European Ombudsman

Report on meeting in the Ombudsman's own-initiative inquiry OI/4/2016/EA on the Joint Sickness Insurance Scheme (JSIS) and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)

Correspondence - 10/04/2019
Case OI/4/2016/EA - **Opened on** 10/05/2016 - **Recommendation on** 16/07/2018 - **Decision on** 04/04/2019 - **Institution concerned** European Commission (Recommendation agreed by the institution) |

Institution or body concerned: European Commission

Date and time: 1 June 2017, 10:15-12:00

Location: Rue de la Science 11, SC11 1/41, « salle verte », Brussels

The Ombudsman

represented by: Ms Rosita Hickey, Head of Strategic Inquiries Unit

Mr Fergal Ó Regan, Head of Coordination of Public Interest Inquiries

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The Commission

represented by: 16 persons (Secretariat-General, DG HR, PMO, DG EMPL)
List of acronyms
DG BUDG

Directorate-General for Budget

DG DIGIT

Directorate-General for Informatics

DG EMPL

Directorate-General for Employment

DG HR

Directorate-General for Human Resources

GIPs

General Implementing Provisions

JSIS

Joint Sickness Insurance Scheme (for EU civil servants and their families)

OIB

Office for Infrastructure and Logistics in Brussels

OIL

Office for Infrastructure and Logistics in Luxembourg

PMO

Paymaster Office

SR

EU Staff Regulations

UNCRPD

United Nations Convention on the Rights of Persons with Disabilities

WHO - APL

World Health Organisation - Priority Assistive Products List

1. Introduction and procedural aspects

The Ombudsman's inquiry team introduced themselves and presented the purpose of the own-initiative inquiry OI/4/2016/EA, which was opened to examine whether the treatment of persons with disabilities under the JSIS complies with the UNCRPD. The inquiry is examining the criteria for the recognition of “serious illness” - and thus the full reimbursement of medical costs - as they are set out in the Commission’s General Implementing Provisions (GIPs). The Ombudsman is concerned that those criteria, notably the criterion of shortened life expectancy, may not necessarily be suited to the specific situation of persons with disabilities.

After receiving the Commission’s reply to the letter opening the inquiry [1] [Link], the Ombudsman inquiry team asked that a meeting be organised to discuss the case. The Ombudsman inquiry team explained that the purpose of the meeting was to provide the opportunity to exchange views and provide clarifications on the Commission’s reply. They added that the Ombudsman will determine her next step in this inquiry on the basis of that reply and the information obtained at the meeting. The inquiry team also informed the Commission that the Ombudsman will publish this report on her website.

2. Exchange of views and clarifications provided by the Commission

For the purpose of the meeting, the Ombudsman inquiry team had sent a set of questions to the Commission aimed at facilitating the discussions (see Annex). The questions touched upon the following issues:

(i) the measures of relevance to the JSIS that the Commission has taken to implement the UNCRPD following the UNCRPD Committee’s September 2015 concluding observation on the JSIS [2] [Link];

(ii) the reasons for the increase in the number of complaints to the Commission, starting from 2013, concerning the non-recognition of a “serious illness” or the failure to fully reimburse medical fees for an illness already recognised as serious;

(iii) the use of the common medical certificate by the EU institutions to assess a person’s degree of disability;

(iv) how the interdependence between the four criteria to recognise a “serious illness” influences the assessment in practice;

(v) the rights of appeal against a decision not recognising the existence of a “serious illness”;

(vi) the procedure for granting benefits above and beyond the JSIS, such as doubling the dependent child allowance, the social aid scheme, and the reasonable accommodation provided by institutions in their capacity as employers;

(vii) the adequacy of the JSIS framework in terms of reimbursing assistive devices and therapies;

(viii) setting up a suitable body involving representatives of persons with disabilities to study how the JSIS is applied on a day-to-day basis to persons with disability related health needs;

(ix) the procedure to amend the Commission's GIPs

The discussion took place on the basis of these questions.

i) The Commission pointed out that the JSIS is a sickness insurance scheme, which covers **medical costs** in accordance with the existing rules, notably the EU Staff Regulations (SR), the Joint Rules on sickness insurance for EU officials (Joint Rules), and the Commission's GIPs. The Commission, however, takes a holistic approach on disability related health needs by taking into account both the medical (JSIS/Paymaster Office [PMO]) and the social aspects (Directorate-General for Human Resources [DG HR]). For this reason, the PMO and the DG HR cooperate fully to deal with requests to reimburse medical and non-medical costs from persons with disabilities. PMO and DG HR work with national authorities (where relevant) and in particular with Belgian authorities in order to help staff members or relatives to benefit from national/Belgian schemes for disabled people.

The Commission noted, in response to a specific question, that **since the changes to the SR that came into effect in January 2014 aimed at fully complying with the UNCRPD, it did not perceive a need for further significant legislative or regulatory changes to the JSIS.**

The Commission also said that it constantly seeks to interpret and apply all the relevant rules in the area of the JSIS in the light of the Article 1(d) 4 of the SR [3] and the UNCRPD.

The Commission further referred to the upcoming Communication on diversity and inclusion (subsequently adopted on 19/07/2017) and also mentioned that it had been in contact with the newly set up association of Commission staff members with disabilities, and with the association of Commission staff members whose family members have disabilities.

ii) The increase in complaints arising from the non-recognition of a "serious illness", with the result that costs are not reimbursed at 100% but at the normal rates, is not necessarily related to disabilities. Cases of "serious illness" mostly relate to other issues, such as heart problems and cancer. The Commission's GIPs were adopted in 2007. According to these rules, the decision to recognise a "serious illness" has to be renewed every 5 years, as a "serious illness" is not necessarily a life-long condition. **The rise in the number of complaints starting from 2013 may derive from the fact that applications to renew this decision recognising a "serious illness", following the end of the 5-year period, were unsuccessful due to the change in individual medical circumstances** . The most frequent cases would concern cancer in remission or low-risk cardiac disease around ten years after a heart attack.

iii) **The Commission explained that there are two distinct roles that are to be considered as complementary: PMO takes care of medical costs and DG HR takes care of non-medical costs.**

PMO is in charge of recognising a "serious illness". The patient has to submit to the

PMO a detailed medical report assessing his/her medical situation by his/her personal doctor. There is no specific model or type of form to be used for this purpose. On the basis of that information, a PMO medical officer assesses the person's condition and provides an opinion. After receiving the opinion of the PMO medical officer, the Head of the PMO's settlement office takes the decision to recognise an illness as a "serious illness" or not. The decision is taken only on medical grounds. Even after the PMO has sent its decision to the patient, he/she can submit additional documents for the PMO to reassess the case. If the patient is not satisfied with the outcome, he/she can submit a complaint under Article 90(2) SR to the appointing authority.

Under a different heading and in a separate context, the Commission's GIPs provide assessment schedules for physical and mental impairments . These are to be found under Chapter 3 of Title II dealing with the reimbursement of the costs of services associated with dependence. This procedure is separate from the recognition of a "serious illness". **These forms are specific to assessing the possible reimbursement of the cost of a permanent or long-term residence in a paramedical establishment.** The forms in question (attached to Chapter 3 of Title II of the Commission's GIPs) are entitled: I. Functional independence evaluation; II. Evaluation of spatial and temporal awareness.

DG HR supplements the PMO by offering payments outside the JSIS for non-medical costs. The " **Medical certificate for the assessment of a disability** " that had been provided as an annex to the reply of the Commission dated October 2016 is used in two cases:
- to assess whether a staff member should be entitled to **a double dependent child allowance** (Article 67(3) of the SR and Conclusion of the Heads of Administration N°177/87 which was transmitted to the Ombudsman).
- to assess disability of staff or their family member in the context of reimbursement of the non-medical costs due to disability (**social aid scheme under Article 76 SR**).

The medical certificate is requested to be filled in by the staff member's doctor. The medical officers of the Medical Service of the institution concerned (not the medical officers of the JSIS/PMO) assess the degree of disability. The form is used by all institutions. As noted in point 2(a) of the Conclusion of the Heads of Administration N°177/87, reference is made to the European Assessment Schedule for Physical and Mental Impairments.

iv) The Ombudsman inquiry team asked whether the criteria set out by the Commission to recognise a "serious illness" risk being disproportionately disadvantageous (or disproportionately difficult to satisfy) for persons with disabilities. By way of reply, the Commission noted that the four criteria used to recognise a "serious illness" are inter-dependent. **As to how this interdependence works in practice, the Commission explained that in applying the four criteria they do not take a 'tick all the boxes' approach but a flexible one. The four criteria, which serve as guidelines to assess each case in a holistic way, are not applied in any kind of automatic fashion. The Commission's GIPs are therefore interpreted in the light of the UNCRPD.**

The Commission stressed that each case is assessed on its own merits. It gave the

example of a PMO decision which recognised the existence of “serious illness” in the case of a child with autism, while there was no shortened life expectancy .

By way of conclusion, while the Commission will always take account of all four criteria (in this sense the criteria are “cumulative”), there is no threshold for each criterion viewed in isolation from the other three criteria. **If a person meets one criterion to a very large extent, this may compensate for the fact that the person does not meet another criterion to a significant extent.**

The Commission noted that the existing criteria are “vague / general” on purpose. They allow the necessary flexibility for PMO to deal with a wide and very diverse range of cases. More specific criteria would limit this possibility.

The Commission also referred to Article 72(3) SR which provides for special reimbursement in case of heavy expenditure. It provides a safety-net where the total expenditure not reimbursed for any period of twelve months exceeds half the officials' basic monthly salary or pension.

v) As explained above, based on all the material in the file, including the detailed medical report by the personal doctor of the person concerned, a PMO Medical Officer provides a medical opinion, on the basis of which PMO takes a decision concerning the (non-)recognition of a “serious illness”. This is in accordance with Article 20(6) of the Joint Rules adopted by all institutions, and Chapter 5 of Title III of the Commission’s GIPs on the JSIS.

Where PMO takes a decision not to recognise a condition as "serious illness" within the meaning of the JSIS rules, the person concerned can always submit a complaint against that PMO decision under Article 90(2) SR. In the context of an Article 90(2) complaint the complainant may provide all documents, which he/she considers important to support his/her claim (including medical opinions/reports issued by doctors of the complainant's choice).

In the course of the new assessment of the file, which is carried out on receipt of the complaint, PMO submits the complaint (including all supporting documents presented by the complainant) to a Medical Officer, who re-analyses the file and issues a reasoned opinion ("avis circonstancié"). If required, the specific case may be presented to the Medical Council [4] , e.g. where the individual case is particularly difficult or where it may (potentially) concern a greater number of cases ("systemic issue").

The complaints (and all relevant documents) are submitted to the Management Committee of the JSIS (in accordance with Article 35 of the Joint Rules). The Committee is composed of representatives from the Administration and from the staff representatives of all the institutions (in accordance with Article 38 of the Joint Rules). According to the rules, the Management Committee may also instruct its Chairman to conduct further investigations. Where the point at issue is of a medical nature, the Management Committee may seek expert medical advice before giving its opinion. The Management Committee must give an opinion which is transmitted simultaneously to the Appointing Authority/ Authority Empowered to Conclude Contracts of Employment and to the complainant.

The complainant receives a reasoned decision of the Appointing Authority/ Authority Empowered to Conclude Contracts of Employment within the statutory time-limit of four months from the submission of his/her complaint. When taking its decision, the Appointing Authority/ Authority Empowered to Conclude Contracts of Employment has at its disposal the full file.

If the complaint is rejected, the complainant may appeal the rejection of his/her complaint to the General Court of the EU in accordance with Article 91 SR.

vi) In its reply to the Ombudsman's letter, the Commission referred to other forms of support for persons with disabilities provided outside of the JSIS. The Ombudsman inquiry team asked for more information on the provision of those benefits by the Commission to its own staff and their families.

The Commission noted that **the JSIS covers medical expenses** only. For people with disabilities, the JSIS covers their medical expenses, including medical expenses related to disability. Other kinds of support (such as expenses related to transport or education) are covered by different programmes at DG HR (or equivalent in other institutions). Upon receipt of a request for reimbursement of costs, PMO and DG HR discuss together in order to assess what is medical/non-medical and decide which entity will cover which aspect of the expenses.

Besides the JSIS medical reimbursement, there are three other types of benefit outside the JSIS for persons with disabilities: i) the social aid scheme, ii) the doubling of the dependent child allowance and, iii) reasonable accommodation. In cases i) and ii), an assessment of the person's degree of disability is required. For that purpose, the medical certificate common to all EU institutions (mentioned in question iii)) has to be filled out by the applicant's personal doctor to be examined by the Medical Service of the Commission. In case iii) the Medical Service may be asked to provide its opinion but the question is solely what reasonable accommodation must be provided by the Commission as employer in the work environment (special IT software, adapted furniture….) in accordance with Article 1d(4) of the SR.

Social integration is the most important aspect of the **social aid scheme;** it covers matters such as, for example, payment for a child's special schooling needs, or costs for the adaptations of a car or at home to cater for the disability. There is currently an annual budget of approximately 2 million euros and DG HR is in contact with the Directorate-General for Budget (DG BUDG) for supplementary funds. To benefit from **the social scheme** (for adults and children), a person needs to have a physical disability of at least 30% or a mental disability of at least 20%.The entitlement to reimbursement under that scheme is linked to the family income, meaning that there are specific thresholds.

As regards the **doubling of the dependent child allowance** , a degree of disability of at least 50% is needed in order for the allowance to be automatically doubled. In cases where the disability is below 50% but at least 30% in the case of a physical disability or 20% in other cases, the allowance will be doubled if the costs incurred are higher than the amount of the

allowance. The allocation can also be doubled in cases of a long-term illness which involves the official in heavy expenditure. There are currently around 170 cases in which this allowance is being paid.

Reasonable accommodation may concern e.g. the adaptation of office equipment or flexible working arrangements. Reasonable accommodation is always provided for on a case-by-case basis. Those involved in the process are, in first instance, the staff member concerned, the line manager and possibly the HR services linked to the Directorate-General and the Medical Service. The Office for Infrastructure and Logistics in Brussels (OIB), the Directorate-General for Informatics (DG DIGIT) and other DG HR services may also be asked to provide advice or support, depending on the sort of accommodation required.

The Commission explained that communication is an important aspect of the effectiveness of the above schemes and that they are focusing on its improvement. Special training on how to deal with disability is available for all Commission staff. Persons with disabilities should have clear information on the non-medical benefits they might be entitled to receive. For this purpose, a special website is currently being developed covering all different forms of support. Moreover, the request forms to be filled out by applicants for these benefits have been made more user-friendly in cooperation with representatives of persons with disabled family members.

vii) **There is no exhaustive JSIS list of assistive devices and therapies that can be reimbursed** . There are, however, three categories:
- devices explicitly covered by the JSIS (such as manual wheelchairs),
- devices explicitly excluded from JSIS reimbursement (such as cars); some items might be eligible for reimbursement under the social scheme, and
- a “grey zone” of devices that might be reimbursed (such as electric wheelchairs) depending on a case-by-case assessment. In these cases, the Medical Council is asked for an opinion. Some items might be eligible for reimbursement under the social scheme.

The absence of a detailed list allows for more flexibility, which is necessary in dealing with disability related health needs.

viii) Staff with disabilities, through their representative associations, will be involved in any decision-making process which concerns them (in accordance with the Diversity Communication that was adopted on 19 July 2017). In particular, as regards JSIS, **the Diversity Communication provides that the "** *Commission will set up a suitable body to study the current situation and to propose ideas and means to lighten as far as possible the burden of staff with disabilities. The Commission will closely consult with and actively involve persons with disabilities, through their representative organisations, in the decision-making processes concerning issues relating to them.* **These recommendations are expected to be implemented before the end of the current mandate of the Commission** ."

The Commission highlighted that until recently no association of disabled staff formally existed. However, in the past, Commission measures were discussed with staff representatives and, in many cases, the Staff Committee, thus ensuring an involvement of the staff as a whole,

including colleagues with disabilities, in the making of decisions and in the application of the rules by the Commission.

The associations will be involved in discussions with all relevant partners and not limited to PMO and DG HR. When it comes to medical or non-medical costs of disabilities, PMO and DG HR are involved. But when it comes to the accessibility of buildings and information or reasonable accommodation, many more players are involved (in addition: OIB, Office for Infrastructure and Logistics in Luxembourg [OIL], DG DIGIT, Medical Service of DG HR).

PMO and DG HR complement each other in dealing with the medical and social aspects of disability related health needs. The Commission will consider taking measures to improve the provision of information, to improve accessibility, to increase awareness, and to promote staff training.

A different approach would entail a total reform of the system, meaning that the JSIS would have to be transformed from a sickness insurance scheme to a social security scheme covering both medical and non-medical aspects of disability. Such a reform would have major implications and would not necessarily benefit persons with disabilities.

ix) To amend the Commission's GIPs one requires **a decision by the College of Commissioners** . Given that the JSIS is an inter-institutional issue, other institutions can trigger the amendment of the Commission's GIPs.

Brussels, 04/10/2017

Ms Rosita Hickey Ms Elpida Apostolidou

ANNEX: Questions for the meeting with the Commission in OI/4/2016/EA

1. Beyond the changes to the SR, **what measures has the Commission taken to implement the UNCRPD** that are of relevance to the JSIS (e.g. reform of internal rules, implementing provisions, guidelines)? In particular, have any measures been taken following the UNCRPD Committee's September 2015 concluding observation on the JSIS?

2. According to the statistical data provided by the Commission, since 2011, 105 complaints have been submitted under Article 90.2 concerning the recognition of a "serious illness" or the full reimbursement of medical fees for an illness already recognised as serious. Out of the 105 complaints, **the vast majority (90) were submitted in the last three years** (6 in 2011, 9 in 2012, 30 in 2013, 42 in 2014, 18 in 2015). As there has been no change in the applicable legal framework, could the Commission provide an explanation for this dramatic increase in the number of complaints starting from 2013?

3. We understand that there is a **common medical certificate that all EU institutions use to assess the degree of disability** . According to this certificate, applicants' doctors and medical officers are asked to refer to the **European Assessment Schedule for Physical and Mental Impairments** . Could you provide more information on this medical certificate and when it is used? Is it used **for the purpose of recognising a "serious illness"** ? Is the medical officer's assessment as to whether the four criteria are fulfilled based exclusively on that?

4. In your reply you note that although, according to the case law, the four criteria for the recognition of "serious illness" are cumulative, the Court has also clarified that their **interdependence is liable to influence the assessment** . Could you explain **how this interdependence between the four criteria influences the assessment in practice** ? Does it mean that in cases where three out of the four criteria are satisfied to large extent (e.g. presence of a very serious handicap), but there is no proven and/or significant effect on life expectancy, the Medical Officer/Council could still in some cases recognise the existence of a "serious illness"?

5. To what extent are decisions on the recognition of the existence of a "serious illness" taken by an individual medical officer or are such decisions taken by a panel of Medical Officers? What rights of appeal exist in cases where a Medical Officer (or panel of Medical Officers) decides not to recognise the existence of a "serious illness"? Is the applicant (patient) allowed to submit his or her own specialist medical (or other professional) opinion? And if so, how is this professional opinion assessed?

6. In your reply, you note that staff with a disability, or members of their family with a disability, can benefit from other payments made outside the JSIS, such as the **doubling of the dependent child allowance** , the **social aid scheme** , as well as **reasonable accommodation** provided by institutions in their capacity as employers. Could you provide more information on the procedure for granting those benefits? Does it include an assessment of the degree of disability of the person concerned? How is this assessment carried out?

7. It has been argued that even in cases where a 100% reimbursement for serious illness is granted, the **framework concerning the reimbursement of assistive devices and therapies is inconsistent or insufficient** . The JSIS reimbursement list does not explain the reimbursement criteria for items such as assistive devices. [5] [Link] Could you provide more information about the regime applicable to reimburse assistive devices and therapies? Has the Commission considered introducing a detailed list similar to the World Health Organisation (WHO) Priority Assistive Products List (APL) [6] [Link]?

8. In your reply, you mention that the Commission is **considering setting up a suitable body, involving representatives of persons with disabilities, employees with disabilities and/or associations of persons with disabilities, to study the current situation as regards the day-to-day application of the JSIS in relation to the disability related health needs, and, if necessary, to propose ideas and means of improvement** . Do you have a detailed timeline for this process? What measures will the Commission take to ensure that representatives of

persons with disabilities are consulted in a meaningful and structured way throughout this process and that the results of this consultation are implemented in practice?

9. We note from the Joint Rules [7] [Link] that the Commission's GIPs laying down the rules for the reimbursement of costs shall be drawn up after consultation with the Staff Regulations Committee and on the opinion of the Management Committee. Could you provide **information on the procedure to amend the Commission's GIPs** ? At what level is the final decision for such an amendment taken?

[1] [Link] The letter opening the inquiry as well as the Commission's reply are available here:

https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/67190/html.bookmark [Link]

[2] [Link] Concluding observations regarding the EU's implementation of the UNCRPD, made by the relevant UN Committee, 2 October 2015, paras 86-87

https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/226/55/PDF/G1522655.pdf?OpenElement [Link]

[3] [Link] According to Article 1(d) 4 SR, "[...] a person has a disability if he has a long-term physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may hinder his full and effective participation in society on an equal basis with others. [...]".

[4] [Link] The Medical Council of the JSIS consists of one Medical Officer from each institution and the Medical Officers from each Settlements Office. It is consulted by the bodies provided for by the Joint Rules, viz. the Management Committee, the Central Office and the Settlements Offices, on any medical issue arising in connection with the administration of the JSIS.

[5] [Link] By way of example, the PMO "practical guide" (2014) to the GIP does not mention wheelchairs at all. There is a rule in the original GIPs (2007) according to which "simple manual wheelchairs" can be reimbursed up to 650 EUR. On the other hand, electronic wheelchairs and items such as communication boards/books/cards, communication software, deafblind communicators, and video communication devices do not seem to be reimbursed.

[6] [Link] The WHO - APL includes 50 priority assistive products, selected on the basis of widespread need and impact on a person's life, such as hearing aids, wheelchairs, communication aids, spectacles, artificial limbs, pill organizers, memory aids.

[7] [Link] Article 52 (2).