



## **Fourth meeting of the European Labour Authority Working Group on Mediation**

30 September and 01 October 2021

### **- Summary of deliberations -**

The ELA Working Group on Mediation (hereafter ‘the Group’) held its fourth meeting in a two-day event on 30 September and 01 October 2021 in hybrid format. 24 experts from the Member States, the European Commission, the European Parliament and ELA were present in Bratislava and another 14 participated via WebEx. The agenda of the meeting comprised five items: (1) presenting examples of cases which may be referred for ELA mediation; (2) update on negotiations with the Administrative Commission (AC) with regards to the establishment of a cooperation agreement, pursuant to Article 13(11) of the Reg. 2019/1149; (3) presenting draft Cooperation Agreement between ELA-SOLVIT; (4) presenting draft rules of procedure (RoP) for mediation of the ELA (first reading of Articles 14-23 and Annexes); and (5) presenting the compromise text on the RoP for mediation of ELA (full text).

In his introductory remarks, the Chair gave an update on the latest developments since the last meeting of the Group on 25 June 2021. He mentioned that comments on the summary of the third meeting of the Group were received and taken into consideration, and the final summary is now available on [www.ela.europa.eu/mediation](http://www.ela.europa.eu/mediation).

The Chair then went on to present the items on the Agenda for the meeting, and the Agenda was adopted.

### **Examples of cases which may be referred for ELA mediation (ref: WD3.0 REV)**

In his introduction, the Chair recalled the main discussions held during the last meeting of the ELA Working Group on Mediation, before giving the floor to a representative from ELA to present in more detail this topic. The representative from ELA, then, presented a revised version of the WD3.0 which includes indicative examples of disputes in the area of social security coordination, in relation to the Posting of workers Directive, concerning free movement of workers, and on social legislation in road transport.

After the presentation, many experts noted that the document was improved when compared to the previous version, and also its balanced nature in the list of examples presented. Some experts asked for clarifications about some examples related to social security coordination which were considered as too broad and generic and suggested to add further examples. Others pointed out the importance of having public administration representatives involved in the dispute or to consider more examples. Other representatives expressed the views that the document is fine, while considering its status as being a working document which contains a non-exhaustive list of potential examples.

As a conclusion, the Chair agreed with this last view, emphasising the fact that these are only predicted examples, and more concrete examples of cases will be made available once the mediation procedure becomes active. Such document is not meant to be neither public nor exhaustive. Consequently, the Group considered the general discussion about the examples closed.

## **Update on negotiations with the AC**

The Chair introduced this point of the agenda and gave the floor to a representative of ELA who provided the experts with an overview on negotiations with the AC with regards to the establishment of a cooperation agreement, pursuant to Article 13(11) of the Reg. 2019/1149.

After that, the Chair invited the current Chair of the AC who continued to report on the main conclusions and the next steps of this negotiation. It has been previously decided that the AC leading delegations would prepare the first draft of the cooperation agreement. The AC provided the first draft of the agreement on the 15<sup>th</sup> of September. It consists of 19 articles divided into 4 titles. ELA will reflect on the text and present its comments and feedback back to the AC. After the AC and ELA agrees on a final version, the cooperation agreement will be sent to the respective decision making bodies of the two entities for adoption. The Chair of the AC reiterated that it stands ready to discuss the remaining details of the cooperation agreement with ELA, once the final comments will be received.

## **Draft Cooperation Agreement between ELA and SOLVIT (ref: WD4.0 REV)**

The Chair introduced the draft of cooperation agreement about the referral of cases between ELA and SOLVIT and representatives from ELA and DG GROW presented the main outlines of the mutual cooperation, on the basis of the WD4.0 REV.

The presentation covered both the legal framework and the communication channels for this cooperation. Then, the representatives discussed the role of ELA and SOLVIT and their responsibilities. Finally, the presentation covered the shared roles of the two bodies involved in the cooperation as well as the proposed amendments to the cooperation agreement provided by the ELA legal service regarding Articles 2(2), 2(3) and 9.

In general, the experts fully supported the cooperation between ELA and SOLVIT, the proposed amendments provided by ELA legal service, as well as the quality of the agreement presented. A question was also raised whether the national SOLVIT centre's efforts on the case may be considered as fulfilling the direct contact and dialogue stage prior to launching the mediation procedure. The Chair provided explanation that, in accordance with Article 14 of the ROP for mediation, the Authority will invite Member States to inform whether direct contact and dialogue was conducted in order to resolve dispute before launching the first stage of mediation. Therefore it will be up to the Member States to inform ELA on whether they consider the direct contact and dialogue stage was completed.

Some experts proposed that the national SOLVIT centres should notify to the national administration the cases to be referred to ELA in advance, specifically before SOLVIT centres reach mutual agreement to refer the case. Others focused on the importance for National Liaison Officers (NLOs) to be informed of the referral and some other experts underlined the need to have a formalized way of communications and approvals of relevant institutions and authorities at a national level before referral takes place. Questions were also raised as regards the process by which ELA will ensure whether the case is within the scope of the mediation procedure, and what is the role of the applicant in the procedure. Given that the mediation procedure aims at resolving disputes between Member States, the Chair explained that the applicant will have no role in this procedure as the content of the referral is, as proposed in the cooperation agreement, anonymized. One expert highlighted the non-mandatory role for the legal advice, to which representatives of ELA and DG GROW replied that legal advice is informal only, optional, and not binding on the Commission and that SOLVIT centres are encourage to obtain it. Representatives from ELA and DG GROW stated that the mediation procedure should not replace the SOLVIT procedure, but rather that ELA mediation should be seen as extension

of the SOLVIT procedure. Both representatives confirmed that ELA will not launch automatically the procedure and it has been confirmed that the national SOLVIT centre is not the main actor in the mediation procedure since it has to inform its national authority and EC SOLVIT before the launch of the mediation procedure. Therefore, safeguards have been included in the procedure, but when it comes to internal processes between the national SOLVIT centre and the national authority, it will be up to the Member States to decide which national communication channel is more appropriate. In addition, after receiving a referral from the national SOLVIT centres, ELA will assess the cases received and decide whether it will launch a mediation procedure on its own initiative, notifying relevant Member States accordingly.

Finally, regarding comments received about the language to be used, the representative from ELA confirmed the language issue will be discussed bilaterally between ELA and SOLVIT but that in any case, the mediation procedure will include also translation and interpretation services to allow a complete understanding of the issue for Member States.

### **Rules of procedure (RoP) for mediation of ELA (ref: WD5.0 and WD 5.1.)**

The afternoon of the first day of the meeting was dedicated to the analysis of Articles 14-23 and the Annexes, while the second day of the meeting focused on a revised version of the text as a whole (namely the compromise text on the RoP, based on WD5.1 and the outcome of the discussion on the first day). Taking into account the comments of the first day as regards Article 14-23 and any remaining comments and feedback on Articles 1-13, the discussion was very detailed and allowed for all positions to be presented in detail and deliberated. A revised text of the RoP was sent on Monday, 4 October, to the experts of the WG for final editorial comments.

Below is a summary of the changes agreed during the meeting which were reflected in the revised text of the RoP.

#### **Article 1**

The proposals for amendments according to the comments received in advance and during the previous WG were presented by ELA. These were as follows: deleted the definition of ‘Eligible members of the Management Board’, agreed on definitions for “Individual case of application of Union law”, adding the word “institutions”. The definitions of “Mediators and experts of the Mediation Board” and of “Experts participating in an advisory capacity” were redrafted according to comments received by the experts and are now more detailed and in line with the founding Regulation.

On **articles 2 and 3** there were no comments received neither in advance, nor during the meeting.

#### **Article 4**

ELA explained the changes to the provision made on the basis of the comments received in advance in relation to Article 4(1), the last sentence has been deleted; on Article 4(2) “neutrality” has been added to the principles of mediation procedure. During the meeting also the cooperation is defined as “sincere” in order to have consistency in the text of the RoP.

On Article 4(3) experts discussed whether or not to include explicitly the social partners in the text of the Article. It was agreed that since experts from social partners organizations will act in an advisory capacity, no specific mention was necessary, since this term is included in Article 1 – definitions, which includes the experts from social partner organisations. On Article 4(4) it was agreed that the word “personal” will be deleted and replaced by the word “professional”.

## **Article 5**

On Article 5(2) the paragraph has been reworded following the experts' proposal for consistency with Article 13(9) of the founding Regulation. The mediation procedure is suspended in cases in which there are ongoing court proceedings at national or Union level. On Article 5(3) the processing and anonymization of all personal data related to the case shall ensure also by the national SOLVIT centres.

## **Article 6**

ELA explained that an amendment to Article 6 was made in order to align the RoP with Article 36(1) of the founding Regulation. The applications for access to EEA countries and Switzerland documents need to be consider in line with the principles of sincere cooperation from the side of these countries.

## **Article 7**

The changes to this provision, proposed by the Secretariat on the basis of all comments received before the meeting, were explained. The aim of these changes were to simplify and also to accommodate the proposals of the some MSs and of the Legal service of ELA.

On Article 7(1), experts agreed, further to the ELA's proposals, to have a more detailed text adding "other than those that are party to the dispute".

On Article 7(2) there were discussions on the proposed simplified text concerning the appointment process of mediators and experts. One expert expressed preference for the version presented during WG 3 (WD 5.0). This expert made a proposal in writing during the meeting. The Chair gave the opportunity to the expert to present the proposal, however another expert raised a point of order, since the proposal was too detailed and came too late for him to express any views on it. Nevertheless, the Chair stated that these proposals will be taken into consideration when finalising the text.

On Article 7(3) experts discussed the level of experience and knowledge that mediators should have with regards to the area under scrutiny. Some experts asked for more flexibility in the required qualifications mediators should have; others sustained that mediators should have a basic knowledge of the European legal framework related to EU labour mobility. The Chair explained that mediators need to have experience in mediation before they are appointed while the experts on the mediation Board should possess professional expertise within the remit of the ELA and that has been the idea behind the proposed redrafting, also taking into account the comments of the ELA Legal officer. The text of Article 7(3) was further amended accordingly, taking into account that mediator will preferably have "basic knowledge related to any of the different areas within the scope of the mediation procedure", while the experts shall have expertise in the fields of competence of ELA. It was agreed that the wording which refers to training shall be compulsory for both the mediators and the experts.

Concerning Article 7(4) rewording aiming at clarity and simplification and also accommodating experts' remarks has been made already before the meeting. During the meeting one expert raised a point about the selection and nomination process of the mediators, concerning the extent of the role of the Management Board in this process. Some experts pointed out that it is important to maintain sense and consistency of the text. Since a lot of supplementary proposals were put forward during the meeting they asked for more time after the meeting to have a look at the revised texts. As a consequence, ELA reworded the paragraph inserting to the extent appropriate for consistency with the rest of the provisions. The latest version sent to the experts addressed this issue with the insertion of "The Authority shall establish a list of all applications received, including all the details specified in the call, and an assessment on whether, in the Authority's view, the persons nominated for mediators and experts satisfy the requirements in paragraph 3. The list shall be sent to the Management Board who shall appoint [...]".

In paragraphs 5-7 only editorial changes were made during the discussions.

#### **Article 8**

That provision was reworded by the Secretariat (WD 5.1.) in order to include all the comments and suggestions made prior to the meeting by the members of the WG.

During the meeting, on Article 8(2), there were comments from the experts considering necessary to ensure continuity to the Mediation Board and it was proposed to follow the rules that are applied in the RoP of the undeclared work platform (UDW Platform). Finally, it was agreed that the sentence “Exceptionally, the initial term of one of the Deputy Chairs shall be 48 months” will be inserted to reflect the concerns raised.

Article 8(5)(g) was also modified so that the Chair of the Mediation Board would decide on the most effective working arrangements for conducting the second stage of mediation in consultation with both the Member States party to the dispute and the Deputy Chairs, as suggested by the experts.

#### **Article 9 – no comments**

#### **Article 10**

On Article 10, a revised text was presented in advance of the meeting in writing by one of the experts which has been discussed and accepted by the other experts during the meeting. The new text has been included in the RoP, with some amendments by the Secretariat made in order to ensure consistency with the rest of the texts.

#### **Article 11 – no comments**

#### **Article 12**

On Article 12 ELA made in advance of the meeting some changes to align the text with the changed ELA-SOLVIT Agreement. During the meeting a proposal came for a slight editorial change with a legal context and it was adopted.

#### **Article 13 – no comments**

#### **Article 14**

On Article 14(1), some experts raised an issue which was accepted, regarding the non-consistency of “shall” in the voluntary mediation procedure. As the RoP has a non-binding nature, the word “shall” was replaced with “may”. On Article 14(2) a few experts requested to increase the deadline from 10 to 15 working days for Member States to confirm in writing their agreement to participate in the mediation procedure. The proposal was accepted and the text was revised accordingly. On the same paragraph and the next one the experts requested to insert the following text “after verifying that the dispute falls within the scope of the mediation procedure” as a safeguard that ELA will review the dispute and confirm that it is under its mandate prior to launching the mediation procedure.

#### **Article 15**

On Article 15(2), it was agreed to keep the original text and maintain the wording “shall adopt” for consistency with the Regulation. On Article 15(3), experts proposed to add “requirement of anonymisation” for any other relevant information concerning the case under review. After the first-day meeting, the proposed amendment was considered redundant since the basic principles already provide for the anonymisation of all data prior to sending them to the Authority. On the same Article, it was also proposed and accepted to add a reference to Article 9(2). The last sentence of Article 15(4) was deleted since the objective of the mediation procedure is reflected in Article 2.

## **Article 16**

On Article 16, experts proposed and it was agreed to use unified wording “divergent points of view” for consistency reasons. On para 2 there was an editorial change. Regarding the last sentence of Article 16(4), it was agreed to delete it to be consistent with Article 15(4).

## **Article 17**

On Article 17(2), some experts requested to change the use of “any steps” with something more appropriate and in line with the Regulation text. A discussion about the change of “shall take” into “are strongly invited to” or “should take” took place. Given the non-binding nature of the agreement reached by Member States on the dispute, “should” was considered more appropriate.

On Article 17(3), some experts asked for clarifications regarding the content of “record of disputes” and who will have access to it. The Chair explained that the experts requested for a record of disputes to be maintained by the Authority in electronic format but there were no further discussions on this matter. He explained further that information such as the parties in the dispute, the mediator and the outcome, could be included, among other pertinent information. He also stated that ELA will reflect further on who will be able to access this record. An expert raised concerns on this issue that more specific information should be received about the information to be included and who will have access to it.

## **Article 18**

On Article 18, the experts agreed that Article 18(2)(h) should be deleted as the mediation procedure is suspended in that case, not terminated. In this regard, experts stated it is necessary to have a separate paragraph or Article concerning the suspension of the procedure. The Chair explained a provision relating to the suspension of the mediation procedure was inserted in Article 5(2).

On Article 18(2)(f), it was proposed to delete “which were not evident or documented when it was informed before the launch of the first stage of the mediation procedure”, because it appears as an redundant addition.

## **Article 19**

On Article 19(1), experts raised the importance of respecting the confidentiality of data when the working methods relied on online platforms and events -an issue which is already covered by the Basic Principles. On article 19(2), some experts stated that NLOs should not be in every instance the main communication channel between the Member States concerned but only when necessary. Also, some experts wanted the NLOs be informed about the procedure . Thus, it was asked to consider NLOs as contact points “where necessary”. Both these proposals are adopted in the final text.

On Article 19(3) there was discussion about the possible location of physical proceedings. The Chair explained that whereas proceedings during the mediation procedure could take place at ELA’s headquarters in Bratislava, or in any other place if there is agreement between the Member States party to the dispute and the mediator/Chair of the Mediation Board, physical hearings should only take place at ELA’s headquarters. This is because ELA will have the facilities to host such hearings which will lead to financial costs savings and also to better organisation.

On Article 19(4), some experts requested to extend the deadline in relation to the possibility to provide written comments on the other Member State’s reply, especially if there is need for translation and interpretation. The Chair reminded those deadlines are indicative and already take into account several issues, including translation.

On Article 19(5), clarifications were asked about how long it would take for a Mediator to be appointed. The Chair explained that if there is no agreement among Member States within the first 10 working days after the launch of the first stage, ELA will appoint a mediator on their behalf within the following 10 working days.

On Article 19(7) some experts considered that “shall control” is a too strong obligation for the mediator, and it has been replaced by “shall ensure” and it was accepted.

On Article 19(8), the basis on which the solution is reached should be in line with the EU acquis and therefore the sentence was redrafted to reflect that with inserting “taking into account the EU acquis and other interpretative documents provided by specialised bodies entrusted by Union law”.

On Article 19(10) and (17) some experts suggested that a deadline be inserted in the text for the mediator and the rapporteur to present the final report. The paragraphs were amended accordingly.

A suggestion was made to delete the last part of the sentence of Article 19(12) as it is self-evident, while on Article 19(13), the deadline was shortened to 15 “working days”, rather than “calendar days”. Both suggestions were implemented in the final text. On the same paragraph, a clarification was asked if the national representatives appointed by Member States could include experts from social partner organizations. The Chair explained that it is up to the Member States to decide which representatives will best represent their interest in the dispute and therefore “national” is deleted from 19(13)(c).

On Article 19(19)(b), “consult the social partners” was replaced with “ask for the opinion of experts from social partner organisations”. On the same sub-paragraph of this Article, the word “single” has been replaced by “first”. The idea of these amendments is to give possibility for different types of experts to be involved in the mediation procedure in advisory capacity, including experts from social partner organizations.

On Article 19(20) and also on Article 18(2)(c) one expert proposed to delete “evidence, facts” but ELA preserved the original version as being consistent with role of the concerted or joint inspections to reach common agreement on all the elements under scrutiny in relation to the dispute.

On Articles 19(24), it has been added “including during hearings” at the end of the paragraph, as proposed by experts.

## **Article 20 – no changes**

## **Article 21**

ELA explained that it will be further agreed with the Commission on the format of the report.

## **Article 22**

Article 22(3) appeared redundant and it was deleted. Also in paragraph 1 the reference to the ELA-AC agreement was deleted as this is outside of the scope of assessment of the RoP and consulting the MSs was envisaged as regards the improvement of the instruments.

## **Article 23 – no comments**

The Chair explained that even though the RoP enter into force on the day following their approval by the Management Board, it may take some time for ELA to start accepting cases as it will need to put the structure in place, such as issuing the calls for mediators and experts of the mediation board.

## **Annex 1**

In point 1, bullet on current job it was added “details of employer”

## **Annex 2**

In the first paragraph it was added “and by experts participating in an advisory capacity”, then some references to other provisions in the RoP were corrected, also a new bullet point was added specifically referring to “Expert participating in an advisory capacity”.

## **Annex 3**

In point 4 the title was changed and “organizations” was added after “social partners” in line with Article 1. On point 6 “Lessons learnt” was deleted.

## **Annex 4**

Replaced the abbreviation AC with “Administrative Commission”.

## **Concluding remarks**

The Chair reminded the next step to be followed:

On 4 October, the RoP for ELA mediation will be sent to the experts for editorial comments/quality check. The experts were notified about the possibility to send written comments following the meeting. The deadline for sending the comments in writing will be 15 October.

On 18 October, the version of the Rules of Procedure that will be sent to Management Board, will be sent to the experts. If an expert does not agree, the expert must send to the Mediation Secretariat a dissenting opinion to be included in the summary of proceedings which will be sent to the Management Board. The deadline for sending a dissenting opinion will be 20 October.

On 27 October, the Decision on the adoption of the Rules of Procedure for ELA mediation, together with the summary of proceedings will be sent to the Management Board for adoption, together with the ELA-SOLVIT agreement for referring cases for mediation, for information.

Finally, the Chair thanked all participants in the event for their active participation and on behalf of the Executive Director of ELA concluded the meeting.