2020

ANNUAL REPORT OF THE

NATO ADMINISTRATIVE TRIBUNAL

2020 Annual Report of the NATO Administrative Tribunal

Introduction

This is the eighth Annual Report of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO). It covers the period 1 January 2020 – 31 December 2020 and is issued, on the initiative of the Administrative Tribunal, pursuant to Rule 4(h) of its Rules of Procedure.

In January 2020 the Tribunal adopted its procedures for the submission of *Amicus Curiae* briefs, clarifying the provisions of Rule 22 of the Rule of Procedure of the AT.

As will be outlined in more detail below, the Tribunal remained operational during the Covid-19 pandemic, but it had to adapt its proceedings to the circumstances. For most cases the oral hearings had to be postponed until the Organization put into place approved tools for videoconferencing.

Composition

The Tribunal's composition has remained unchanged during the reporting period and is as follows:

Mr Chris de Cooker (Netherlands), President;
Mr Laurent Touvet (France), Member and Vice-President,
Ms María-Lourdes Arastey Sahún (Spain), Member;
Mr John R. Crook (United States), Member; and
Mr Christos A. Vassilopoulos (Greece), Member.

The mandate of two members (Ms María-Lourdes Arastey Sahún and Mr John R. Crook) will expire on 30 June 2021. In January 2021, the President of the Tribunal informed the Secretary General of the matter, requesting the initiation of the internal

procedures for the appointment of the new members.

The Tribunal was throughout the year assisted in an outstanding manner by the Registrar, Ms Laura Maglia.

Organizational and administrative matters

Following the move to the new HQ in May 2018, and a transfer of the Tribunal's offices in August 2019, the Tribunal was in November 2020 again asked to relocate within the building. Functional and suitable space has been maintained and the Tribunal trusts that the present arrangements will remain unchanged.

An intern was selected to serve in 2020, but the candidate ultimately declined the offer.

Proceedings of the Tribunal in 2020

Due to the Covid-19 pandemic the Tribunal had to annul its scheduled 23-24 March 2020 session. It could also not hold a session in July for the same reasons, but it was able to examine cases by videoconference at its 28-29 September and 14-15 December sessions. The Tribunal availed itself of the tools the Organization put in place for online meetings, in full respect of the security regulations in force. It rendered 10 judgments, three of which were delivered in 2021 and are covered in this Report.

The Tribunal's President issued five orders in 2020 and the Tribunal one.

The NATO International Staff (NATO IS) was respondent in five cases, the NATO Support and Procurement Agency (NSPA) in two, the NATO Communications and Information Agency (NCIA), the NATO ASG Management Agency (NAGSMA) and the Supreme Allied Command Transformation (SACT) in one case each.

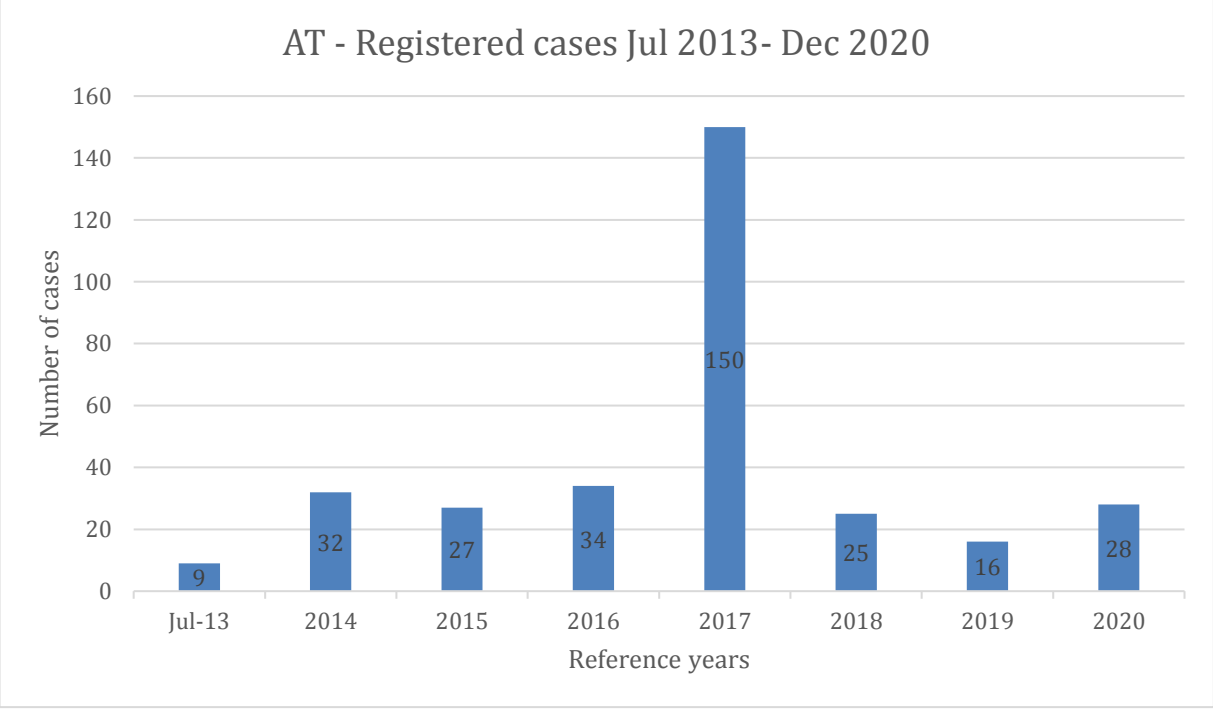
The Tribunal continued to resolve cases as expeditiously as possible under the circumstances of the pandemic situation.

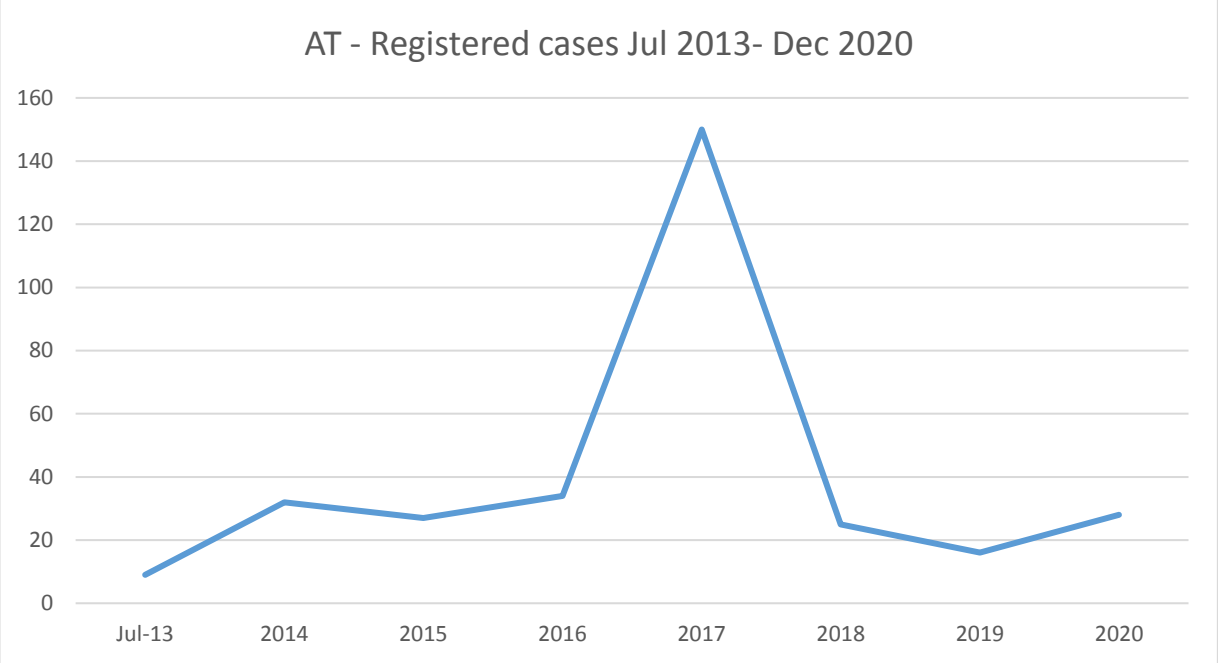
Most judgments were rendered in a time-span of between seven and fifteen months from the time of filing to the rendering of the judgment. One case took seventeen months, primarily because the case involved three joined appeals for which a more advanced online tool was required also in view of the subject matter of the cases.

In 2020, twenty-eight new appeals were introduced.

Cases are assigned to Panels of three judges or to the full Panel, with due consideration to the principle of rotation and to equitable distribution of workload. In each case, the President designates another member of the Panel or himself to serve as judge-rapporteur, *inter alia*, to prepare a draft judgment for consideration and approval by the Panel. Taking together the years 2013-2020, the President and the members have been assigned between 30 and 34 cases each.

The Tribunal published for the first time statistics of its judgments and orders in 2019. The statistics have been updated to include the judgments and orders rendered in 2020 and are published on the website. In addition to the statistics, below are two charts representing the trend of submitted cases.





The Tribunal's case law in 2020[1]

During the period covered by this report, Tribunal rendered the following judgments and orders, including judgments that were rendered in 2021 following the December 2020 session.

The AT President issued in total five orders:

- three joining orders: Case No. 2019/1290 and Case No. 2020/1298; Case No. 2020/1294, Case No. 2020/1295 and Case No. 2020/1296; Case No. 2020/1309 and Case No. 2020/1316;
- a withdrawal order in Case No. 2020/1299; and
- a dis-joining order in Case No. 2020/1312, Case No. 2020/1313 and Case No. 2020/1314.

The Tribunal issued one order in Case No.2020/1305 seeking to gain access to a document which was part of the proceedings and to which both the appellant and the respondent had access, but with respect to which the IS Office of Legal Affairs (OLA) invoked a claim of legal privilege (see *infra* under the case summary).

[1] The following summaries of Tribunal judgments are for information purposes only and have no legal standing. The full texts of the judgments can be found on the Tribunal's website.

Joined Cases Nos. 2020/1294-1296, **Case No. 2019/1287** and **Case No. 2020/1304** dealt with the financing of the medical insurance scheme, in particular with the payment of contributions by certain long-serving staff.

In 2017 a number of staff and retired staff lodged appeals against the 2 February 2016 NAC decision to amend the footnote to Article 51.2 of the Civilian Personnel Regulations (CPR). On 30 August 2018, the Tribunal in Judgments in Cases Nos 2017/1114-1124, 2017/1127-1242 held that the appeals were inadmissible since none of the appellants had been directly and adversely affected by a decision implementing this amendment to the CPR. The Tribunal noted the need for staff and retired staff to obtain legal certainty, observing that the inadmissibility conclusion did not prevent them from challenging the lawfulness of the amendment to the footnote in future challenges of implementing decisions applying it to them. The appellants in Joined Cases Nos. 2020/1294-1296 were among the appellants in Cases Nos. 2017/1127-1242, as was the appellant in Case No. 2020/1304 who submitted a separate appeal. The appellants challenged the letters of the Head of the IS Pension Unit forwarding statements showing the appellants' pension entitlements and giving details of the calculations including deductions for medical insurance. These appeals were considered admissible.

In consideration of the impact and importance of the cases, the President decided to have them heard by a full Panel consisting of the President and the four members of the Tribunal. An *amicus curiae* brief was submitted by the Chairman of the Confederation of NATO Civilian Staff Committees.

Detailed facts of the cases can be found in the 2018 Tribunal Annual Report. Concerning the merits, the Tribunal noted that this is not the first time that it or its predecessor had to adjudicate appeals concerning the adjustment of contributions to the medical insurance scheme (for example Cases Nos. 425, 723 and 901). The Tribunal recalled that it is inherent in any medical plan that contributions evolve in the light of increases in life expectancy and in medical costs and, moreover, that it was not in dispute that the funding of the RMCF was not sustainable and that remedial measures were needed as a matter of urgency. The Tribunal assessed whether the impugned decision was lawful. Several principles were considered, the principal ones summarized below:

Violation of the principle of equal treatment and non-discrimination

The appellants alleged that they were treated differently from staff members in a comparable situation who retired before 3 August 2016, both groups having contributed to the group insurance scheme for a minimum of 25 years, but one category had the right to free continued medical coverage and the other did not. The only difference was the date of retirement, which was said to be arbitrary and not to constitute an objective reason for abolishing the right to free medical cover.

The Tribunal considered that with the changes that were introduced to the RMCF over time, a number of different groups were created, each having different rights. Differences did exist between these different groups, but this was inherent in the administration of a program such as the RMCF, which required that lines be drawn to define which persons fell into which groups. The 3 August 2016 retirement date was such a line. The appellants were informed of this date, and had the possibility to retire before 3 August 2016, as well as the right at the time of retirement to discontinue their enrolment in NATO's medical plan. The Tribunal therefore did not accept that the drawing of this line violated the principle of equal treatment.

Violation of the principle of the protection of legal certainty and legitimate expectations

The appellants submitted that they had a legitimate expectation to benefit from free medical coverage after the age of 65 and referred to the Tribunal's jurisprudence regarding this principle. The Tribunal observed that the history of the RMCF clearly showed that the rules regarding the financing of the medical cover were repeatedly changed. This process of evolution over time showed that the appellants' claim of legitimate expectations to a static *status quo* had no basis in the facts.

Violation of acquired rights and/or upsetting the balance of contract

The appellants submitted that the right to free continued medical coverage in retirement previously guaranteed through the footnote to Article 51.2 of the CPR applied to them specifically, and was part of the provisions establishing their individual positions that were a determining factor in their decisions to accept employment with the Organization.

These provisions therefore gave rise to acquired rights. Alternatively, the appellants claimed that, should the Tribunal decide that the right to free continued medical coverage constituted a statutory provision, the underlying decision to revise the footnote upset the balance of their contracts and entitled them to compensation.

The Tribunal concurred with the positions taken by its predecessor, the NATO Appeals Board, and other international administrative tribunals, in particular the ILOAT, with respect to the legal principles and analytical approach applicable to these claims. The NATO Appeals Board consistently held that the provisions concerning the medical plan are statutory provisions that can be revised subject to certain limits. Staff and retirees cannot in general expect to retain the benefit of such general and non-personal provisions in force at the date of entry into their employment contracts, even when their individual contract makes reference to the said terms, as is normally the case. These terms, which are regulatory in nature, can be modified at any time by the competent administrative authority in the interests of the service, subject to the principle of no retroactive effects and to any limitations the competent authority may itself impose on its power to modify them. Further, if the effect of the modifications is to upset the balance of the contract between the staff member and the Organization, the former is entitled to compensation.

The Tribunal referred to AB Decisions in Cases Nos. 425 and 723, in which the Board found that certain past changes to the medical plan did not upset the balance of the contract. The Tribunal further noted that the current changes were prospective in operation and that the appellants had the opportunity to take alternative measures to avoid the impact of the impugned decision. It considered that the amounts involved were very reasonable compared to similar schemes elsewhere. They guaranteed continued medical cover without any changes in the reimbursement scheme, and did not significantly realign the employment relationship, affect the economic balance of the appellants' prior contracts, or alter a fundamental terms of employment in consideration of which they accepted their appointments many years ago, or which subsequently induced them to stay on. Therefore, the impugned decision did not violate acquired rights or affect the economic balance of the contracts.

The Tribunal also rejected pleas of negligence and violation of the principle of good

administration and the duty of care; violation of contractual obligations; violation of the principle of non-retroactivity; and violation of procedural rules. The appeals were dismissed.

Case No. 2019/1287 is the follow up of Case No. 2017/1126. On 5 September 2018, the Tribunal found in its judgment in Case No. 2017/1126 that the pre-litigation procedure was not properly followed in that the appellant was not heard by the full IS Complaints Committee but only by its Chair. The Tribunal remanded the case for a correct application of the complaints procedure. The appellant was a retired staff member who would have reached the required 25 years of contributions on 31 August 2016, whereas the amendment to the footnote entered into force on 3 August 2016. The arguments on the merits were very similar to those in Joined Cases 2020/1294-1296 and Case No. 2020/1304 and the Tribunal's assessment aligned with that in the cases *supra*. The Tribunal appreciated that application of the amended footnote to the appellant so close to meeting the conditions for free life-long medical coverage under the former version might have appeared harsh or unreasonable. It held, however, that, although the impugned decision did impose financial costs, the reasons for doing so were objective and the costs of providing life-long medical coverage to the appellant were reasonable. The appeal was dismissed.

Other cases dealt with: harassment and occupational invalidity, transfer of post, installation allowance and removal expenses, disciplinary proceedings, special salary adjustment, and definite-duration contract renewal.

Joined Cases Nos 2019/1284-1285-1291 deal with harassment and occupational invalidity. The appellant, in service with the IS since 1985, held the post of principal interpreter and supervisor and, following a restructuring of the service in 2015, was appointed team leader. In 2016 her performance was downgraded from "very good" to "good", her supervisor questioning her abilities to serve as a team leader and putting pressure on her to step down from this role. The appellant went on sick leave and in 2017 invalidity proceedings were initiated. The Invalidity Board recognized that the appellant was unable to continue in service and was entitled to an invalidity pension as of May 2018.

In response to the appellant's claims and request for assistance regarding alleged harassment and repeated bullying, the Organization did not recognize that these were established. However, it considered that the Head of the Interpretation Services was managing the service in a problematic manner and initiated disciplinary action in his regard.

The Tribunal considered that there was substantial evidence that the appellant was subjected to harassment and bullying by her managers, based on its review of the evidence of the unfavorable working conditions of ICS staff members as reflected, inter alia, in the reports of the internally-conducted investigation and of the Complaints Committee. The Tribunal therefore annulled the contested decisions insofar as the respondent made an error of judgment regarding the application of NATO policy on the prevention and management of harassment, discrimination and bullying in the workplace. The appellant was awarded €75,000 for the harm suffered.

The appellant also contended that her invalidity should have been determined to be occupational in origin, advancing several arguments (violation of the principle of legal certainty, error of judgment in the review of the report and the conclusion of the Invalidity Board (IB) as well as procedural irregularities). The Tribunal recalled its limited powers of review in examining the findings and reports drawn up by an IB and concluded that no factual error could be established in the IB's decision that would taint the contested decision with illegality. Case No. 2020/1291 was dismissed.

In **Case No. 2019/1293** the appellant challenged the NSPA's decision to transfer him to an interim post, followed by the suppression of his previous position in a reorganization of the service. The transfer was intended to cover the period until an available and suitable permanent post was found for the appellant, which occurred within a few months. The appellant did not challenge the suppression of his previous post, nor the transfer to the permanent position, but instead disagreed with the overall process, which in his view should have resulted in a termination of his contract with the payment of a loss of job indemnity. The Tribunal observed that the appellant had not contested the suppression of his previous position, which rendered the requested annulment of the contested decision without object. By challenging the transfer to the interim post the appellant was neither seeking to recover a position which no longer

existed, nor to re-establish that position. Finally the Tribunal held that the temporary nature of the appellant's assignment was established since a definite post was created to satisfy both the interests of the service and the professional capacities and expectations of the appellant. The appeal was dismissed.

In **Case No. 2020/1297** the appellant challenged NCIA's decision not to grant him installation allowance and removal expenses. The appellant worked as a contractor for a company supporting NCIA first in Belgium and then in a duty location in The Netherlands, before taking up his duties with the Agency in that location in The Netherlands. The Tribunal recalled its settled case law that what is important in determining the "actual and habitual residence" (Article 26.1.1 of the CPR) of a staff member in order to determine eligibility for the installation allowance is whether the staff member has his residence at the duty station on a continuous basis, regardless of various links he or she may have kept with the country of origin, such as taxation, social security benefits, maintenance of a home and its basic supplies or even administrative residence. In the present case the appellant worked continuously for almost a year in the duty location in The Netherlands before joining the NCIA as a staff member at the same location. Accordingly, he was not entitled to the requested allowance. The Tribunal dismissed the appeal.

Case No. 2019/1289 and **Case No. 2020/1301** were not joined, but the Tribunal decided to rule on them in a single judgment as they were presented by the same appellant, concerned two administrative decisions involving the same facts, and largely involved similar reasoning. The appellant, a NAGSMA staff member holding a definite duration contract, was suspended a few hours after the General Manager (GM) received a whistleblower letter from two people outside the organization claiming that his behavior was incompatible with NATO's rules. Disciplinary proceedings ensued. The Disciplinary Board (DB) recommended dismissal of the appellant and the GM decided to terminate his contract.

In the light of the requirements of Article 60.2 of the CPR, the Tribunal found that while the whistleblower's accusations may have met the conditions of being serious, there was no *prime facie* evidence that they were well founded. No evidence of such a nature was presented on the day that the administration received the accusations and

suspended the appellant. The Tribunal therefore held that the decision to suspend him was illegal, or at the very least premature. Regarding the Disciplinary Board that led to the appellant's termination, the Tribunal noted that it must, in accordance with Article 6.1 of Annex X to the CPR, be composed of three members. In the present appeal it was, however, composed of four members. The Tribunal noted that the DB's impartiality must be beyond doubt and that a disciplinary penalty recommended by a Board not properly constituted renders the subsequent disciplinary decision illegal. The Tribunal therefore annulled the GM's decisions to suspend appellant and to terminate his contract.

Case No. 2020/1300 was submitted by a NATO retiree challenging the refusal to grant a special adjustment of his pension to take account of high inflation during the months of June, July and August 2018. The appellant also claimed violation of the duty of care in view of the length of the procedures involved in considering his appeal.

During the hearing, the Tribunal heard an expert from the International Service for Remuneration and Pensions. The main matter at stake was whether the special adjustment method was correctly applied. The Tribunal highlighted that the process followed in both the annual and special adjustments of remuneration for staff of the Coordinated Organizations is based - after collection of the necessary statistical data by the appropriate bodies and the necessary consultations - on recommendations by the Co-ordinating Committee on Remuneration (CCR) to the Councils of the Coordinated Organizations, which take the final decision for their respective organizations. The recommendations are based on a methodology approved by the Councils, which in the case of NATO is incorporated in the CPR.

The Tribunal, recalling that in accordance with Article 6.2.1 of Annex IX to the CPR, it has the authority to rule on the legality of CPR provisions that seriously violate a general principle of international public service law, reviewed whether the correct interpretation was given to Article 7 of Annex II to the CPR. The Tribunal took guidance from the principles of the 1969 Vienna Convention on the Law of Treaties, which the Parties agreed applied in the circumstances, and in particular its Article 31 concerning the interpretation of legal instruments. The Tribunal concluded that the calculations concerning the adjustments in the reference periods considered were properly applied

in light of the inter-related provisions of Article 7 of Annex II to the CPR. Concerning the second claim, the Tribunal concluded that the time required between the first enquiries and the rendering of the judgment was not unreasonably long and that the alleged adverse effect on the appellant was not established. The Tribunal dismissed the appeal.

Case No. 2020/1305 concerns the non-renewal of the contract of the ACT's Financial Controller, following the Council's revision of the NATO Financial Regulations in 2015 introducing a maximum length of service for such positions. The appellant, who had been in service under multiple multi-year contracts since 2008, contested, *inter alia*, the non-extension of his contract, which the ACT wished to renew. The Tribunal recalled its previous case law holding that a staff member on a fixed term contract does not have a right to a further contract, and that the decision whether or not to offer one lies within the discretion of the HONB. The Tribunal can only review such a decision if discretionary power is abused. This was not the case in the present case, where the HONB did not renew the contract because of the NAC's decision limiting Financial Controllers' terms of service. The appeal was therefore dismissed.

In the course of the proceedings OLA raised the issue of legal privilege with respect to several documents originating in OLA, including a document, which was part of the appellant's submissions but to which the AT did not have access. The Tribunal ordered the Secretary General to declassify the document, and it was subsequently made available to the Tribunal. In connection with OLA's claim of privilege, the documents involved were assessed not to be relevant and were not considered by the Tribunal, so there was no ruling on the claim of privilege. However, for the future, the Tribunal stated that it is, in principle, prepared to address and give effect to appropriate claims of privilege with respect to documents involving legal (but not policy) advice provided in confidence by OLA attorneys to NATO bodies and staff members, or involving communications between OLA attorneys and outside counsel. However, such claims should be made only where the circumstances indicate that legal advice was provided with the expectation of confidentiality, and where the recipient does not defeat that expectation by disseminating the legal advice beyond the circle of persons who require knowledge of it in order to perform their duties.

Lastly, one case was summarily dismissed under Rule 10 of the Tribunal's Rules of Procedure. In **Case 2019/1292** the appellant, a former NSPA staff member, was put on sick leave and then, as of August 2010, on extended sick leave. In 2011 NAMSA (former NSPA) terminated her contract. The appellant lodged an appeal with the NATO Appeals Board (Decision No. 840-845-849) which annulled the decision and ordered her reinstatement. In 2012, following the appellant's continued sick leave, the respondent decided to immediately terminate her contract. The appellant contested this decision with the AT (Case No. 883) which annulled the termination only with respect to its immediate entry into force. In the present case, the appellant raised several issues regarding the 2010 facts and their related proceedings. She did, however, not follow the dispositions of the pre-litigation procedures in force since 2013 and the Tribunal summarily dismissed her appeal.