

Decision on how the European Securities and Markets Authority handled the procedure for establishing a staff member's invalidity (case 2029/2020/PL)

Decision

Case 2029/2020/PL - Opened on 11/05/2021 - Decision on 11/10/2021 - Institution concerned European Securities and Markets Authority (No further inquiries justified) |

The case concerned the time taken by the European Securities and Markets Authority (ESMA) to handle a procedure for establishing a staff member's invalidity. The inquiry focused on determining whether ESMA was taking the necessary measures to finalise the procedure without further delay.

The Ombudsman identified a number of shortcomings. However, as the procedure was finalised in the course of the inquiry and the complainant can now challenge the outcome if he so wishes, including procedural flaws, the Ombudsman closes the inquiry with the finding that no further inquiries are justified. The Ombudsman makes a suggestion for improvement to ESMA to reflect on what happened in this case and consider taking concrete measures to avoid delays in future delegated administrative procedures.

Background to the complaint

1. The complainant was a staff member of the European Securities and Markets Authority (ESMA). In March 2018, following a period of sick leave, the complainant asked ESMA to launch a procedure to establish his invalidity and whether its origin was occupational (work-related).
2. ESMA initiated the invalidity procedure in July 2018 [1] and delegated the management of the procedure to the Medical Service of the European Commission. [2]
3. In this procedure, an Invalidity Committee consisting of three doctors needs to be appointed. One doctor is appointed by the administration, one by the staff member concerned and one by mutual agreement of the two other doctors. In July 2018, the complainant and ESMA appointed their doctors. In December 2018 these doctors agreed on a third doctor.
4. The Invalidity Committee was to meet on 26 February 2019. However, four days before that



meeting, ESMA asked to replace its appointed doctor. This new doctor disagreed with the choice of the third doctor, which meant that the process of finding a third doctor had to be restarted. This process reached an impasse and, in line with the applicable rules, the European Court of Justice appointed the third doctor in July 2019.

5. The Invalidity Committee met on 12 October 2019, and recognised the complainant's permanent invalidity. However, due to an oversight, the conclusions report did not address the question whether the invalidity was of occupational origin.

6. The Committee met again in June 2020, to determine the origin of the disease, but did not reach a conclusion.

7. On 13 October 2020, ESMA took a partial decision recognising the complainant's "permanent and total invalidity". However, since the Invalidity Committee had not yet reached a conclusion on the origin of the disease, it left this aspect open, pending the Invalidity Committee's decision.

8. In November 2020, the complainant turned to the Ombudsman.

The inquiry

9. The Ombudsman opened an inquiry into how ESMA was handling the invalidity procedure.

10. In the course of the inquiry, the Ombudsman received ESMA's reply on the complaint. The Ombudsman also invited the Commission to comment on the complaint, as it was managing the invalidity procedure. The Commission did not send any comments.

11. In July 2021, ESMA closed the invalidity procedure, taking a decision on the origin of the disease.

Arguments presented to the Ombudsman

12. The complainant claimed that ESMA had delayed the procedure by taking procedural decisions late, changing the appointed doctor shortly before the Invalidity Committee was to meet in February 2019, and failing to ensure that the steps in the procedure, as well as the final decision on the origin of his invalidity, were taken in a timely manner.

13. The complainant also contends that he was not informed of the Invalidity Committee's conclusion of October 2019 at the same time as the administration, as provided for in the applicable rules [3]. According to the complainant, ESMA received the report in February 2020. The complainant received it in August 2020, after having made several requests.

14. In its reply to the Ombudsman, ESMA expressed its regret for the long time the invalidity procedure was taking. It said that the delay was mainly due to a *"series of unfortunate*



circumstances beyond ESMA's control" .

15. ESMA argued that the error in the first decision of July 2018 did not delay the invalidity procedure. The fact that ESMA had to issue a new decision in October 2018 did not prevent the Commission and ESMA from taking procedural steps between March and October 2018.

16. Regarding the change of doctor, ESMA had carefully considered the matter and concluded that having a balanced Invalidity Committee outweighed the negative impact of changing doctors shortly before the Committee was scheduled to meet. ESMA acknowledged that the decision to change its doctor had contributed to the delay. However, ESMA could not have foreseen that the change would result in such a lengthy discussion to find a new third doctor.

17. ESMA noted that it was for the Commission's Medical Service or the complainant's doctor to share the conclusions report with the complainant.

18. ESMA concluded that, while it was the authority responsible for deciding on the complainant's invalidity and its origin, it was for the European Commission's Medical Service to manage the invalidity procedure. ESMA had expected that the Medical Service would handle the procedure in line with its internal procedures, including timely management.

The Ombudsman's assessment

19. The obligation to conduct administrative procedures within a reasonable time constitutes a general principle of EU law [4] and is part of the right to good administration set out in the Charter of Fundamental Rights of the European Union. [5] It is particularly important for an EU body to act within a reasonable time when the procedure relates to the state of health of the person concerned.

20. When the Ombudsman opened this inquiry, the invalidity procedure had been ongoing for over thirty-eight months. The complainant had already complained [6] to ESMA about the time the procedure was taking. The Ombudsman opened the inquiry to investigate whether ESMA, as the 'appointing authority' ultimately responsible to take a decision on the matter, was taking all the necessary actions to make sure that the procedure was finalised without further delay.

21. The Ombudsman is not convinced by ESMA's argument that the delay was due mostly to a series of *"unfortunate circumstances beyond ESMA's control"*. While the Commission and the Invalidity Committee may have contributed to the delay, it is ESMA, as the body responsible for taking the decision, that is bound by the obligation to handle the matter within a reasonable time. [7] As appointing authority, ESMA had a duty to monitor the procedure and ensure that it was properly handled. Although the management of the invalidity procedure was delegated to the Commission, ESMA retained its duty to have regard for the welfare of its staff members, in this case the complainant [8] .

22. Beyond these responsibilities as appointing authority, ESMA's own actions also appear to



have contributed to the delay. For instance, ESMA's mistake in the first decision caused a domino effect, as the fact that there were two decisions seem to have caused some confusion, with consequences on the overall time that the procedure took.

23. The Ombudsman is not convinced by ESMA's argument for wanting to replace its doctor. The specialisation of the third doctor could not have come as a surprise to ESMA given the nature of the complainant's illness. ESMA also knew the specialisation of the complainant's doctor, which was the same as the chosen third doctor. In addition, ESMA could have foreseen that replacing its doctor would delay the procedure, in particular since it had taken the first doctors six months to agree on the third doctor and two months to find a date to meet.

24. This said, ESMA has now finalised the procedure and the complainant has the opportunity to challenge ESMA's final decision including any potential procedural flaws. In view of this, the Ombudsman is closing the inquiry with the finding that no further inquiries are justified. The Ombudsman will make a suggestion for improvement to ESMA, encouraging it to reflect on what has happened in this case and consider taking measures to avoid similar problems in future delegated administrative procedures.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion [9] :

No further inquiries are justified.

The complainant, the European Securities and Markets Authority and the European Commission will be informed of this decision .

Suggestion for improvement

ESMA should reflect on what happened in this case and consider taking concrete measures to avoid delays in future delegated administrative procedures.

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 11/10/2021

[1] Due to a mistake in the initial delegation, in October 2018, ESMA had to issue a new delegation to extend the mandate of the Invalidity Committee to determine, in case of invalidity, whether the disease was of occupational origin.



[2] Service-level agreement signed between the European Commission and ESMA of 1 January 2018. Under this agreement, ESMA delegates to the Commission the management of the invalidity procedure, up to the preparation of the draft decision to be taken by ESMA, as responsible authority.

[3] The Commission's "Invalidity committee procedural manual".

[4] Case T-394/03, *Angeletti v Commission*, Judgement of 11 April 2006. Par.162 available at : <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:62003TJ0394&from=HR> [Link]

[5] Article 41(1) of the Charter of Fundamental Rights of the European Union.

[6] Under Article 90(2) of the Staff Regulations of Officials of the European Union ('the Staff Regulations')

[7] Case T-394/03, *Angeletti v Commission*, paragraph 152 and 159.

[8] Case T-567/16, *McCoy v Committee of the Regions*, of 23 October 2018, paragraph 147-148, available at:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=206941&pageIndex=0&doclang=EN&mode=lst&d> [Link]

[9] This complaint has been dealt with under delegated case handling, in accordance with [the Decision of the European Ombudsman adopting Implementing Provisions](#) [Link]