EC Disability Support Group

Brussels, 31 January 2018

European Ombudsman
1 avenue du Président Robert Schuman
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France

Re.: JSIS consultation - OI/4/2016: Comments from the EC Disability Support Group to the European Ombudsman's consultation on the Joint Sickness Insurance Scheme (JSIS) and the UN Convention on the Rights of Persons with Disabilities (UNCRPD)

Dear Ombudsman,

The EC Disability Support Group (EC DSG) is an association of staff of the European Commission, as well as other EU Institutions, who are responsible for a person with a disability or a delay in development. We currently have over 280 members including staff not only from the Commission, but also from the Council, the Parliament, the EEAS, EU agencies as well as various delegations around the world. For several years we have expressed our concerns regarding the fact that the JSIS rules do not contain any specific provisions for persons with disabilities, thus making the right to healthcare on an equal footing with other staff an uphill battle. This is particularly relevant with regard to the rules concerning the recognition of a serious illness within the context of a disability.

In October 2015, following its first review of the EU's compliance with the UNCRPD, the UN Expert Committee overseeing the implementation of the UNCRPD made the following comments as regards Article 25 of the UNCRPD on Health and its application by the EU institutions which echo our concerns:

86. The Committee is concerned that European Union staff members with disabilities or who have family members with disabilities are discriminated against by European Union health insurance schemes.

87. The Committee recommends that the European Union revise its Joint Sickness and Insurance Scheme so as to comprehensively cover disability-related health needs in a manner that is compliant with the Convention.

The EC Disability Support Group has therefore welcomed the Ombudsman's own-initiative inquiry OI/4/2016/EA launched in May 2016 on whether the treatment of persons with disabilities under JSIS complies with the UNCRPD. In Annex you will find the EC DSG's views on the suggestions made by the Ombudsman as well as on the information provided by the Commission to the Ombudsman in its comments on the own-initiative enquiry and at its meeting with the Ombudsman. Please feel free to contact us should you require any further information.

Yours sincerely,

(signed)

Coordinators EC Disability Support Group

ANNEX

JSIS consultation - OI/4/2016: Comments from the EC Disability Support Group to the European Ombudsman's consultation on the Joint Sickness Insurance Scheme (JSIS) and the UN Convention on the Rights of Persons with Disabilities (UNCRPD)

As a general comment, the EC DSG would like to ask the Ombudsman to make recommendations instead of suggestions on the grounds that (1) the Commission has so far not fully answered the Ombudsman's questions, (2) some of the information provided by the Commission is in our view inaccurate and (3) the Commission did not fulfil its obligations stemming from the UNCRPD and so far did not take concrete actions to follow-up on the comments of the UN Expert Committee.

General compliance of JSIS with UNCRPD

In our view, the problems regarding the compliance of JSIS with the UNCRPD are of a more general nature and go beyond the four GIP criteria relevant to recognising a "serious illness". We believe the JSIS's medical approach to disability is not compliant with the social model approach of the UNCRPD.

In its own-initiative inquiry the Ombudsman also identified the medical approach to disability as a potential difficulty:

"*This purely medical approach to disability is not aligned with the social model approach promoted by the UNCRPD, confirmed by the Court's case-law*[1]*, and endorsed in the new Article 1(d)(4) of the amended Staff Regulations, which defines disability as a long-term physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may hinder the person's full and effective participation in society on an equal basis with others*."

In this context, the Ombudsman put the following question to the Commission: "*How does the Commission intend to follow up on the UN Expert Committee observation suggesting that "the European Union revise its Joint Sickness and Insurance Scheme so as to comprehensively cover disability-related health needs in a manner that is compliant with the Convention"? Please provide a list of measures already taken and/or envisaged*."

In its comments on the own-initiative enquiry the Commission abstained from answering this important question. Instead it limited itself to referring to the revised Staff Regulations and the introduction of a new definition of disability in line with UNCRPD.

Since the EU ratified the UNCRPD, the Convention is part of the EU's legal order. In term of the hierarchy of norms the UNCRPD is superior to the Staff Regulations and the relevant implementing rules. This situation has been recalled by the *'Comité de préparation pour les affaires sociales'* (CPAS) in its report of 13 March 2012. This report prepared for the CCA (*Collège des Chefs d'Administration*) came to the conclusion as regards the UNCRPD " *elle est, de ce fait, directement applicable dans tous ses éléments pertinents dans le domaine statutaire. On pourrait, par conséquent, y prendre base directement pour l'adoption de mesure dans tout l'éventail des activités administratives des institutions*". The report also identified the provisions of the Staff Regulations concerning persons with disabilities which could be

[1] Judgment of 11 April 2013 in joined cases C-335/11 and C-337/11, HK Danmark, paragraph 38.

influenced by the EU's ratification of the UNCPRD. The CPAS also mentioned in this respect Article 72 of the Staff Regulations regarding health insurance under the chapter of social security benefits.

Indeed, the CPAS had received in 2010 a mandate from the CCA to "*examiner la possibilité d'harmoniser sur le plan interinstitutionnel,[…] les modalités de mise en oeuvre 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 its report, the CPAS presented some proposals regarding the internal decisions of the institutions stating that:

"Les institutions ont pris l'engagement d'adopter une interpretation conforme à la Convention et, si nécessaire, une implémentation pour toutes dispositions posant obstacle pour l'application intégrale de cette dernière. […]

Les dispositions internes devraient, soit reprendre en leur sein des normes administratives lesquelles sont adoptées en interprétation du statut (en particulier des conclusions des CCA, voire les orientations provisoires gérant des allocations budgétaires à l'intention des handicapés), soit renvoyer à des textes adoptés par les institutions là où ils existent (Codes de bonne conduite, décisions internes dans le cas de la Commission et du Conseil).

En parallèle, il conviendrait d'identifier les dispositions du statut es des autres textes réglementaires adoptés en exécution de ce dernier, toute provision étant éventuellement susceptible de contrevenir à la Convention."

In its report, the CPAS also informed that "*la DG HR de la Commission considère que son cadre est conforme aux exigences de la Convention*". This statement is again repeated in the draft minutes of the CCA's meeting of 21 March 2012: "*La Commission estime que son cadre règlementaire est conforme aux exigences de la Convention, ce qui n'est pas le cas des autres institutions*". It remains unclear on which basis the Commission came to this conclusion. The report does not refer to any in-depth assessment which could have been the basis for such conclusion.

In its first public reaction to the comments issued by the UN Committee in October 2015, the Commission took a different view. On 4 December 2015 Ms Souka, Director-General of DG HR, delivered a speech at the inter-institutional conference "Reaching out to staff with disabilities" on behalf of Ms Georgieva, at the time European Commission's Vice-President responsible for Budget and Human Resources in which she outlined the Commission's follow-up to the UN Committee's comments. *"In the current JSIS of the European Institutions the reimbursement of costs relating to disabilities follows principles and guidelines from the medical insurance scheme which sometimes impose important financial complexities and make unsuitable analogies to very ill persons. Such procedures and practices would not be in line with the social model of the UN Convention. In the Staff Survey colleagues also expressed their dissatisfaction on this point. So, let's analyse the current Joint Sickness Insurance Scheme and other support mechanisms and where necessary adapt accordingly*." Also in relation to JSIS she added: "*It is my commitment to see that we make real progress on all these issues*".

In her speech on behalf of Vice-President Georgieva, Ms Souka acknowledged that the JSIS was not in line with the social model of the UNCRPD and committed to analysing JSIS in this respect and to making the necessary adaptation. As far as we are aware, this announcement has not been followed-up by the Commission.

In its meeting with the Ombudsman on 1 June 2017, the Commission took again a completely different view stating that "*since the changes to the Staff Regulations that came into effect on 1 January 2014 aimed at fully complying with the UNCRPD, it did not perceive a need for further significant or regulatory changes to JSIS*".

In sum, we have to observe that since the European Union became party of the UNCRPD in 2011, the Commission did not take any measure to make Article 72 of the Staff Regulations and JSIS rules compliant

with the UNCRPD. So far, the Commission has also not taken any specific actions to follow-up on the comments of the UN Committee issued in October 2015. Furthermore, there is no evidence that the Commission since 2011 has ever conducted any in-depth assessment regarding the compliance of JSIS rules and related General Implementing Provisions (GIPs) with the UNCRPD. In this respect, the Commission has failed for more than 7 years to fulfil its obligations under the UNCRPD.

Against this background, we fully support the Ombudsman's suggestion that "*the Commission should carry out an assessment to identify whether any provisions of the GIPs and/or the related forms, need to be revised in view of the UNCRPD and the UNCRPD Committee's concluding observations in 2015*". It should however be noted that the JSIS Joint Rules should also be part of the scope of such an assessment. Moreover, the EC DSG would suggest that such an in-depth assessment be conducted by independent external experts in order to ensure impartiality.

Furthermore, we would encourage the Ombudsman to recommend that the Commission commits to revising any provisions of the JSIS Joint Rules and GIPs which according to the assessment are not in line with the UNCRPD.

Recommendation 1: The Commission should conduct an in-depth assessment to be carried out by independent external experts, to identify whether the Joint Rules, any provisions of the GIPs and/or the related forms, need to be revised in view of the UNCRPD and the UNCRPD Committee's concluding observations of 2015.

The JSIS's GIP criteria for the recognition of a serious illness

We deeply regret that in its suggestions the Ombudsman only raises the question of how the four criteria for assessing the recognition of serious illness are applied by the Commission and is not questioning the four criteria as such. In our view, the four criteria are for several reasons not compliant with the UNCRPD. Those reasons were outlined by the Ombudsman in its own-initiative enquiry.

First, as already mentioned, the purely medical approach to disability is not aligned with the social model approach promoted by the UNCRPD.

Second, the four criteria treat the concepts of 'illness' and 'disability' as identical, although the Court′s case law, in the context of interpreting the Equality Employment Directive 2000/78, has confirmed their distinct character: "*Toutefois, en utilisant la notion de «handicap» à l'article 1er de ladite directive, le législateur a délibérément choisi un terme qui diffère de celui de «maladie». Une assimilation pure et simple des deux notions est donc exclue*" [2]. As illness and disability are two different concepts, the Commission should use different criteria to establish the seriousness of an illness and of a disability.

Third, those criteria, and in particular the criterion of shortened life expectancy, are not always suited to the specific situation of persons with disabilities nor are they always appropriate to assess the gravity of a disability. Many disabilities, although they have a very significant impact on the well-being of the person concerned, do not necessarily impact negatively on life expectancy. They may give rise to high expenses in terms of treatment, medication or special devices/equipment, which are essential for the person′s full and effective participation in society on an equal basis with others. If such treatment, medication or special devices/equipment cannot be provided, the consequences can be severe. This is particularly the case for children with disabilities, where intensive early treatment can have very significant positive and enduring benefits for their welfare.

Fourth, Article 21(1) of the Charter of Fundamental Rights of the EU provides that "[a]ny discrimination based on any ground such as ... disability ... shall be prohibited″. In accordance with settled case-law, the principle of non-discrimination requires that comparable situations must not be treated differently and that

[2] Judgment of 11 July 2006 in Case C-13/05, Chacon Navas v. Eurest Colectividades SA, paragraph 44.

different situations must not be treated in the same way. It is arguable that assessments of the severity of disabilities and assessments of illnesses should be based on different criteria. In particular, in assessing whether a disability is ″severe″, the issue of life expectancy is not necessarily a relevant criterion. Treating the two concepts as the same, and not ensuring specific provisions to assess the severity of a disability, is arguably not compliant with the UNCRPD provisions and the case law. Separate criteria and/or specific provisions are therefore necessary as regards reimbursing medical expenses for persons with disabilities under the JSIS.

By using criteria based on a medical approach not adapted to disability, the Commission breaches the UNCRPD and hinders the effective realisation of its objectives. In fact, the full reimbursement (100%) of the medical costs related to a disability is the only way to realise the UNCRPD's objectives regarding the accessibility of health services, rehabilitation and medical devices which are indispensable for the full integration of persons with a disability into society.

The same argumentation can also be used in relation to article 26 of the Charter. The realisation of the objectives in this article, namely to ensure for persons with disabilities the independence, social and occupational integration and participation in the life of the community, is seriously limited by the financial restrictions resulting from the four GIP criteria and their application.

In this context, the Ombudsman own-initiative enquire of 10 May 2016 asked "*specifically, does the Commission intend to introduce separate criteria under the GIP and/or special provisions for the reimbursement of the medical costs of persons with disabilities under the JSIS? If not, please provide an explanation as to why not, addressing the four points outlined above*".

In its reply, the Commission did not confirm its intention to introduce separate criteria under the GIP and/or special provisions for the reimbursement of the medical costs of persons with disabilities under the JSIS. However, the Commission expressed its readiness "*to examine the day-today 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 Regulations 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*".

Since then, the Commission has not taken any action to follow-up on this announcement and to set up such a body. In its Communication "*A better workplace for all: from equal opportunities towards diversity and inclusion*" of 19 July 2017 the Commission has even stepped back from those previous commitments. The Diversity Communication announces 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"*.

As there is no explicit reference made to the JSIS, we fear that the Commission is not ready to follow-up with concrete measures on the UNCRPD Committee's recommendation "*to its Joint Sickness and Insurance Scheme so as to comprehensively cover disability-related health needs in a manner that is compliant with the Convention*". Instead of discussing whether the treatment of persons with disabilities under the JSIS complies with the UNCRPD, the Communication refers to other forms of financial support in case of non-medical expenses linked to a disability. Those forms of financial support should not be mixed up with health-related costs covered by the JSIS and the follow-up to the relevant UNCRPD Committee's recommendation.

We therefore fully support the Ombudsman's suggestion: "*The Commission should, as referred to in its letter to the Ombudsman, set 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-today application of the JSIS in relation to disability related health needs, and, if necessary, to propose ideas and means of improvement. The Commission should set out a detailed timeline for this process. It should ensure that the representatives of persons with disabilities are consulted in a structured and meaningful way and that the results of this consultation are implemented in practice*."

However, in our view it should be specified that the task of this body should not be limited to study the day-to-day application in relation to JSIS. The body should also examine the JSIS rules (Joint Rules and GIPs) as such and their relation to disability related health needs with the aim of making those compliant with the UNCRPD. In relation to serious illness the body should assess two options: (1) introduce separate criteria under the GIP related to persons with disabilities and/or (2) establishing special provisions for the reimbursement of the medical costs of persons with disabilities under the JSIS.

Recommendation 2: The Commission should set up a suitable body, involving representatives of persons with disabilities, both staff with disabilities and staff with dependants with disabilities to study the current situation as regards the day-today application of the JSIS in relation to disability related health needs, to accompany the independent assessment regarding the compliance of JSIS rules with the UNCPRD, and, if necessary, to propose ideas and means of improvement. The Commission should set out a detailed timeline for this process and ensure that the results of this process are implemented in practice. The involvement of other EU institutions in this exercise is also essential as the JSIS is a service for the staff of all the EU institutions.

Application of the four criteria

In recent years, the EC DSG has also seen some major problems in the application of the current criteria. In the years 2013-2015, several members of our group saw their requests for the recognition of serious illness or their requests for prolongation rejected by the Commission. In some of those cases, it can be observed that while the four criteria as such remained unchanged the Commission had changed the way they were applied, notably when it comes to the criteria of shortened life expectancy as regards persons with disabilities.

The reasons that led to the changes to the interpretation of the criteria for the recognition of serious illness are unknown to us, although we can only suspect that cost-savings had a role to play in this regard. However, following the internal reorganisation of the JSIS service, practices as regards the application of the criteria for the recognition of serious illness have improved enormously, particularly in the JSIS Brussels settlements office. EC DSG members are very grateful for these changes, but we believe that despite these improvements, a systematic alignment of the JSIS rules to the UNCRPD is necessary because the existing problems are of a more general nature,

The Commission provided the Ombudsman with statistical data regarding the complaints which have been submitted since 2011 concerning the recognition of serious illness or the full reimbursement of medical fees for an illness already recognised as serious. The number of complaints increased drastically from years 2011-2012 to years 2013-2014 and then decreased again in 2015. This trend seems to confirm the change in the way PMO applied the criteria from 2013 to spring 2015. The explanation given by the Commission (change in individual medical conditions in the case of renewals) is not plausible as the percentage of renewals which are rejected because of improved medical conditions should remain stable from year to year.

In the following paragraphs, we will refer to one particular case to illustrate how the Commission applies in practice the four criteria and to demonstrate the problems in the procedure used by the Commission. In this particular case, the Commission refused in August 2014 a request for the prolongation of serious illness. After the refusal of an article 90.2 complaint in March 2015, an appeal was brought to the EU Civil Service Tribunal. In the end, the Commission annulled in June 2016 its decision and granted retroactively a prolongation of the serious illness.

In its meeting with the Ombudsman 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. […]

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."

Such an approach seem to be in line with the interpretation of the Civil Service Tribunal (CST) regarding Article 20, paragraph 6, of JSIS which stipulates that the decision of the appointing authority on the recognition of serious illness shall be taken "after consulting the [m]edical [o]fficer of the [s]ettlements [o]ffice". According to the CST:

- "*the medical officer or the medical council has to conduct a specific and thorough examination of the situation presented to it. It should be noted in this connection that it is for the administration to establish that an assessment of this nature has been made*."
- the four criteria have "*to be taken into account in relation to one another by the medical officer or the medical committee, with the view to enabling a comprehensive assessment of the seriousness of the consequences of the illness in question and thereby investing the practitioners with considerable latitude in the medical evaluation of the particular situations they are called upon to assess*."
- "*the medical officer or the medical council may not therefore, when examining a request for recognition of the existence of a serious illness, merely consider in isolation some of the criteria listed in point 1, or even limit the assessment solely to the criteria which do not appear to be met*".
- the four criteria are "*cumulative. However, 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*
- it has to be ensured *"that those opinions were adopted on the basis of a specific and thorough examination of the state of health of the person concerned, an examination that takes into account in a comprehensive manner, as required by point 1, the four interdependent criteria set out in that point*".

In its decision of 2014 on the particular case in question, the Commission's refusal to recognise the existence of serious illness has been justified by an assessment from the medical officer being limited to one sentence: "*L'examen des 4 critères de reconnaissance de maladie grave et de leurs interrelations, ne permet pas de donner un avis favorable pour la prolongation du statut de maladie grave actuellement: pas de pronostic vital défavorable. Avis à revoir en cas d'évolution défavorable"*.

In this case, the medical officer clearly did not undertake a specific and thorough examination of the state of health of the person concerned. The medical officer did not examine three of the four criteria nor did he/she examine them in a cumulative manner.

It is obvious that the mentioning of "*examen des 4 critères"* does not fulfil the conditions established by the CST in another case on the same matter, the Allen case. The examination cannot be reduced to a formality or a clause. It is for that reason that the CST specified that it is for the administration to establish that a specific and thorough examination of the situation presented was conducted. The Commission's decision therefore breaches Article 20, paragraph 6, of JSIS and Article 1, Chapter 5, Title III of the GIP, as interpreted by the judge in the Allen case.

We therefore support the Ombudsman's suggestion to ask the Commission to clarify in the GIPs the way the four criteria have to be assessed and to bring them in line with the case law and with existing UNCRPD obligations (see recommendation 1).

Problems with the Commission's procedure in dealing with Article 90(2) complaints regarding the recognition of serious illness

In its meeting with the Ombudsman, the Commission also explains that in the case of an article 90(2) complaint the Commission undertakes a new assessment of the file. "*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").*"

In our view, this procedure is problematic for various reasons which became evident from the particular case we have used for illustrating the problems with the procedures to be followed as regards the recognition of serious illness. The complainant filed an article 90(2) complaint which was rejected by the Commission. In its decision the Commission quoted a 2nd "*circumstantiate opinion*" of a medical officer which was the same medical officer who had issued the first opinion. "*The medical officer in charge examined the complainant's medical file twice, as explained above, and came to the same conclusion as before*."

This time the medical officer briefly discussed the criteria of shortened life expectancy in an abstract way by referring to some EU statistics on mortality which were not relevant to the case in question. The medical officer also briefly discussed two other criteria (1) if the illness is likely to be drawn-out and 2) the presence or risk of a serious handicap. This is however done in an abstract way without a specific and thorough examination of the specific case. The 4th criterion (the need for aggressive diagnostic and/or therapeutic procedures) is not mentioned at all. Furthermore the medical officer does not follow a holistic approach by examining the four criteria in a cumulative manner.

The first problem which emerges from this case is that the review of the medical file was carried out by the same medical officer who already provided the first opinion. This links with the Ombudsman's suggestion *"The PMO should ensure that any review of a medical file, following a complaint under Article 90 (2) of the Staff Regulations, is carried out by a different Medical Officer than the one who provided an opinion in the context of the contested decision."*

The second problem concerns the second opinion by the medical officer. While a medical assessment by the medical officer is explicitly required under the procedure for recognising a serious illness, the Joint Rules or GIP do not mention a second "reasoned" or "*circumstantiate*" opinion of the Medical Officer or the Medical Council in the case of Article 90 (2) complaints.

Article 35(2) of the JSIS's Joint Rules stipulates that it is only the Management Committee who may seek expert medical advice before giving its opinion:

"*(2) Before taking a decision on a complaint introduced on the basis of Article 90(2) of the Staff Regulations the appointing authority or, as the case may be, the Administrative Board shall request the opinion of the Management Committee.*

The Management Committee may instruct its Chairman to make 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 cost of the expert opinion shall be borne by the Scheme."

Medical assessments properly prepared by the medical officer or the medical committee must be considered definitive, provided that the conditions in which they are made are not unlawful (judgment of 14 September 2010 in Case F-79/09 AE v Commission, paragraph 64). This is reiterated by the Commission in the

particular case in question. In its decision rejecting the Article 90 (2) complaint the Commission states "The Medical Officer's opinion serves as a definitive basis for the Appointing Authority".

The Commission speaks about "*the Medical Officer's opinion*" which has to be the first one which was issued on the request for recognition serious illness. If this first opinion serves as a definitive basis for the Appointing Authority, the Commission is not entitled to ask for a second reasoned opinion. The role of the Appointing Authority in analysing the Art 90 (2) complaints should be limited to verifying if the medical officer in issuing its first medical opinion has complied with the requirements as laid down by GIPs and as interpreted by the case law. By asking for a reasoned opinion, the Commission is misusing the procedure as demonstrated by the case in question. The purpose of the second reasoned medical opinion requested by the Appointing Authority is to correct the weaknesses and the irregularities of the first medical opinion which had only examined one of the four GIP criteria.

It should also be noted that the Management Committee when issuing its opinion on the particular case in question had not received the 2nd reasoned opinion. The Management Committee took its decision based on documents received in November 2014, while the second medical opinion dates from December 2015.

The Ombudsman should therefore ask the Commission to abandon the practice of asking for a second reasoned opinion by a medical official when responding to Art. 90(2) complaints as this practice is not in line with the JSIS rules and constitutes a misuse of the regular procedure.

Furthermore, as an overall comment regarding the process for the JSIS medical officers to carry out an assessment for the recognition of serious illness, we would suggest to the Ombudsman to recommend to the Commission that the medical officers take into account the medical reports issued by the doctors who treat the person with disabilities in question, which is currently not the case in all instances of recognition of serious illness.

The case in question raises also serious concerns when it comes to the role of the Management Committee and the way the Appointing Authority takes its opinions into account. In this particular case, the Management Committee came to the conclusion that the original decision of the Commission to refuse the recognition of serious illness should be annulled. In this respect, the Commission stated the following in its Decision to reject the Art 90 (2) complaint:

In accordance with the aforesaid provision, the Management Committee was consulted on the present complaint at its meeting of 21 and 22 January 2014 and was of the opinion that the contested decision of the Settlements Office should be annulled.

However, it must be pointed out that whereas, in accordance with Article 35(2) of the JR, the Appointing Authority has to request the Management Committee to give its opinion before deciding on a complaint under Article 90(2) SR, the Appointing Authority is not bound by this opinion, but must primarily ensure that the decision is taken in compliance with the rules.

In the particular case in question, the Commission did not follow the opinion of the Management Committee without providing any specific justification.

Recommendation 3: The Commission should always follow the opinion of the Management Committee when responding to Art 90(2) complaints.

Assistive devices

According to the Commission, the absence of a detailed list of reimbursable assistive devices under the JSIS allows for more flexibility, which is necessary in dealing with disability related health needs. However, the Ombudsman considers that the publication of a (non-exhaustive) list would provide clarity to persons with disabilities on the type of devices that can be reimbursed. The EC DSG would support this suggestion as it would help to provide some guidance of the devices that can be reimbursed.

Recommendation 4: The Commission should publish a non-exhaustive list of reimbursable assistive devices under the GIPs.

Non-medical benefits for persons with disabilities

It is important to recall that other forms of financial support in case of non-medical expenses linked to a disability should not be mixed up with health-related costs covered by the JSIS and the follow-up to the relevant UNCRPD Committee's recommendation. However, it should be noted that it is sometimes not clear to staff of the EU institutions, which non-medical expenses are covered by the Commission's and other EU institutions' social welfare schemes and which ones are covered by the JSIS as in the case of some therapies, appliances or home care related to disability they are sometimes covered by the budget line "supplementary aid for the disabled" managed by the social welfare services of the EU institutions and sometimes by the JSIS health insurance. We therefore fully support the Ombudsman's suggestion that: "*The Commission should carry out an assessment to identify - in a non-exhaustive way - non-medical needs relating to disabilities. It should initiate a procedure to ensure that the non-medical needs of EU civil servants - and their families - with disabilities are addressed in a satisfactory way, through the allocation of sufficient resources and within an appropriate framework, under the EU institutions' social schemes. As regards reasonable accommodation provided to its own staff, the Commission should review its current rules, adopted in 2004, in the light of the provisions of the UNCRPD which apply since 2011."* This should provide more clarity to staff as regards which services they have to contact for the different expenses related to disability.

At the same time, it is important that the assessment also verifies if the existing social schemes and the respective rules are compliant with the UNCPRD. As pointed out earlier, the Commission so far failed to carry out an in-depth assessment on whether the staff regulations and the implementing rules are in line with the UNCRPD. As part of the assessment, the Commission should also identify whether any provisions regarding the social schemes and/or the related forms, need to be revised in view of the UNCRPD. If there is a need for such revisions the Commission has to follow-up. We would recommend that such an in-depth assessment is conducted by external independent experts.

Recommendation 5: The Commission should conduct an assessment to be carried out by external experts to identify - in a non-exhaustive way - non-medical needs relating to disabilities and verify if the current rules and/or related forms for the EU institutions' social schemes need to be revised in view of the UNCRPD.

Recommendation 6: The Commission should ensure that the non-medical needs of EU civil servants - and their families - with disabilities are addressed in a satisfactory way, through the allocation of sufficient resources and within an appropriate framework, under the EU institutions' social schemes. To this end, the Commission should set up a suitable body, involving representatives of persons with disabilities, both staff with disabilities and staff with dependants with disabilities to study the current situation as regards the day-to-day application of the EU institutions' social schemes including the application of the budget line "supplementary aid for the disabled", to accompany the independent assessment regarding the compliance of rules of the EU institutions' social schemes with the UNCPRD, and, if necessary, to propose ideas and means of improvement. The Commission should set out a

detailed timeline for this process and ensure that the results of this process are implemented in practice.

Furthermore, there is already one area where the EC DSG sees an urgent need for improving the financial support for staff with dependants with disabilities. Every year a number of staff of the EU institutions cannot enrol their children in European Schools or has to move them out of European Schools because of their special educational needs. The alternative is either a Belgian Flemish or Francophone special school (the inclusion of children with special needs in mainstream schools is extremely difficult in Belgium) or an international school (for children who can be educated in an English-speaking educational environment; moreover, these schools tend to be more accommodating to children with special needs). International schools are all private, fee-paying schools and parents have to pay high school fees (up to 45.000 € or more per year). The European institutions can offer help to staff in this situation to cover part of the education fees of private schools through its social welfare special budget line for the disabled (the financial aid varies between 65% and 95% of the education costs depending on the total family income and requires annual re-application). However, the granting of this financial aid is based on the degree of disability of the child and other criteria.

Parents are therefore penalised twice for having children with special educational needs: firstly, they have to find alternative schools (there is only one English-speaking school in Brussels with a specific special education needs support programme, waiting time for enrolment can be up to 3 years) as the European Schools are not willing to enrol their children and/or they are not permitted to stay any longer in the European school system. Secondly, while school fees at European Schools are paid by the European institution where the member of staff works, those parents who cannot bring their children to European schools do have to cover themselves a substantial part of the fees for alternative schools, or even the whole amount if they are not granted any financial aid from the special budget line for the disabled.

We would therefore suggest that all staff with children having special education needs who cannot be enrolled in European Schools is put on equal footing with other staff not being in that situation and for whom the European institutions fully cover the school fees of the European schools.

Furthermore, it should be noted that the requirement for parents to apply annually for the social grant for alternative schooling is time-consuming and a source of considerable anxiety due to the delays in decisions and grant payments compared to the schools' payment schedules. In effect, the parents normally have to pay upfront in June or September but may not receive an approval decision and grant payment until the following January or February. Thus, these parents are carrying a financial risk which could have a serious impact on their scope to keep the child in the establishment in question, whereas parents using the European Schools have no such worries.

Recommendation 7: The Commission should end the discriminatory treatment of staff with children having special education needs who cannot be enrolled in European Schools and fully cover the fees of alternative schools. Additionally, the Commission (as well as other EU institutions) should be required to allocate appropriate budgetary resources to this budget line of "supplementary aid for the disabled" and to allocate enough staff to deal with requests for financial help in a timely manner.

Medical certificate

The ″medical certificate″ common to all EU institutions, which refers to the European Assessment Schedule for Physical and Mental Impairments (also known as the "European Disability Scale"), is not used to recognise a ″serious illness″. However, it is used for granting the doubling of the dependent child allowance and social aid benefits relating to disabilities. Representatives of persons with disabilities contend that this scale is excessively medicalised and does not take into account the individual circumstances relating to disabilities.

It is particularly inappropriate in the case of children with special educational needs. It should be noted that the recently adopted revised assessment form no longer includes a reference to such learning difficulties, whereas there are no accompanying instructions on where and how such needs should be recorded for the purposes of the JSIS and the financial grant. Furthermore, where such assessments are required to be repeated purely for the purposes of the grant and/or double child allowance applications, the cost should be covered in full by the administration.

The EC DSG agrees with the Ombudsman's suggestion that the Commission should initiate a review of the content of the medical certificate by the Inter-institutional Medical Board as regards, in particular, the appropriateness of the European Disability Scale in assessing a person′s degree of disability. Consideration should be given to the development of a separate assessment for children with special educational needs, taking account of the pedagogical aspects alongside the medical.

We certainly support the Ombudsman's observation, particularly regarding the European Disability Scale. This European Rating Scale has been proposed back in 2003 by European Parliament's Committee on Legal Affairs and the Internal Market in a report with recommendations to the Commission on a European disability rating scale. The European Disability Scale has never been endorsed or further developed. Moreover, we would suggest that all the EU institutions use the same system for assessing disability in all disability-related procedures, whether health-related or related to different entitlements and other forms of reasonable accommodation for carers of persons with disabilities, as currently each allowance follows a different procedure

Recommendation 8: The Commission should initiate a review of the content of the medical certificate by the Inter-institutional Medical Board as regards, in particular, the appropriateness of the European Disability Scale in assessing a person′s degree of disability and taking into account the social model of disability established in the UNCRPD..

<u>Associations representing persons with disabilities</u>

The Commission says that it has 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.

While we support the Ombudsman's suggestion that the Commission should establish regular contacts with the associations of EU staff members with disabilities (or of EU staff members whose family members have disabilities) in order to receive feedback on the day-to-day application of the JSIS and of the social schemes for persons with disabilities, we think the Ombudsman's suggestion is not going far enough. Associations of EU staff with disabilities and staff with dependants with disabilities should not only be asked to provide feedback on the day-to-day application of the JSIS and of the social schemes for persons with disabilities. The Commission should respect the general obligations under Article 4 of the UNCRP regarding the structured involvement of persons with disabilities, including children with disabilities, through their representative organisations, in the development and implementation of legislation and policies to implement the present Convention[3].

We are very concerned that in its meeting with the Ombudsman, the Commission only speaks about the involvement of staff with disability through their representative association which was only created in 2017, while the EC DSG created in 2011, was not mentioned at all. The Commission "*highlighted that until recently no association of disabled staff formally existed. However, in the past, Commission measures were*

[3] UNRCPD, Article 4 General Obligations, point 3. ", *and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations*."

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 ".

Furthermore, the Diversity Communication states that 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*". Again, the EC DSG which represents staff with dependants with disabilities is not mentioned. In this context, we also stress that in matters related to JSIS which is an inter-institutional service, representatives of other EU institutions, including representatives of staff with disabilities and carers of persons with disabilities should also consulted and involved in this process.

It should be noted that the EC DSG was also not consulted by the Commission when preparing the Diversity Communication. In March 2017, representatives of our group met with Commissioner Oettinger who indicated his intention to consult with support groups on the planned communication on diversity before adopting it. Unfortunately, this did not happen. We would therefore encourage the Ombudsman's to recommend to the Commission to involve support groups representing staff with disabilities or staff caring for a person with a disability through their representative organisations, in the development and implementation of policies, rules and measures concerning them.

Recommendation 9: The Commission should involve in a meaningful, timely and structured way the support groups representing staff with disabilities and staff caring for a person with a disability through their representative organisations, in the development and implementation of policies, rules and measures concerning them.

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