed. These were communicated and are always available on the data storage system at D-PHYS.

The rules on basic funding are clearly formulated on the basis of the use of Reference Chairs; the amount for the Reference Chairs per institute is specified and communicated in the Framework Concept for the Distribution of Resources.

The rules on the process of allocating "G-Money", now "E-Money", have also been formulated and communicated. As has been seen in the past, the scope that the rules are forced to offer regarding the use of this "emergency pot" has been interpreted in different ways. The rules on "E-Money" have been formulated in a more restrictive way, but by their very nature they offer a certain scope for defining emergencies and special cases.

³⁵ Transcript Prof. Dr. ██████████, page 3.

³⁶ See "Strategie und Entwicklungsplan 2017-2020" ["Strategy and development plan 2017-2020"], 2.1 Values, page 11: "*Ermöglichungskultur: Die ETH Zürich pflegt eine Kultur der Ermöglichung und des Vertrauens. Sie schafft Raum für Neugier und Kreativität, fördert die kritische Auseinandersetzung mit dem eigenen Handeln und unterstützt die Entwicklung und die Umsetzung innovativer Ideen, die an der Front des aktuellen Wissens entstehen.*" [Culture of enablement: ETH Zurich cultivates a culture of enablement and trust. It creates space for curiosity and creativity, promotes the critical appraisal of one's own actions and supports the development and implementation of innovative ideas that emerge at the forefront of current knowledge.]

On the basis of the discussions with the interviewees, it was established that the guidelines are known and that there is a common understanding of the purpose of this pot.

4. *On the good governance of the rules*

Corporate governance guidelines of the Confederation

The Confederation's Corporate Governance Guidelines make recommendations for the general governance of independent federal entities. Here, the focus is on the management and supervision of these entities by the Confederation, and on the basic organisation of the entities. Details relating to their internal organisation are not covered comprehensively. Nevertheless, certain guidelines may reasonably be referred to when reviewing the procedures used at D-PHYS for the distribution of resources.

The second guideline recommends "*schlanke Strukturen und klare Kompetenzregelungen zwischen den Organen*" [lean structures and clear rules on competencies between the governing bodies] of the independent entity.³⁷ In principle, the multilevel budgeting process, in which the budget is prepared by the departmental management and the distribution of the resources is then decided by the Executive Committee, meets the requirement of a lean structure, since the preparatory work is undertaken by a small group of people and the decision is then made by a democratically legitimised committee. Competencies relating to the distribution of resources are clearly regulated, since the procedures and competences are specified in the Rules of Procedure of D-PHYS and are binding.

OECD Guidelines on Corporate Governance of State-Owned Enterprises

The OECD Guidelines on Corporate Governance of State-Owned Enterprises also make recommendations regarding general governance. Although these Guidelines are addressed to state-owned institutions whose "activities [...] are largely of an economic nature",³⁸ they are recommended by the Confederation as a tool for the governance of independent entities in general, and also explicitly for the ETH Domain. The Guidelines primarily deal with the overarching governance and the transparency of the organisation towards the outside, although individual elements may reasonably be applied to the internal organisation.

On the control mechanisms:

*"The Boards of state-owned enterprises should develop, implement, monitor and communicate internal controls, ethics and compliance programmes or measures [...]".*³⁹

³⁷ The Confederation's Corporate Governance Guidelines (in German), version of 31.8.2015; see: https://www.efv.admin.ch/dam/efv/de/dokumente/finanzpolitik_grundl/cgov/37%20Leits%C3%A4tze.pdf.download.pdf/CG_Leitsaetze_d.pdf, published by the Federal Department of Finance (FDf); accessed on 17 June 2019, p. 2.

³⁸ OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, published by the Organisation for Economic Co-operation and Development (OECD), see: https://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en, accessed on 17 June 2019, p. 15.

³⁹ OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, published by the Organisation for Economic Co-operation and Development (OECD), see: https://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en, accessed on 17 June 2019, p. 23.

Here, the question of internal control mechanisms is relevant to the rules on the distribution of resources. In principle, certain control mechanisms exist through the involvement of the various bodies: the Department Conference (decides on Framework Concept for the Distribution of Resources), the departmental management (prepares the budget) and the Executive Committee (decides on the distribution of resources). However, only limited control by the professors over the decisions of the Executive Committee is possible, because - as mentioned previously - no explanation of the budget or the changes is given and the individual professorial chairs have no formal role in the budgeting process. Only limited control is available in relation to the distribution of the G-Money funds, since persons outside the Executive Committee are not informed about the applications submitted or the decisions. The Executive Committee's decisions do, however, enjoy a high degree of legitimacy since various office holders and all heads of institute are represented on it.

On transparency:

"State-owned enterprises should report material financial and non-financial information on the enterprise in line with high quality internationally recognised standards of corporate disclosure, and including areas of significant concern for the state as an owner and the general public. [...] With due regard to enterprise capacity and size, examples of such information include: [...] Enterprise financial and operating results, including where relevant the costs and funding arrangements pertaining to public policy objectives;"⁴⁰

Here, the question of disclosing the costs and funding arrangements is particularly relevant in the context of allocating resources within the department. As mentioned above, the values for the Reference Chairs are known within the department, and they represent a significant pillar of the financing structure. Furthermore, the distribution of the basic funding to the individual institutes and to the individual professorial chairs within the institutes is transparent at D-PHYS. There is less transparency as regards how the budget is derived, the distribution of the G-Money funds, and the additional funding and financing agreements.

Overall, BDO is of the opinion that the rules on the distribution of resources meet the requirements of the various applicable OECD standards, but there is still room for improvement in some respects, such as a detailed statement of the budget for the individual chairs and disclosure of the G-Money arrangements.

General UN recommendations on good governance

The subsidiary organisations of the United Nations apply the principle of good governance as a guideline for a variety of programmes. While there is no standard or "official" definition of the concept, the principles - with slight variations - are essentially as follows:⁴¹

⁴⁰ OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, published by the Organisation for Economic Co-operation and Development (OECD), see: https://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en, accessed on 17 June 2019, p. 24.

⁴¹ See for example: What is Good Governance?, United Nations Economic and Social Commission for Asia and the Pacific, published on 10 July 2009, see <https://www.unescap.org/resources/what-good-governance>; accessed on 25 June 2019; See also: Good Governance and Human Rights, The Office of the High Commissioner for Human Rights, see: <https://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx>; accessed on 25 June 2019.

- a) Participation
- b) Rule of law
- c) Transparency
- d) Responsiveness
- e) Accountability
- f) Effectiveness and efficiency
- g) Equity and inclusiveness

Applied to the rules on the distribution of resources:

- a) Participation: Department Conference, departmental management and the Executive Committee are composed of members of D-PHYS. Membership of these bodies is by election or *ex officio* (e.g. Head of Institutes have a seat in the Executive Committee, and presidents of committees in the Department Conference). Access to these bodies is open to all members of the department. At the level of the individual institute, all professors are involved in decisions on the distribution of resources. The criterion of participation is therefore met.
- b) Rule of law: The rules on the distribution of resources are derived from the overarching laws, ordinances and regulations and are therefore based on the law. The procedural rights of the bodies involved are defined in the Rules of Procedure.
- c) Transparency: There is transparency as regards the distribution of resources, in the form of the various sets of minutes and e-mails giving information about the distribution of resources at institute level. As previously mentioned, there are certain restrictions as regards how the budget is derived, the distribution of the G-Money funds, and the additional funding and financing agreements.
- d) Responsiveness: There are institutional opportunities to participate in the various bodies (Department Conference, Professors' Conference, Executive Committee etc.). According to the majority of the interviewees, concerns raised by members of the department are addressed both individually by the Heads of Institute and Heads of Department, and also - where necessary - discussed in the relevant committees. The majority of the persons interviewed by BDO therefore judge the system to be responsive.
- e) Accountability: A duty of accountability exists in that concerns and queries can be brought to, for example, the Heads of Institute or Department Conference. The relevant persons can also be "made accountable" for their decisions by means of the election - or non-(re-)election - of the Head of Institute and Head of Department. However, there is no formal opportunity for a professor to appeal against the actual allocation of resources or for Heads of Institute or Heads of Department to be voted out during office, for example.
- f) Effectiveness and efficiency: It is not possible to assess effectiveness and efficiency within the framework of the administrative enquiry.
- g) Equity and inclusiveness: The various groups at D-PHYS are represented on the committees at the appropriate level (institute management and council, Department Conference, Executive Committee). The members formally have equal status within the committees. The actual inclusion of specific groups of people (such as professors who are not Swiss nationals, or women) is difficult to assess: because the total number of persons and candidates in any given year or election

process is limited, quantitative statements are of limited value. During the period investigated by BDO, there were a maximum of just three female full or associate professors working at D-PHYS who could have been elected as members of the departmental or institute management. They were also Heads of Institute for varying terms of office, and thus represented on the Executive Committee. At the time when this report was written, however, there were no female members represented in the departmental management, there are admittedly currently only two female full or associate professors employed at D-PHYS.⁴² It is therefore difficult to evaluate the current state of equity and inclusiveness. As regards the department members of non-Swiss nationality, one member is always represented on the executive committees.

Guidelines of professional bodies

BDO is not aware of any overarching rules or recommendations relating to good governance in respect of the Swiss higher education landscape. Individual associations in the US higher education landscape have drawn up recommendations on good governance. In what follows, these should be considered as illustrative. In each case, we only take account of passages that refer to the procedures for the distribution of resources, which is the subject of our enquiry.

Among other things, the Association of Governing Boards of Universities and Colleges says in its Statement on Institutional Governance:

"Governing boards [in this instance, the Executive Board] should state explicitly who has the authority for what kinds of decisions—that is, to which persons or bodies it has delegated authority and whether that delegation is subject to board review."⁴³

The clear definition of responsibilities required in this Statement is implemented in the RoP D-PHYS.

And on the budgeting process:

"The board should set budget guidelines concerning resource allocation on the basis of assumptions, usually developed by the administration, that are widely communicated to interested stakeholders and subject to ample opportunity for challenge. But the board should not delegate the determination of the overall resources available for planning and budgetary purposes. Once the board makes these overarching decisions, it should delegate resource-allocation decisions to the chief executive officer who may, in turn, delegate to others."⁴⁴

The cascading budgeting process described here, which delegates powers to allocate resources in a step-by-step manner from the Executive Board down to the departments,

⁴² Art. 27.3 RoP D-PHYS states that assistant professors may also be elected as heads of institute. However, according to the interviewees, the election of an assistant professor is unusual.

⁴³ Statement on Institutional Governance, Association of Governing Boards of Universities and Colleges, published on 8 November 1998, see: <https://portfolio.du.edu/downloadItem/139204>; accessed on 25 June 2019, p. 6.

⁴⁴ Statement on Institutional Governance, Association of Governing Boards of Universities and Colleges, published on 8 November 1998, see: <https://portfolio.du.edu/downloadItem/139204>; accessed on 25 June 2019, p. 7.

corresponds to the basic structure of the process for budgeting and the distribution of resources at ETH and in D-PHYS.

The American Association of University Professors formulated a Statement on Government of Colleges and Universities, which discusses matters including the allocation of resources and budgeting:

"A second area calling for joint effort in internal operation is that of decisions regarding existing or prospective physical resources. The board, president, and faculty should all seek agreement on basic decisions regarding buildings and other facilities to be used in the educational work of the institution.

A third area is budgeting. The allocation of resources among competing demands is central in the formal responsibility of the governing board, in the administrative authority of the president, and in the educational function of the faculty. Each component should therefore have a voice in the determination of short- and long-range priorities, and each should receive appropriate analyses of past budgetary experience, reports on current budgets and expenditures, and short- and long-range budgetary projections. The function of each component in budgetary matters should be understood by all; the allocation of authority will determine the flow of information and the scope of participation in decisions."⁴⁵

Here, the emphasis lies on the appropriate involvement of the various bodies of the Executive Board and the teaching staff. Both the Executive Board (sets the budget parameters) and the teaching staff (decides on the distribution of resources via the Department Conference, Executive Committee and institute management) are involved in the budgeting process and the distribution of resources at D-PHYS.

Furthermore, the *American Association of University Professors* outlines in its report entitled *Financial Exigency, Academic Governance, and Related Matters* recommendations regarding the role of the teaching staff in budgeting, among other matters:

"[...] the president, and the faculty should participate in financial decisions according to their particular expertise and responsibilities. Specifically:

[...] the faculty is expected to establish faculty salary policies, and, in its primary responsibility for the educational function of the institution, to participate also in broader budgetary matters primarily as they impinge on that function.

[...]

Faculty, administrators, and trustees need to advance their points of view vigorously, but they must also be willing to accept compromise in the pursuit of common goals.

[...]

⁴⁵ Statement on Government of Colleges and Universities, The American Association of University Professors; see: <https://www.aaup.org/report/statement-government-colleges-and-universities>; accessed on 25 June 2019.

The faculty should participate both in the preparation of the total institutional budget and in decisions relevant to the further apportioning of its specific fiscal divisions. How should the faculty participate in these tasks? Through an institutional-level body that represents the entire faculty. Certain kinds of budgetary decisions—for example, those dealing with curriculum, faculty status, or department equipment—require decentralized decision making (in, say, departments, divisions, schools, or colleges). But in matters of concern to the entire university, such as desirable funding levels for the next fiscal period, recommendations should be made by an institution-wide faculty body in concert, of course, with the administration and governing board.

For the faculty to have a meaningful role in budgetary decisions it must have access to all information that it requires to perform its tasks effectively, and the opportunity to confer periodically with representatives of the administration and governing board."⁴⁶

Like the general Statement cited above, this also addresses the shared responsibility of the university management and the teaching staff, which should in particular be demonstrated by involving committees that include representatives of the teaching staff in the budgeting process and ensuring that the teaching staff receive sufficiently detailed information about budgeting and the distribution of resources. It also stresses that, in addition to the institutional and procedural aspects, there is also an important cultural aspect: seeking consensus between the people and committees involved.

At D-PHYS, the teaching staff and professorial chairs are included by consulting the Department Conference, Executive Committee and institute management during the resource allocation process. There is transparency regarding the key financial figures and decisions; transparency is more limited as regards how the budget is derived, the distribution of the G-Money funds, and the additional funding and financing agreements. In the interviews conducted by BDO, it was consistently stressed that, in principle, attempts to find solutions in D-PHYS are characterised by efforts to achieve a broad-based consensus. Differences were evident between the interviewees regarding the efforts to achieve consensus: while the majority of those interviewed regard the efforts to achieve consensus in a positive light, the more sceptical interviewees saw the emphasis placed on these consensus efforts as resulting in an unwillingness to listen to critical voices within the committees.⁴⁷

Conclusion

The rules on the distribution of resources at D-PHYS are lawful, appropriate and sufficiently transparent. The rules on the distribution of resources at D-PHYS essentially comply with the requirements of "good governance".

⁴⁶ Financial Exigency, Academic Governance, and Related Matters, American Association of University Professors, published in April 2004, see ; accessed on 25 June 2019, contains references to the older document "The Role of the Faculty in Budgetary and Salary Matters".

⁴⁷ Additional statement dated 15 May 2019 to transcript Prof. Dr. ██████████, page 8.

2.1.3

Question 3: When the Rules of Procedure of the Department of Physics were amended in 2013, were calculated measures taken to restrict transparency as regards the distribution of resources and/or to exclude people from the resource distribution process in an arbitrary and discriminatory way?

The amendment of the Rules of Procedure in 2013 clarified the regulations pertaining to transparency; “calculated measures” cannot be said to have been instituted. Through the formulation of “level-appropriate transparency” (*stufengerechte Transparenz*) no one is excluded from the process of fund distribution in an arbitrary or discriminatory manner.

Description of the existing situation

The Rules of Procedure of D-PHYS (“RoP D-PHYS”) were revised in 2013. In the context relevant to this enquiry, the key change was the introduction of “level-appropriate transparency” (*stufengerechte Transparenz*) (the newly inserted text is underlined):

- Insertion of Art. 4.6: *“Das Departement sorgt für Transparenz bei der Mittelverteilung und Mittelverwendung. Dabei ist die Information über die Verteilung der Mittel auf die Institute gemäss Art. 4.2 allen Professoren zugänglich, diejenige über die Verteilung der Mittel auf die Professuren in den Instituten gemäss Art. 4.3 ist den Mitgliedern des jeweiligen Institutes offenzulegen.”*

[The department ensures transparency in the distribution and use of resources. Information about the distribution of resources to the institutes in accordance with Art. 4.2 is available to all professors, and information about the distribution of resources to the professorial chairs in the institutes in accordance with Art. 4.3 must be disclosed to the members of the respective institute.]

- Deletion of the previous Art. 5.4: *“Sie [die Organisationseinheiten und Forschungseinrichtungen] sind verpflichtet, die Departementsleitung über die gesamten ihnen zur Verfügung stehenden Sachmittel, Personalmittel und Räume zu informieren. Diese Information ist allen ordentlichen, ausserordentlichen und Assistenzprofessoren und den Ausschussmitgliedern des Departements auf Anfrage zugänglich.”*

[They [the organisational units and research facilities] are required to inform the departmental management about all the funding for equipment, funding for staff and premises available to them. This information is available on request to all full, associate and assistant professors in the department and the members of the Executive Committee.]

The wording of Art. 4.6 remains unchanged in the current version of the Rules of Procedure⁴⁸ of D-PHYS.

⁴⁸ RoP D-PHYS dated 27 May 2016 (version of 1 October 2017).

Significant findings

It can be seen from the amendments to the Rules of Procedure in 2013 as described above that "level-appropriate transparency" was newly included: the previous requirement regarding transparency was supplemented in Art. 4.6 by the following rule:

"Information about the distribution of resources to the institutes in accordance with Art. 4.2 is available to all professors, and information about the distribution of resources to the professorial chairs in the institutes in accordance with Art. 4.3 must be disclosed to the members of the respective institute."

This addition creates transparency for the individual professors as regards the distribution of resources between the individual institutes and between the professorial chairs within the respective institute. The RoP D-PHYS previously referred only to "transparency in the allocation and use of resources"⁴⁹ without any further explanation. Further, transparency regarding the distribution of funding for equipment, funding for staff and premises was reduced through the deletion of Art. 5.4. On the other hand, the Executive Committee's responsibility pursuant to Art. 18.2 a) remains unchanged:

"Tasks of the Executive Committee

18.2 The following obligations are reserved exclusively to the Committee:

a) it is responsible for the budgeting and distribution of the resources in accordance with Art. 4 paras. 1 and 2;"

Most of the professors interviewed by BDO (with the exception of the complainant) said that the amendment of the Rules of Procedure in 2013 was to be understood as a clarification of the previous rules on transparency:

ETH was reorganised from ten departments to sixteen, which also resulted in a change in the management bodies of the departments. From 1990 to 2004, the ultimate authority over the budgets still lay with the university, i.e. with the President of ETH specifically, and not yet with the departments. The second structural change came with the autonomy of the departments as a result of the budgetary authority conferred upon the ETH by the Federal Council. As of 2004, this was compulsorily implemented at departmental level.⁵⁰ Before the introduction of autonomy, there was little transparency as regards the distribution of resources, according to the interviewees. They said that in the first few years of autonomy, the rules - including those on transparency in the distribution of resources - had not yet been defined clearly. This phase was described, amongst other things, as "wilde Zeit"⁵¹ [wild time], "wilder Westen"⁵² [Wild West] and "chaotisch"⁵³ [chaotic]. The interviewees said that the implementation took place in a structured process during the period when Professor ██████████ was Head of Department at D-PHYS. According to the interviewees, it became necessary not only to harmonise the distribution of resources by means of Reference Chairs, but also to enshrine transparency regarding the allocation

⁴⁹ Art. 3.6 of the earlier version of the RoP D-PHYS.

⁵⁰ Transcript Prof. Dr. ██████████, page 3; transcript Prof. Dr. ██████████, page 5; transcript Prof. Dr. ██████████, page 5.

⁵¹ Transcript Prof. Dr. ██████████, page 4.

⁵² Transcript Prof. Dr. ██████████, page 10.

⁵³ Transcript Prof. Dr. ██████████, page 5.

of resources in the RoP D-PHYS. They reported that this occurred in the RoP D-PHYS as amended in 2013.⁵⁴ Interviewees also placed on record that the concept of level-appropriate transparency was clarified with Legal Services at ETH before the Rules of Procedure were amended.⁵⁵ In their assessment of the changes, the interviewees went on to explain that the transparency that existed in previous years was no different from that defined in the concept of level-related transparency introduced in 2013. In other words, they said that - even beforehand - not all the figures had been disclosed in full or explained, and that the number of figures disclosed after the amendment of the RoP D-PHYS had not decreased.⁵⁶ When voting on the definition of transparency, a pronounced majority of the professors voted in favour of the introduction of level-appropriate transparency.⁵⁷

Most of the persons interviewed by BDO do not desire greater transparency regarding the distribution of resources. They regard the current state of knowledge and transparency as sufficient. This is on the one hand because they know the amount assigned to the Reference Chairs on which the distribution of resources is based, and on the other hand because they have confidence in the members of the Executive Committee. They also said that the Department Conference is by now informed, in an anonymised format, of the size of the budgets for the individual institute and chairs. Furthermore, the interviewees felt that merely giving information about figures is not enough, and that the figures should be given in the relevant overall context. In other words, greater transparency regarding the figures would not - in their view - necessarily bring about an improved level of knowledge. Some individuals stated that, despite their interest in seeing more detailed figures, this had been decided against owing to the amount of work required and the complexity of the task. The interviewees also question how much additional knowledge would be gained by greater transparency. In this connection it is striking that the interviewees who originate from English-speaking countries or who have worked in those countries for some time tend to express a desire for greater transparency. It was also stated in this context that a "cultural issue" might be involved.⁵⁸

The complainant considers the "level-appropriate transparency" to be non-transparent. She said that, on the one hand, amending the Rules of Procedure in 2013 did not remove the arbitrary nature of the distribution of resources and, on the other, the distribution of resources had since then degenerated into a "complete black box" because only the Executive Committee members had knowledge of it.⁵⁹

Conclusion

The introduction of level-appropriate transparency in the amended Rules of Procedure of D-PHYS in 2013 established for the first time that not all professors have full access to

⁵⁴ Transcript Prof. Dr. ██████, page 4; transcript Prof. Dr. ██████, page 4; transcript Prof. Dr. ██████, page 4; transcript Prof. Dr. ██████, page 10.

⁵⁵ Transcript Prof. Dr. ██████, page 4.

⁵⁶ Transcript Prof. Dr. ██████, page 4.

⁵⁷ Transcript Prof. Dr. ██████, page 5 (40:2 votes); transcript Prof. Dr. ██████, page 4 (with 6 votes against); transcript Prof. Dr. ██████, page 6; minutes of the Department Conference HS13_2, held on 13 December 2013, page 13.

⁵⁸ Transcript Prof. Dr. ██████, page 4.

⁵⁹ Transcript Prof. Dr. ██████, page 4 f.; complaint, point 31.

information about the distribution of resources. Full access has been reserved to the members of the Executive Committee at D-PHYS since the amendment.

The majority of the interviewees confirm that the amendment of the Rules of Procedure in 2013 made the rules on transparency more precise, and that this amendment did not alter the underlying philosophy as regards the distribution of resources and how it is communicated. The key change had already taken place a few years earlier, with the introduction of departmental autonomy. Some interviewees were unable to evaluate this matter, because they had not yet joined D-PHYS in 2013 or they did not yet have any involvement in these matters.

The question asked for the purpose of this administrative enquiry refers firstly to the deliberate restriction of transparency regarding the distribution of resources, and secondly to the arbitrary and discriminatory exclusion of individuals from the resource distribution process. The question was answered as follows:

- By amending the Rules of Procedure in 2013, measures were taken that reduce transparency regarding the distribution of resources. However, most of the interviewees said that these restrictions were not newly introduced at that time, but instead reflected the previous practice. It therefore does not appear plausible to speak of "calculated measures taken". In particular, it is not clear who took these measures in a "calculated" manner and with what intention.
- Through the formulation of "level-appropriate transparency" no one is excluded from the process of fund distribution in an arbitrary or discriminatory manner. The rules would have been arbitrary if transparency had been restricted in an inappropriate and incomprehensible manner. This is not the case, although it could certainly be argued that transparency should be extended to all the professors, for example. However, grading the degree of transparency according to the criteria of "institute member" or "Executive Committee member" does not appear inappropriate - in publicly funded institutions it is quite usual for the degree of transparency to be graded for different groups of people, and this appears comprehensible. The rules would be discriminatory if they treated different groups of people unequally on the grounds of inappropriate criteria, or equal standards were not applied to all. All the professors are affected equally by the application of level-appropriate transparency, since the criteria of "institute member" or "Executive Committee member" do not discriminate against any person or group of persons in an unusual or inappropriate way. The criteria for the distribution of resources, i.e. the rules on allocating the budget to the institutes and professorial chairs, were not altered by the amendment of the Rules of Procedure in 2013. As described in Section 2.1.4, BDO does not consider the distribution of resources to be arbitrary or discriminatory.
- Nor is participation in the resource distribution process, i.e. making decisions in the Executive Committee and also in the individual institutes, discriminatory or arbitrary; it falls to the responsibility of the Executive Committee or institute members, just as it did in the period before 2013. The wording in the Rules of Procedure refers exclusively to the body, i.e. the Executive Committee, but offers no special rights for individuals that could lead one to conclude that there is discrimination or arbitrariness aimed at individual persons or groups of people. Here, too, it could be argued, for example, that the Professors' Conference rather than the Executive Com-

mittee should decide how resources are allocated. However, assigning budgetary authority to a body whose membership is restricted to a limited group of people appears to be an appropriate and comprehensible decision that is common in many organisations. The composition of the Executive Committee is evaluated in Section 2.2.1.

- If the question is extended to cover the arbitrary or discriminatory exclusion from transparency regarding the distribution of resources, it can be shown that all the professors are equally well-informed at the level of their respective institutes. At departmental level, too, the professors who are not Executive Committee members are equally well-informed regarding the distribution of resources, so there cannot be said to be discrimination or arbitrariness.

However, in connection with the further amendment of the Rules of Procedure in 2016/2017, the situation of the independent professorships should be noted. The latter are not directly represented in the Executive Committee, and can only be represented by one of the institute heads in respect of specific concerns (Art. 26.4b RoP D-PHYS). This later amendment of the Rules of Procedure therefore produced discrimination against the independent professorships in connection with the resource distribution process because they are not represented in this process by a representative they have elected and cannot put forward their concerns directly.

2.1.4

Question 4: With regard to the internal distribution of resources by the departmental management of D-PHYS, has there been any arbitrary treatment or discrimination against individuals, and in particular against the complainant herself?

There is no evidence of discriminatory or arbitrary treatment of any individual with regard to the distribution of resources. The resource distribution process follows clear rules and is implemented in the Executive Committee by a group of persons defined by their official functions. Thus there is no evidence of any discriminatory or arbitrary distribution of resources either.

Description of the existing situation

As explained in Section 2.1.1, resources are allocated in accordance with the rules set forth in the RoP D-PHYS and the guidelines of the Framework Concept. In particular, at D-PHYS the distribution of the basic funding is based on the Reference Chairs.

Applications may also be made for financial resources from the G-Money/E-Money pool.

Additional funding is applied for by direct requests to the Executive Board, and in individual cases funding agreements are concluded directly with the President of ETH.

With regard to the resource distribution process, according to the RoP D-PHYS the Executive Committee is responsible for deciding on the budget and allocating the resources. Various office holders at D-PHYS are members of the Executive Committee.

Significant findings

At D-PHYS, the distribution of funds for basic funding is governed by the concept of Reference Chairs. These are defined precisely for each institute in terms of money and premises, and apply to the professorial chairs of the institute. The figures for the respective Reference Chairs are known to the members of the department and form part of the Framework Concept. Adjustments are made according to the number of employees and their age distribution (higher social insurance contributions) and, to a very limited extent, for other individual reasons. It is laid down that the basic funding may differ from the Reference Chair by only 10-15%.⁶⁰

The Framework Concept, which defines how the Reference Chairs are used, was approved by the professors according to the minutes of the Department Conference held on 13 December 2013.⁶¹

"Der Vorsteher liest die Stellungnahme [der Anzeigerin] (entschuldigt) vor, die mit dem vorliegenden Konzept nicht einverstanden ist. Die DK [Departementskonferenz] nimmt die Stellungnahme zur Kenntnis. Nach gründlicher Diskussion stimmt

⁶⁰ See footnote 14.

⁶¹ Minutes of the Department Conference HS13_2, held on 13 December 2013, page 13. The annex mentioned in the minutes and the complainant's position statement are not available to us.

die DK [Departementskonferenz] dem Konzept mit einer Enthaltung zu (siehe Beilage)."

[The chairman read out the position statement [of the complainant] (apology for absence received), who does not agree with the concept under discussion. The DC [Department Conference] took note of the position statement. After a full discussion, the DC [Department Conference] approved the concept with one abstention (see enclosure).]

All Executive Committee members are involved in the process of allocating the resources. The members are office holders in the department, who are elected directly by the department members or at institute-level. The Department Controller is also a member of the Executive Committee. The composition of the Executive Committee is defined in the RoP D-PHYS, and refers to functions, not individuals.

As regards the funds that the complainant receives from D-PHYS, it has been established that she receives more funds than other professorial chairs:

- In comparison with the other chairs in her institute, she receives a basic endowment that is approximately TCHF [REDACTED] higher; this is due partly to the larger number of employees for her chair (as guaranteed in 2008) compared with the other chairs at the institute (known as the "7/7/7/8" rule⁶²) and partly to the top-up to the post-graduate salaries funded by the Swiss National Science Foundation (SNSF);
- Via her numerous applications for funding from the "G-Money" pool, which were all approved, she received CHF [REDACTED] in further funding over the years. That is more than double the amount received by the recipient of the second-largest award of G-Money funding.
- She also has more floor space available.

These facts were confirmed by the findings of the financial analysis performed in 2018 on the complainant's professorial chair.⁶³

In the discussion of the findings of the financial analysis, it was made clear that the complainant could apply for extraordinary additional funds of CHF [REDACTED] per year.⁶⁴ The application for 2019 had already been approved.

⁶² The numbers 7/7/7/8 refer to the guaranteed number of posts per chair at the institute that are covered by the basic funding. Additional posts must be financed from third-party funds. In 2008, eight posts were allocated to the complainant by the then ETH president. See "2008 letter 8 positions 8Apr08.pdf".

⁶³ Final report on financial analysis of professorial chair of [REDACTED] (D-PHYS), Department of Controlling of ETH Zurich, dated 17 July 2018. The financial analysis was triggered by the observation that the complainant received a significant proportion of the G-Money pool. Since this pool will be reduced in future on account of the funding for the three new assistant professorships, it was necessary to clarify whether any activities were dependent on G-Money funding.

⁶⁴ Final report on financial analysis of professorial chair of [REDACTED] (D-PHYS), Department of Controlling of ETH Zurich, dated 17 July 2018.

Conclusion

As regards the basic funding, there is no discrimination or arbitrariness towards an individual professorial chair. The allocation is carried out using clearly comprehensible parameters, namely the Reference Chair as well as the number of staff and their age distribution.

Nor is there any discrimination or arbitrariness as regards the distribution of funds from the G-Money pool or the E-Money pool: the basic rules are clearly communicated and it is up to each individual professor whether they submit an application. According to the information available, applications for G-Money funding were usually approved in the past, which means that it was not possible to identify any discriminatory or arbitrary behaviour in the rejection of applications.

The question whether the complainant in particular has been discriminated against in the distribution of funding must be answered in the negative. In fact, the complainant receives a higher budget overall for her professorial chair than the other chairs at her institute, and also applied for and received by far the biggest amount of funding from the G-Money pool. BDO has seen no information to suggest that applications by the complainant have been rejected unusually often or on inappropriate grounds. Furthermore, from 2019 onwards the complainant can apply for extraordinary additional funding from the President.

The members of the Executive Committee, i.e. a clearly defined group of office holders, participate in the distribution of resources. Insofar as the selection of the Executive Committee members does not take place in an arbitrary or discriminatory manner (see Section 2.2.1), no discrimination or arbitrariness is evident as regards the involvement of individuals - and specifically of the complainant - in the process of distributing the resources.

2.2 Allegation of constant discrimination by the D-PHYS departmental management

2.2.1 Question 1: On which principles and according to which rules are members appointed to the executive committees of D-PHYS?

The principles and rules for appointing members of the D-PHYS executive committees are recorded in a transparent manner.

Description of the existing situation

Art. 7 RoP D-PHYS names the following bodies of the department: the Department Conference, the Professors' Conference, the Teaching Committee, the Grading Conference, the Head of Department and his deputy, the Director of Studies and his deputy, the Departmental Management, the Executive Committee, the Department Coordinator, the Strategy Commission, the Security Council, the bodies of the institutes and laboratories, the IT advisory service, the Library Commission, the Operations Commission, the General Assembly of the Departmental Services, the Mobility Adviser and the Technical Adviser for Physics as well as those for the specialist Master's courses run by D-PHYS, the Admissions Committee for Physics and the Admissions Committees for the specialist Master's courses run by D-PHYS, the Awards Committee and the Doctoral Committee.

The Department Conference, as the department's most senior body, is composed of the following members of the department pursuant to Art. 9 RoP D-PHYS:

- all the professors belonging to the department and four representatives of the other members of the teaching staff;
- the Department Coordinator;
- seven representatives of the mid-level academic staff;
- four representatives of the administrative and technical staff, of whom at least one belongs to the Operations Commission;
- seven representatives of the students and guest students ("Hörer");
- the teaching specialist as well as representatives from teaching methodology, mobility advice and technical advice;
- the Study Coordinator and the Timetable Coordinator;
- the presidents of the IT advisory service, the Security Council and the Library Commission;
- the associate members of the department.

In the narrower sense, the following bodies are considered to be executive committees that have tasks, competencies and responsibilities relating to the distribution of resources in accordance with the Rules of Procedure:

- The Head of Department and his deputy (*Departementsvorsteher und sein Stellvertreter*): In accordance with Art. 19 RoP D-PHYS, the Department Conference requests the President to appoint the Head of Department and his deputy from the full and associate professors of the department. The term of office is for two or three years, respectively; re-election is permitted twice or once, respectively. The President decides upon exceptions.

- The Departmental Management (*Departementsleitung*): This body consists of the Head of Department, his deputy, the Director of Studies, the Department Coordinator and the President of the Strategy Commission. These persons are members of the departmental management *ex officio*. Apart from the Department Coordinator (see below), they are elected by the Department Conference from the full and associate professors of the department (Art. 19 para. 1, Art. 21 para. 1 and Art. 31 para. 2 RoP D-PHYS).
- The Executive Committee (*Ausschuss*): In accordance with Art. 25 RoP D-PHYS, the Executive Committee consists of the Head of Department, his deputy, the Director of Studies, the Department Coordinator, the President of the Strategy Commission and a full or associate professor from each of the department's organisational units; the institutes are represented by their Heads, the Financial Controller, a representative of the mid-level academic staff of all organisational units and research facilities of the department, the representative of the Operations Commission in the Department Conference, a representative of the students of the department and the Study Coordinator (without voting right). The majority of the persons with a seat on the Executive Committee are *ex officio* members. The organisational units and research facilities elect their representatives using their own electoral procedures. The student associations and the associations for mid-level academic staff select their representatives for the Executive Committee from their representatives in the Department Conference.
- The Strategy Commission (*Strategiekommission*): In accordance with Art. 31 para. 1 RoP D-PHYS, the Strategy Commission is composed of its chair, the Head of Department, his deputy and the Director of Studies, plus four other members. Those members who are not *ex officio* members are elected in accordance with Art. 31 para. 2 RoP D-PHYS by the Department Conference from the full and associate professors of the department. Thereby, it is intended to ensure that all operational institutes and the Paul Scherrer Institute are represented in the Strategy Commission.
- The Department Coordinator (*Departementskoordinator*): The election is made by the Department Conference in accordance with Art. 8 para. 2 RoP D-PHYS. In accordance with Art. 29 para. 2 RoP D-PHYS, any experimental physicist belonging to the department may be elected. Deputisation for the Department Coordinator is arranged by the Executive Committee.
- The Head of Institute (*Institutsvorsteher*): The Executive Board of the institute elects the Head of Institute from its members in accordance with Art. 27 para. 3 RoP D-PHYS. This must be confirmed by the Head of Department.
- The Executive Board of the institute (*Institutsleitung*): In accordance with Art. 27 para. 3 RoP D-PHYS, the Executive Board of the institute is at a minimum composed of all the full, associate and assistant professors belonging to the institute or laboratory.
- The Institute Council (*Institutsrat*): In accordance with Art. 27 para. 4 RoP D-PHYS, the Institute Council is composed at a minimum of the Head of Institute as chair plus one representative each of the members of the institute or laboratory in accordance with Art. 2 para. 4 lit. c RoP D-PHYS.

Significant findings

Art. 45 para. 1 OO establishes the minimum structure of the departmental bodies. In addition, according to para. 2 the departments are free to set up other bodies, especially

a departmental Executive Committee. The appropriate form must be laid down in the departmental Rules of Procedure. At D-PHYS the Rules of Procedure contain appropriate provisions.

The OO of ETH Zurich sets forth the principles and rules on electing the Head of Department, his deputy and the Director of Studies (Art. 46 para. 2 lits. f-g). The overarching Organisation Ordinance contains no further provisions regarding the election of persons to other functions and/or executive committees of the department as listed above. According to Art. 56 para. 2 OO, the Head of Department is responsible for all departmental matters that are not assigned to another body. There is therefore a general assumption of competence on the part of the Head of Department. This means that, in principle, the Head of Department could - in the absence of any rules to the contrary - make the elections autonomously by virtue of his office. Meanwhile, as regards the elections for the departmental executive committees at D-PHYS, it may be stated that they are appointed or constituted by a democratic majority decision of the most senior body (i.e. the Department Conference). Individual representatives on the Executive Committee are the exception. These election procedures also obey the principle of a majority decision by the relevant group.

The composition and election procedure for the Executive Board of the institute and the Institute Council are described in Art. 31a paras. 3-5 OO. BDO has found that these provisions have been included in the RoP of D-PHYS without any changes.

Conclusion

BDO concludes that the principles and rules for appointing members of the D-PHYS executive committees are recorded in a transparent manner in the OO and the RoP D-PHYS.

2.2.2

Question 2: Are the principles and rules for appointing members of the D-PHYS executive committees, and the organisation of the management and monitoring of D-PHYS, lawful, appropriate, comprehensible and up-to-date? Does the appointment of members of the executive committees and the organisation of D-PHYS comply with the principles of "good governance"?

The principles and rules for appointing members of the D-PHYS executive committees, and the organisation of the management and monitoring, are lawful, appropriate, comprehensible and up-to-date.

In the interests of "good governance", election proposals should be supplemented by a requirements profile and a list of the candidates' qualifications and experience relevant to the performance of the position in question.

Description of the existing situation

The principles and rules for appointing members of the executive committees are described above (see Section 2.2.1). For illustrative purposes, the preparatory process for the elections in the spring semester of 2019 is documented: it is evident from the minutes made available and the primary data collections that information regarding forthcoming elections is provided in a timely manner to the Department Conference, the Professors' Conference and the Executive Committee.⁶⁵ The posts for which elections were being held were described. Furthermore, at the Conferences the Head of Department can be shown to have invited all interested persons to make themselves known to the departmental management. The current office holders were also asked whether they wished to stand for re-election, if eligible. In addition, the current office holders actively approached potential candidates to encourage them to stand. On 12 January 2019 the Department Coordinator issued a written reminder inviting the recipients to put forward nominations and candidatures for election.⁶⁶ The Department Coordinator gathers all the responses and keeps them in chronological order.⁶⁷ In spring 2019, the professors were informed of the candidatures received to date.⁶⁸

If more than one candidate stands for a particular office, no preliminary triage is carried out. All the candidates presenting themselves for election are listed on the ballot paper. The Department Conference consequently votes on a choice of candidates.⁶⁹

The available documents and the interview transcripts indicate that this process has been conducted in a similar way in the past. In 2017 a selection committee (Profs. █████, █████ and █████) was additionally set up to identify and canvass possible candidates for the executive committees.⁷⁰

⁶⁵ Minutes of the Department Conference on 28 September 2018, p. 11; minutes of the Professors' Conference on 14 December 2018, p. 5; minutes of the Executive Committee meeting on 24 September 2018, p. 12.

⁶⁶ "D-PHYS election year 2019 search for candidates" dated 12 January 2019.

⁶⁷ "D-PHYS Wahlstatus Mai 2019 (Vorschläge)" ["D-PHYS election status May 2019 (nominations)"], undated.

⁶⁸ Minutes of the Department Conference on 1 March 2019, p. 12; minutes of the Executive Committee meeting on 28 February 2019, p. 14.

⁶⁹ Election proposal May 2017, undated.

⁷⁰ Minutes of the Executive Board meeting on 27 February 2017, p. 7.

The departments are subordinated to the Executive Board in accordance with Art. 4 para. 3 OO. The Vice Presidents of ETH Zurich have authority to issue instructions to the departments in accordance with their responsibilities (Art. 9 ff. OO). In the main, the overarching provisions govern the tasks, competencies and responsibility of the departmental bodies in a uniform way (Art. 29 ff. OO). A department may decide to include more extensive rules in its Rules of Procedure. The Head of Department is responsible for monitoring the implementation of the decisions of the departmental bodies and ensures the budget allocated to the department is used properly and the budgetary requirements are met. He has the necessary authority to do this (see Section 2.1.1 for further details regarding the distribution of resources).

Significant findings

BDO notes that the appointment of members of the D-PHYS executive committees is conducted in accordance with the principles and rules set forth in the Organisation Ordinance of ETH Zurich and the RoP D-PHYS (lawfulness). The election of persons to senior positions at D-PHYS is clearly and comprehensibly regulated. The relevant information is publicly available in the Legal Collection of ETH Zurich. The primary data collections showed that the interviewees are familiar with the principles and rules. Moreover, the departmental rules of D-PHYS correspond in type and nature to the relevant provisions of the other departments of ETH Zurich.⁷¹ They can therefore be regarded as appropriate. Furthermore, the President of ETH is responsible for approving the Rules of Procedure of a department (Art. 46 para. 2 lit. e OO).

The primary data collections also indicate that the great majority of those interviewed believe that the democratic election of the members of the executive committees by the staff (the Department Conference) takes place in an up-to-date and appropriate manner. However, the Department Conference does not have an actual choice of candidates (only one candidate is put forward) for the majority of the positions to be filled.⁷²

When considering "good governance", it should be noted that the guidelines and management model of the Swiss Confederation are for reference only, and the relevant OECD guidelines are not binding. Nevertheless, these corporate governance guidelines serve as the key frame of reference as regards the management of independent federal entities. On this topic, the Confederation's corporate governance report explicitly states that ETH Zurich is one of the most important entities in which these organisational guidelines should be applied to planning and management. In this connection, it is necessary to respect the special characteristics that result from guaranteeing ETH Zurich academic freedom in terms of teaching, learning and research, and the institutional autonomy that this requires.

The key reference framework on governance states that independent federal entities should have lean structures and clear rules on competencies between the governing bodies.⁷³ The Confederation's model law for institutions providing services of a monopolistic nature also states that the number, composition and collaboration of the bodies must

⁷¹ Rules of Procedure D-BAUG of 14 December 2016, Rules of Procedure D-MATH of 11 December 2018, Rules of Procedure D-INFK of 23 February 2015, Rules of Procedure D-BSSE of 14 December 2010, etc.

⁷² Election proposal May 2017, undated.

⁷³ The Confederation's Corporate Governance Guidelines (in German), version of 31.8.2015.

ensure efficient and effective operational management and supervision. The organisational decree should conclusively name the governing bodies of the institution. De facto committees should be avoided. The principle of lean structures also applies to the composition of the governing bodies.

With regard to the composition of the executive committees, candidates for election must be able to demonstrate expertise, industry knowledge and independence. Diversity (particularly in terms of age, sex, origins and mother tongue) promises added value. Meanwhile, the requirements should not be so demanding that they jeopardise the desirable amount of choice between candidates with the necessary knowledge and skills. The model law also states that the selection of people to serve on executive committees should take account of the Federal Council's requirements profile for members of the board of directors or institutional board of independent federal organisations (see Art. 8j GAO) and the model requirements profile.⁷⁴ In the opinion of BDO, these rules also apply by analogy to the departments of ETH Zurich, which enjoy a high degree of autonomy. Furthermore, the OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015) state that the composition of boards should enable an objective and independent judgment to be reached. All board members should be nominated on the basis of their qualifications and have the same legal obligations. When nominating and electing board members, it is particularly important to ensure that the governing bodies are capable of performing their tasks professionally and independently. Here, the Confederation's model requirements profile states that the governing body as a whole must include a variety of skills and also operate as a team at a personal and professional level.

As well as the skills that the governing body as whole must demonstrate, the Confederation's model requirements profile also indicates the qualities required by the individual members:

- Willingness to carry out the performance mandate and strategic objectives
- Impeccable reputation and personal integrity
- Aptitude for strategic thought
- Ability to analyse, aptitude for synthesis and critical discernment as well as intellectual agility
- Resilience and willingness to make decisions in complex situations and take responsibility for them
- Ability to work in a team and resolve conflict
- Discretion
- Freedom from vested interests that would hinder the ability to form unbiased opinions
- Adequate availability in terms of time

Conclusion

Based on the work described in this report, BDO has not become aware of any matters that would lead one to assume that the principles and rules for appointing members of

⁷⁴ Model requirements profile (available in German, French and Italian only) https://www.efv.admin.ch/dam/efv/de/dokumente/finanzpolitik_grundl/cgov/Muster%20Anforderungsprofil%20f%C3%BCr%20VRIR.pdf.download.pdf/Musteranforderungsprofil_def.pdf

the D-PHYS executive committees, and the organisation of management and monitoring, are not lawful, appropriate, comprehensible or up-to-date.

In respect of "good governance", it should be noted that in the majority of elections the Department Conference does not have a choice of candidates presented to it. In the light of the primary data collections, BDO concludes that the interviewees have a clear picture of the requirements for the individual members. On the other hand, exercising a management function is usually felt to be a "burden", which takes up a significant amount of time and has a negative impact on the person's own research. The task is perceived as a valuable service to the department. This state of affairs entails the risk that candidates are elected because of their availability or personal motivation rather than their skills and suitability.

From the "good governance" perspective, it would be desirable for the Department Conference to be presented with an actual choice when electing people to the governing bodies. Furthermore, the election proposals should do more than simply list names and institutes. Along with the election proposal, the Department Conference should receive a requirements profile and a list of the candidates' qualifications and experience relevant to the performance of the position in question. This would make the reasons for election/non-election more objective and more comprehensible to all those involved.

2.2.3 *Question 3: Is there evidence that individual members of D-PHYS, particularly the complainant herself, are marginalised and consistently and improperly excluded from senior roles within the Department of Physics, and thus constantly discriminated against?*

BDO has not established any facts indicating that individual members of D-PHYS are openly and directly marginalised and consistently and improperly excluded from senior roles within the Department of Physics, and thus constantly discriminated against.

It is important that elections are conducted according to objective criteria and that the flawless functioning of the governing bodies is regarded as the top maxim. From the "good governance" perspective, the requirements (both for committees and for candidates) should therefore be made more objective.

Description of the existing situation

In Section 2.2.1. we described the principles and rules for appointing members of the executive committees. A number of necessary qualifications for election were named in the primary data collections, inasmuch as the electoral body actually had a real choice (see Section 2.2.2): integrity, reliability, consideration to colleagues, openness to compromise, negotiating skills, setting personal interests aside, properly representing

D-PHYS at ETH Zurich, etc. The specified criteria largely correspond to the Confederation's model requirements profile for members of executive committees.⁷⁵

In the opinion of the interviewees, not all their colleagues meet these criteria equally. These persons are therefore not proposed and/or elected.

Significant findings

Any person who is eligible according to the Rules of Procedure may stand for existing vacancies. The relevant body or committee is free - in accordance with a standard procedure - to make a decision on the nominations received. No preliminary triage of the candidates is carried out.

The complainant herself was Head of [REDACTED] from 2003 to 2005 and Deputy Head of Department D-PHYS from 2007 to 2009. Despite standing for election on several occasions, she has not been elected to any of the Department's executive committees since then.

Conclusion

Based on the work described in this report, BDO has not become aware of any matters that would lead one to assume that individual members of D-PHYS, particularly the complainant herself, are openly and directly excluded from, or consistently and improperly kept out of, senior roles within the Department of Physics, and thus constantly discriminated against.

The elections follow a set procedure and are decided by a simple majority vote. Nevertheless, the processes should be reconsidered with a view to "good governance" (see Conclusion to Section 2.2.2).

It is important that elections are conducted according to objective criteria and that the flawless functioning of the governing bodies is regarded as the top maxim. For this reason, it may indeed be asked why a professor as renowned as the complainant has not been elected to executive committees (department, institute) in the last 10 years, particularly since most people evidently tend to regard management roles as a "burden". It is not possible for BDO to evaluate conclusively whether the complainant actually meets all the criteria required of the members of an ETH Zurich executive committee, since the election resolutions are not available in a suitably formulated format (see Section 2.2.2). Based on the interviews conducted, BDO concludes that in the case of non-election the electors regard social skills and personality as ultimately decisive. In the interviews, frequent mention was made of the departmental committees' efforts to achieve consensus and the search for compromise as an important shared value. This consensus-based outlook can result in people who cultivate a more direct and challenging culture of debate being perceived as less suitable or "appropriate". From the "good governance" perspective, the requirements should be made more objective, as previously described. This would prevent the election from being decided on the basis of implicit criteria that are not transparent to all those involved. An objective requirements profile of this kind,

⁷⁵ Model requirements profile (available in German, French and Italian only) https://www.efv.admin.ch/dam/efv/de/dokumente/finanzpolitik_grundl/cgov/Muster%20Anforderungsprofil%20f%C3%BCr%20VRIR.pdf.download.pdf/Musteranforderungsprofil_def.pdf

tailored to the various executive committees and their members, could bring clarity and be discussed by means of active communication between the departmental management and the candidates during the nomination process itself.

2.3 Allegation of corruption and abuse of office and power at ETH Zurich

2.3.1 *How does the complainant substantiate the publicly levelled allegation of corruption at ETH Zurich? Does the allegation of corruption hold true? If so, it is necessary to show to what extent, when and by whom such misconduct was found to have occurred.*

The complainant has distanced herself from the publicly levelled criminal allegations of corruption and abuse of office on the part of ETH Zurich. There are no indications, either in the allegations made by the complainant or in the other interviews and documents examined, that would point to the criminal offence of corruption.

Description of the existing situation

a) Allegations made by the complainant

The complainant accused ETH of corruption in an interview on the online portal [REDACTED] on 22 March 2019. She justified this allegation by saying *"Die ETH wird von inoffiziellen Koalitionen gelenkt, die sämtliche Macht auf sich vereinigen."* that [ETH is run by unofficial coalitions that control all the power among themselves]. In the interview with [REDACTED], the complainant made a general allegation of corruption against ETH; in other words, she did not make any specific allegation against the Department of Physics or against specific persons. She criticised the transparency surrounding the distribution of resources. She said that, for years now, she has been calling for the Executive Board to strive to comply with fundamental principles of management *"da wir sonst Gefahr laufen, korrupte Strukturen zu haben. Jetzt haben wir sie."* [because otherwise we are in danger of having corrupt structures. And now we have them.]

According to a report in [REDACTED] on 30 March 2019 (*"Wie der Fall [REDACTED] die ETH spaltet"* [Why the [REDACTED] case is causing a rift at ETH], on 26 March 2016 the complainant sent an e-mail to the entire department and to numerous female researchers in other countries, in which she repeated the allegations contained in the [REDACTED] interview.

The complainant does not mention "corruption" in the complaint against the responsible persons of ETH and of the Executive Board which she submitted to the ETH Board on 11 October 2018.

b) Criminal offence of corruption (Art. 322ter ff. SCC)

In relation to the above-mentioned allegations, the following offences classified as corruption under the Swiss Criminal Code (SCC) come into consideration: Art. 322ter SCC ("Bribery"), Art. 322quater ("Acceptance of bribes"), Art. 322quinquies ("Granting an advantage") and Art. 322sexies ("Acceptance of an advantage").

- According to Art. 322ter SCC, a person is liable to prosecution for bribery if they offer, promise or give a public official an undue advantage, or offer, promise or give such an advantage to a third party in order to cause the public official to carry out or to

fail carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion. The person who commits the offence of bribery can be anyone, but the offence must be directed against a public official.

- Any person who as a public official demands, secures the promise of or accepts an undue advantage for that person or for a third party in order that he carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion is guilty of acceptance of bribes according to Art. 322quater SCC. The offence of acceptance of bribes is the mirror image of the offence of bribery pursuant to Art. 322ter SCC, where the offender must be a public official.
- Any person who offers, promises or gives a public official an undue advantage with regard to the performance of his official duties is liable to prosecution for granting an advantage pursuant to Art 322quinquies SCC.
- Any public official who demands, secures the promise of or accepts an undue advantage with regard to the performance of his official duties is liable to prosecution for acceptance of an advantage pursuant to Art 322sexies SCC. Art. 322sexies SCC mentions the acts of "demanding", "securing the promise of" or "accepting" an undue advantage, as does the offence of "acceptance of bribes" pursuant to Art. 322quater SCC.

The offences of bribery and acceptance of bribes on the one hand, and those of granting or accepting an advantage on the other, differ in that the latter do not involve the public official giving some specific consideration but are instead intended to ensure that the official will in general be favourably disposed as regards his future conduct in office (Donatsch, Strafrecht IV, 5th edition 2017, § 135, p. 642 f.).

The above-mentioned offences presuppose that a public official as defined in Art. 110 para. 3 SCC is either the offender or the person in relation to whom the offence is committed. In criminal law, the concept of public official covers both institutional and functional public officials, and thus also the employees of ETH Zurich, as an autonomous public-law institution (Art. 5 ETH Act), insofar as they carry out public duties (Decision of the Swiss Federal Supreme Court (BGE) 135 IV 198).

Significant findings

a) Results of the interviews

In the interview with BDO, the complainant stated on several occasions that by "corruption" she did not mean the criminal offence of corruption, the legal definition of which was not known to her in detail as a legal layperson. Her legal representative also emphasised that he had nothing to do with this allegation of crime and his client had not discussed it with him before the [REDACTED] interview.

During the interview with BDO, the complainant stated that she was referring to the "corrupt structures" at ETH Zurich when she made her allegation. She said that by using this term she meant

- Lack of transparency regarding the distribution of resources;
- An inner circle of professors who abuse their power ("Anyone who does not cooperate is excluded");
- Using threats to inhibit criticism (e.g. the complainant being threatened with an administrative enquiry by the Executive Board);
- Failure to verify the statements of certain persons;
- Poor communication by ETH Zurich;
- Exclusion of the complainant from the departmental Executive Committee.

The allegations therefore relate to the first two areas covered by the administrative enquiry - the distribution of resources and governance on the one hand, and discrimination on the other - and do not fulfil any of the criteria associated with the criminal offence of corruption.

When BDO asked whether the complainant sent the e-mail referred to in the article published in ██████████ on 30 March 2019 to other professors at ETH Zurich, she declined to answer.

In all the other interviews conducted by BDO with professors of D-PHYS and individual members of the Executive Board of ETH Zurich, the question regarding known cases of corruption was also always answered in the negative. Prof. Dr. ██████████ also referred to the "corrupt structures" of ETH Zurich in connection with the questions on existing cases of corruption, and his description coincided with that of the complainant, although he also acknowledged that he did not mean criminal corruption⁷⁶.

b) Findings from the other documents examined in the investigation

Nor do the other documents examined in the investigation contain any pointers indicative of corruption.

Conclusion

There are no indications, either in the allegations made by the complainant or in the other interviews and documents examined, that would point to the criminal offence of corruption. The actions criticised in this connection relate to the topics of transparency, governance, as well as equal treatment and non-discrimination, which were discussed in Sections 2.1 and 2.2 above.

⁷⁶ Transcript Prof. Dr. ██████████, page 13.

2.3.2

Is the publicly levelled allegation of abuse of office and power, particularly by the departmental management of D-PHYS and by the ETH President, substantiated? If so, it is necessary to show to what extent, when and by whom such abuse was found to have occurred.

The complainant has distanced herself from the publicly levelled criminal allegation of abuse of office on the part of ETH Zurich. There are no indications, either in the allegations made by the complainant or in the other interviews and documents examined, that would point to an abuse of power in the criminal sense.

Description of the existing situation

a) Allegations made by the complainant

In the [REDACTED] interview, the complainant accused the Ombudsperson, the Vice Rector for Doctoral Studies, the trusted intermediary of the Head of Department and the ETH President of "*stark eigene Interessen beimischen*" [strongly mixing their own interests] into the [REDACTED] case. She also stated that in the large Departments of Physics and Chemistry there is an inner circle of professors "*die dank intransparenter Entscheidungsprozessen ihre Macht missbrauchen können*" [who are able to abuse their power thanks to non-transparent decision-making processes]. In this connection, the complainant spoke only of the potential for abuse of power, and therefore did not say that an abuse of power had actually occurred. As an example of the potential for abuse of power, she instanced the Rules of Procedure of the Physics Department, which were revised in 2013, thus virtually eliminating transparency with regard to the distribution of resources in her view. Since then, she said, it is no longer possible for all professors to access information about the distribution of resources in the department - only those of the institute in question. This is problematic, she added, because ETH resources are provided by the taxpayer and should therefore be treated with due diligence. She went on to say that transparency with regard to the distribution of resources is one of the basic principles of good administration, and according to the law, the funds should be distributed in accordance with the principle of "load and performance".

According to a report in [REDACTED] on 30 March 2019 ("*Wie der Fall [REDACTED] die ETH spaltet*" [Why the [REDACTED] case is causing a rift at ETH]), on 26 March 2019 the complainant sent an e-mail to the entire department and to numerous female researchers in other countries, in which she repeated the allegations contained in the [REDACTED] interview.

The complainant does not mention "abuse of office" in the complaint against the responsible persons of ETH/the Executive Board which she submitted to the ETH Board on 11 October 2018.

b) Abuse of public office as a criminal offence pursuant to Art. 312 SCC

Official powers are deemed to have been abused pursuant to Art. 312 SCC if a public official uses them to secure an unlawful advantage for himself or another or to cause prejudice to another. Abuse of public office is the misuse of state power. On the one hand, Art. 312 SCC protects the State's interest in ensuring the probity of public officials

who conscientiously exercise the position of power entrusted to them and, on the other, protects citizens against the unchecked and arbitrary exercise of state power (Judgment 6B_281/2018 of 24.01.2019 E. 1.3).

This offence is interpreted narrowly by the Federal Supreme Court because of the general way in which the definition of the criminal act is worded. A person misuses his official powers, for example, when he uses the powers conferred on him by his official position in an unlawful way, i.e. acts or exerts pressure by virtue of his office in circumstances where this should not occur. Public office is also deemed to have been abused when the use of the instrument of power is lawful but the permitted degree of force has been exceeded (Judgment 6B_560/2010 of 13.12.2010 E. 2.3 with notes).

To qualify as abuse, the official power must as a rule be directed at persons outside the administration who are subjected to that power. According to expert opinion, acts against subordinate officials count as abuse of public office only if the instruction itself was for the purpose of an official act (Heimgartner in: Basler Kommentar [Basel Commentary], Strafgesetzbuch [Criminal Code], Art. 312 N 16, Trechsel/Vest, in: Trechsel/Pieth, loc. cit., Art. 312 N 13, Donatsch, Strafrecht IV, 5th edition 2017, § 120 p. 353).

The act consists of the unlawful use or exercise of power without a specific outcome necessarily being achieved. In subjective terms, there must be intent or indirect intent and the intention to secure an unlawful advantage for oneself or another or to cause prejudice to another, whereby indirect intent is sufficient (Judgment 6S.885/2000 of 26.02.2002 E. 4a; Donatsch, Strafrecht IV, 5th edition 2017, § 120 p. 554).

Significant findings

a) Results of the interviews

- In the interview with BDO, the complainant stated that when using the terms "abuse of office" and "abuse of power" she was referring to the "corrupt structures" at ETH Zurich, not the criminal offence of abuse of public office. She said that to her, "abuse of power" meant exploiting a position of power in the non-legal sense. Please see Section 2.3.1 a) above on this point.
- In their interviews with BDO, Prof. Dr. [REDACTED] and Prof. Dr. [REDACTED] described the complainant's conduct at a meeting of the D-PHYS department as constituting an abuse of power: at the meeting, the complainant is alleged to have verbally attacked her male colleagues and also revealed to the department the confidential academic ratings of other professors in the Astronomy Institute, which were known to her because of her role on the SNSF Research Council.⁷⁷ The complainant is thereby said to have improperly disclosed information from the SNSF. On this subject, the complainant stated that she did not understand how anyone could make such an allegation. She said she had merely stated that she had been informed by Professors [REDACTED] and [REDACTED] of their achievements in connection with their SNSF applications. She said she had not disclosed any kind of confidential information.⁷⁸

⁷⁷ Transcript Prof. Dr. [REDACTED], page 9; transcript Prof. Dr. [REDACTED], page 18.

⁷⁸ Position statement Prof. Dr. [REDACTED] of 22 June 2019, page 3.

In the opinion of BDO, this behaviour on the part of the complainant cannot be construed as abuse of public office in the criminal sense.

- In his interview with BDO, Prof. Dr. ██████ accused the former President of ETH Zurich, Prof. ██████, Prof. ██████, the Vice Rector Prof. ██████, the Vice President Prof. ██████, the Rector Prof. ██████ and Ombudsman ██████ of having abused their power over him by associating him with the ██████ case, closing the Institute of Astronomy and transferring him to an independent professorship.⁷⁹ He said this course of action had ruined his career.

This matter refers to facts relating to the ██████ case, which the ETH Board has explicitly excluded from the scope of this administrative enquiry. Furthermore, it does not relate to the abuse of public office in the criminal sense, since it did not involve an official act by a public official. As the subject of the present administrative enquiry is, after all, the allegations made by the complainant, the course of action by ETH Zurich that has been raised by Prof. ██████ will not be discussed further.

b) Findings from the other documents examined in the investigation

The other documents examined in the investigation similarly did not contain any indications of cases of abuse of office.

Conclusion

There are no indications, either in the allegations made by the complainant or in the other interviews and documents examined, that would point to an abuse of power in the criminal sense. Various people have spoken of "abuse of power" by individual members of the Executive Board, professors at D-PHYS and other employees of ETH Zurich. However, the actions criticised in this connection relate mainly to the topics of transparency, governance and equal treatment, which were discussed in Sections 2.1 and 2.2 above.

⁷⁹ Transcript Prof. Dr. ██████, page 13f.

3 CLOSING REMARKS

This report was produced in the course of the administrative enquiry in the Department of Physics D-PHYS at ETH Zurich into the questions put forward for investigation by the Presidential Decree of the ETH Board of 8 April 2019 in accordance with the legal requirements pursuant to Art. 27a ff. of the Government and Administration Organisation Ordinance (GAOO; SR 172.010.1).

After the secondary data collection, various guideline-based interviews were conducted with respondents. These approaches built up a comprehensive picture that clearly showed relevant connections. The data collection and its evaluation went according to plan. The documents and files requested by BDO were made available within a reasonable period of time. The findings and information were then condensed and organised by topic. The analysis constantly referred back to the questions defined for investigation by the commissioning client. The existing situation was described, and our findings and the conclusion with reference to the questions investigated were documented.

As requested, in the framework of the enquiry we undertook the analysis and evaluation of the three topic areas and pointed out areas where further action is needed. The specifications of the commission in terms of content were thus achieved and fulfilled.

BDO has produced this report to the best of its knowledge on the basis of the documentation and information available to us and the enquiries and clarifications carried out. The findings, conclusions and recommendations contained in this report are based on the facts available to us up to the closing date (24 June 2019). In addition, it should be noted that events or actions subsequent to the above date could lead to other findings, the effects of which are not described in the present report.

The final report was submitted to the ETH Board in German.

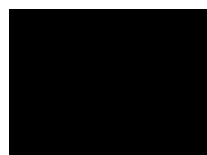
We thank you for commissioning us with this task and for the trust you have placed in us.

Zurich, 28 June 2019

BDO AG



Lead Investigator



Deputy Lead Investigator