

Comments of the Commission on an own-initiative inquiry from the European Ombudsman

- Ref. OI/4/2016/EA on whether the treatment of persons with disabilities under the Joint Sickness Insurance Scheme (JSIS) complies with the UN Convention

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

The European Ombudsman opened an own-initiative inquiry in order to assess whether the Commission does apply specific criteria for the reimbursements of medical costs of persons with disabilities under the JSIS and how the Commission will follow the recommendation by the experts Committee of the UN Convention on the Rights of Persons with Disabilities to revise the JSIS. One of the elements would concern the current rules granting medical reimbursement at a rate of 100% to persons with disabilities, in the case where the health impact of the disability does not meet the four criteria established to recognise a "serious illness". In addition, following the Concluding observations on the initial report of the European Union of the UN Committee on the Rights of Persons with Disabilities (hereinafter the "UN Committee conclusions"), the European Ombudsman questions whether the Joint Sickness Insurance Scheme (JSIS) complies with the provisions laid down by the UN Convention on the Rights of Persons with Disabilities (UNCRPD) to which the EU is a party.

II. THE INQUIRY

The current own-initiative inquiry on behalf of the European Ombudsman puts on hold two specific individual complaints in relation to the JSIS and submitted by two staff members whose children have disabilities. Nevertheless, the opinion of the European Ombudsman is that those two complaints appear to raise a systemic issue. Therefore, the European Ombudsman has decided to open the present own-initiative inquiry.

The European Ombudsman raises a number of questions on the compliance of the JSIS with the UNCRPD.

III. THE COMMISSION'S COMMENTS ON THE ARGUMENTS

In order to provide the European Ombudsman with a full picture, the Commission intends to enshrine its answer in the general context of the implementation of the UNCRPD by the Member States and the EU Institutions. This includes the timetable for future EU reporting as described in the UN Committee conclusions (point 94) which requests that the European Union submit its second and third periodic reports together no later than 23 January 2021 and to include therein information on the implementation of the recommendations included in those conclusions.

At the outset, the Commission would like to highlight that it is of course committed to honour its obligations under the UNCRPD making its best efforts to respect such calendar.

The Commission would like to provide the following replies to the questions 1 and 2 in which the European Ombudsman asks how the Commission intends to follow up on the UN Expert committee observation suggesting that the EU should revise its JSIS to cover comprehensively disability related health needs in a manner that is compliant with the Convention.

The Commission highlights that when the Staff Regulations were thoroughly revised by Regulation No 1023/2013 which entered into force on 1 January 2014, the co-legislators already examined in compliance with the EU's obligations under the UNCRPD whether there is a need to bring the Staff Regulations in line with that of the UNCRPD. Such need was identified as regards the definition of disability which led to the revision of Article 1d(4) of the Staff Regulations. The Staff Regulations has for many years referred to the notion of "reasonable accommodation" in relation to the essential functions of the job, which refers to appropriate measures, where needed, to enable a person with disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. In that sense it reflects the UNCRPD's purpose to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.¹

The co-legislators decided to examine further whether other parts of the Staff Regulations needed revision. The CCA (Collège des Chefs d'Administration) gave mandate to the CPAS (Comité de Préparation pour les affaires sociales) to *"examiner la possibilité d'harmoniser sur le plan interinstitutionnel,[...] les modalités de mise en œuvre de cette Convention au sein des institutions en tenant compte notamment du Code de bonne conduite pour l'emploi des personnes handicapées adopté en 1997"*. In that context, a Working Group of the CPAS was created and the CMI (Collège Médical Interinstitutionnel) was also consulted. In March 2012, the CPAS sent a report to the CCA. In parallel, the process of revision of the Staff Regulations took place ending with the adoption of Regulation (EU, EURATOM) N°1023/2013 of the European Parliament and of the Council of 22 October 2013 which entered into force on 1 January 2014. In September 2014, the CCA considered that the proposals presented by the CPAS Working Group were reflected in the new provisions of the Staff Regulations. For this reason, the CPQS (Comité de Préparation pour les Questions Statutaires), which at that time had replaced the CPAS, considered that the issues were solved by the amendment to the Staff Regulations. The CCA agreed, on its 274th meeting on 21 October 2015, to delete this point from its agenda. To the knowledge of the Commission, the Ombudsman did not raise any objection to this approach at the time.

Against this background, the Commission considers that the text of Article 72 of the Staff Regulations is in line with Article 25 of the UN Convention. Pursuant to Article 72(1) of the Staff Regulation, all beneficiaries, whether they are disabled or not, receive reimbursement of sickness costs under certain conditions of 80% or

¹ See report of the European Parliament's Committee on Legal Affairs (document A7-0156/2012), justification for amendment no 20.

85%, depending on the pathology. In case of a serious illness, this reimbursement is increased to 100% for costs related to that illness, also independently of whether that illness is linked to a disability.

Medical costs related to a disability are thus in any event reimbursed at the level of at least 80% or 85% provided that they meet the conditions for reimbursement set by the implementing rules.

The concept of "serious illness" in Article 72 of the Staff Regulations is, as the European Ombudsman knows, further defined in lower-ranking rules and these rules are constantly being implemented in practice by the Commission and interpreted by the EU Courts in their case law, also in the light of the UNCRPD. The four criteria describing the concept of serious illness are, according to the case law, cumulative. Thus, the fact that just one of those criteria is not met justifies the adoption of a decision refusing to recognise the existence of a serious illness. But the case law has also clarified that *"[...] in the examination carried out by the medical officer or the medical council, the assessment of one of the criteria is – in view of the interdependence which the text provides for between those four criteria – liable to influence the assessment of the other criteria. Thus, although one of the criteria may appear not to be satisfied when considered in isolation, examination of it in the light of the assessment made of the other criteria may lead to the opposite conclusion, namely that that criterion is in fact satisfied, such that the medical officer or the medical council is precluded from undertaking consideration of merely one criterion taken on its own."* (Judgment of the European Union Civil Service Tribunal of 28 September 2011, Case F-23/10, Allen / European Commission).

The Commission would also like to clarify that payments by the JSIS should not be seen in isolation because staff members with a disability or staff members' disabled family members – in the meaning of the Staff Regulations - can benefit from other payments made outside the JSIS. Parents of disabled children, based on a reasoned decision of the appointing authority including medical documents proving that the child has a disability involving them in heavy expenditure, may be for instance entitled to the doubling of the dependent child allowance in accordance with Article 67(3) of the Staff Regulations which represents a lump-sum reimbursement of additional costs related to the child's disability². Furthermore, staff members can apply for payments from a social aid scheme pursuant to Article 76 of the Staff Regulations for the reimbursement of non-medical costs related to a disability. The persons that are eligible to apply for supplementary aid include the persons in active employment, their dependent spouses and children and persons treated as such, as well as persons receiving an orphan's pension. The costs that may be covered by the supplementary aid are non-medical costs and include expenses such as costs of residence, costs of education or special training, care by a home nurse, transport expenses linked to the residence or training, as well as costs for certain equipment. In cases where the expenses cannot be distinguished between medical and non-medical expenses, the costs are divided between JSIS and the supplementary aid for the disabled scheme. The beneficiary's contribution to the expenses varies between

² See also the Conclusions of the Heads of Administration No 177/87 (2nd revision) of 27 March 2014.

45% and 95% for equipment costs and between 5% and 35% for other expenses depending on the family income. Currently, the yearly budget of the supplementary aid is around 2.1 million euros and the number of beneficiaries about 170.

In this context, the Commission would like to respectfully submit that, while the JSIS by its very nature follows a medical approach, the existence of the above mentioned schemes demonstrate that the Staff Regulations as a whole do contribute to the general compliance with the social model of disability as promoted by the UNCRPD. In the same vein, while the Commission agrees that a disability does not necessarily constitute a serious illness in the sense of Article 72 of the Staff Regulations, it should like to emphasise that whereas the JSIS is designed to cater for health-related expenses and thus also for serious illnesses, other available forms of support such as those mentioned above as well as the reasonable accommodation provided by the institutions in their capacity as employers serve to compensate disadvantages resulting from other aspects of a disability.

As regards the third question raised by the European Ombudsman related to the number of requests for recognition of a serious illness submitted by staff members with a disability or by a beneficiary with a disability, this type of statistic is not available. Each request is submitted to the medical officer for an opinion following in-depth analysis on a case by case basis, before a decision is being issued.

As regards the number of complaints concerning either the recognition of a "serious illness" or the reimbursement of the medical fees incurred at a rate of 100% for an illness already recognised as "serious", the situation is as follows:

2011: 6 complaints

2012: 9 complaints

2013: 30 complaints

2014: 42 complaints

2015: 18 complaints

Out of those total figures, however, it is very difficult to identify the exact number of complaints which are directly related to a disability. This is because, while some "serious illnesses" may lead to a situation which results in a disability, that fact does not necessarily emerge from the elements on the complaint file.

For the sake of completeness however, the European Ombudsman may find below the data concerning the complaints in which the complainants themselves alleged the existence of a permanent disability (physical, mental, intellectual or sensory etc.):

2011: 0 complaint

2012: 0 complaint

2013: 4 complaints 4 rejected

2014:	5 complaints	4 rejected (1 of which annulled by the Court)
2015:	7 complaints	1 rejected

IV. CONCLUSION

In conclusion, the Commission underlines that the JSIS is only one of the components necessary to fulfil the objectives of the Convention and should be assessed as such. It goes without saying that the Commission is committed, also in the interest of the diversity of its workforce, to protect and promote the rights of persons with disabilities in line with its obligations under the treaties – notably Article 10 (TFEU), the Charter of Fundamental rights of the European Union and the Staff Regulations, and under the UNCRPD.

In that respect, the Commission is currently working on a new Diversity and Inclusion Strategy aiming at furthering diversity and inclusion amongst its staff, including for people with a disability.

In particular, with a view to fostering the development of a holistic approach in line with the spirit of the Convention, the Commission is ready to examine the day-to-day application of the JSIS in relation to the disability related health needs, notably as regards the suitability of the criteria for serious illness in the light of the most recent case law as regards the Staff Regulation and the Convention. The Commission considers to task a suitable body, involving representatives of disabled persons, disabled employees and/or disabled persons' associations, to study the current situation and, if necessary, to propose ideas and means to develop further such approach.

Enclosure:

Conclusions of the Heads of Administration No 177/87 (2nd revision) of 27 March 2014.