



Third meeting of the European Labour Authority Working Group on Mediation

25 June 2021

- Summary of deliberations -

The ELA Working Group on Mediation (hereafter ‘the Group’) held its third meeting on 25 June 2021 by video conference. The agenda of the meeting comprised four items: (1) updating the Group 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; (2) presenting examples of cases which may be referred for ELA mediation; (3) presenting the proposed procedure for the referral of cases from SOLVIT to ELA; and (4) presenting the draft rules of procedure for mediation of the European Labour Authority (ELA).

In its introductory remarks, the Chair gave an update on the latest developments since the last meeting of the Group on 23 April 2021. He mentioned that comments on the summary of the second meeting of the Group had been received and taken into consideration, and the final summary is now available on www.ela.europa.eu/mediation.

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

Update on negotiations between ELA and the AC

Before giving an update on negotiations held between ELA and the AC, the Chair of the AC Ms Elisabete Silveira took the opportunity to address the Group. She mentioned that the AC delegations were consulted on a document prepared from the Leading Delegations of the AC, a revised version of which was discussed in the Working Party on 1 June. A final document was prepared after the Working Party to be used as a basis for the second meeting on the ELA – AC cooperation on 29 June. The Chair also mentioned that the incoming Slovenian Presidency will participate in the future Group to ensure continuity, as Slovenia’s mandate of the EU Presidency starts on 1 July. She further added that, in addition to the ELA-AC cooperation, the AC is currently assessing its internal rules of procedures in order to ensure that the AC will be ready to cooperate with ELA.

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

In his introduction, the Chair stated that one of the main innovations of the ELA mediation procedure is that it extends over several areas of EU labour mobility law where currently there is no dispute settlement mechanism among national authorities. He also clarified that in WD3.0, some examples were being provided of potential disputes which may arise between national authorities and which may be referred to ELA for mediation. One has to keep in view that these are only predicted examples from a theoretical approach, and more concrete examples of cases will be made available once the mediation procedure becomes active.

A representative of ELA then provided 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, some experts mentioned that the list was unbalanced, since a significant number of examples of cases concerned social security. Some members also asked for clarifications on the referral of individuals cases since it was not clear to them if the ELA mediation procedure would deal only with one case of a single person or if it could also accept a group of individual cases that raise the same (or a similar) issue of application of Union law. Another point was made to underline the need to ensure the facts of cases referred were as clear as possible.

More information was asked on some of the cases presented, whilst some other experts proposed some other examples of cases which were not included in the list. As a conclusion, the Chair invited all experts concerned to send further examples in writing, with the aim of adding more potential examples to WD3.0.

Proposed procedure for the referral of cases from SOLVIT to ELA (ref: WD4.0)

Representatives of ELA and the Commission (DG GROW) provided the experts with an outline of the process to be followed by SOLVIT on the cases which could be referred to ELA for mediation, on the basis of WD4.0.

The proposed process for referral of SOLVIT cases to ELA started by identifying which cases may be referred to ELA, being unresolved cases within the legal scope of the ELA Regulation. SOLVIT cases are generally handled by two SOLVIT Centres ("home" and "lead"): both the home and lead national SOLVIT Centres concerned should mutually agree to refer the case to ELA for mediation within a specified deadline. Those centres should, within the scope of the usual SOLVIT case-handling procedures, also be encouraged to obtain informal legal advice from the Commission's services before reaching agreement to refer the case to ELA for mediation. If agreement is reached to refer, the national SOLVIT centres concerned should notify the national authorities concerned about the agreement to refer the case to ELA and shall also inform the SOLVIT Coordination Team of the SOLVIT Centres' agreement to refer the case to ELA.

When referring the case to ELA, the national SOLVIT Centres concerned shall send a case summary, including any necessary documentation. Upon receipt, ELA will assess whether the case in question falls within the scope of mediation and will inform the SOLVIT Coordination Team and referring national SOLVIT Centre/s accordingly. Finally, ELA should inform the national SOLVIT Centres concerned and the SOLVIT Coordination Team on its decision and on the consent of the national authorities to accept the case for mediation. If the case is accepted, ELA will inform the SOLVIT Network about other activities carried out during the ongoing mediation procedure. This may be done via a specified communication channel, to be set out in future working arrangements between ELA and the SOLVIT Network.

After the presentation, some experts made clear that the proposal for SOLVIT to refer cases to ELA was welcomed. One expert underlined how, since some unresolved SOLVIT cases progress to court or to infringement proceedings by the Commission, it was a positive step to be able to offer further mediation opportunities via ELA. Some experts expressed the view that the mutual agreement between SOLVIT Centres to refer a case to ELA is an internal matter of the SOLVIT Network, falling outside the scope of the ELA mediation procedure. Another expert was of the view that consent of both SOLVIT Centres should not be necessary.

Questions were also raised as regards the number of cases which the SOLVIT Network may potentially refer to ELA; and whether the SOLVIT Centres will be acting as representatives of the Member States during the mediation procedure, or if this will be done by national administrations. A representative from DG GROW clarified that the national administrations will be in charge of the mediation; it will

however be the SOLVIT Network that receives the complaint from citizens or business, in which the difference of opinion on the application of EU law becomes apparent. The number of cases referred by SOLVIT is expected to be low.

Some experts also asked whether the SOLVIT Centres will seek and receive the consent of the individual/s involved in the case prior to referring the case to ELA. The Chair responded that this is an issue that SOLVIT will need to examine.

Concerning a number of questions about the “legal advice” provided by the Commission’s service, the representative from DG GROW stated that obtaining informal legal advice in certain cases is already an integral part of the SOLVIT case-handling system: such advice is not binding on the Commission.

On the question of notification of the national authority, one expert was of the view that this notification could be done by ELA and there was no need to require the national SOLVIT Centres to do this. This expert and others underlined the need to reduce administrative burden. However, a large number of experts expressed the opinion that SOLVIT Centres should notify their national administrations before the SOLVIT Centres refer a case to ELA. Some experts underlined that such notification did not remove the need for the national administrations subsequently to agree mutually to the referral to mediation.

Thus, ELA and the SOLVIT Network should continue working together to ensure that the procedure both before and after the case reached ELA reflects the position expressed during the Group. A document drawing up proposed working arrangements will be prepared.

Rules of procedure for mediation of ELA (ref: WD5.0)

The Chair started presenting the proposed rules of procedure (ROP) for mediation of ELA, on the basis of WD5.0. The ROP include the general provisions (Articles 1-6), the structure and organization (Articles 7-8), the launch of the mediation procedure (Articles 9-13), the stages of the mediation procedure (Articles 14-18). He then moved on to the working arrangements as those are described in Article 19 and lastly the final provisions (Articles 20-23) and the Annexes. By the end of the meeting, the discussions reached until Article 13. The remaining articles will be covered in the next WG meeting. Note was taken of all the comments made with a view to provide a revised text for the next meeting of the Group.

Article 1

On Article 1, clarifications regarding who are the ‘eligible members of the Management Board’ were raised, with a recommendation to delete this term. The Chair clarified that the Management Board will be asked to nominate experts as mediators and experts for the Mediation Board, and the Management Board members who will be eligible to nominate experts are those members coming from the Member States. Nevertheless, this term will be reflected upon in order to find a better description.

Other comments concerned the social partners who may participate in an advisory capacity during the mediation procedure, and whether they will be national or sectoral, and the definition “national SOLVIT Centre” since this is not in use in the ROP.

Article 2

On Article 2, there were no comments.

Article 3

On Article 3, it was mentioned that the term ‘individual cases’ as provided in Article 3(1) of the ROP, as well as in Article 13(1) of the founding Regulation needs to be analysed further, and that the ROP could be streamlined with the inspection guidelines. The Chair clarified that ELA had looked at the inspections guidelines, and not many similarities have been found. He added that a reference to individual cases was included in the Working Document 5.0 as so it is stated in Article 13 (1) of the ELA Regulation. Nevertheless, this will be reflected upon with a view to define what is meant by ‘individual cases’. Concerns were also raised as regards the term „disputes admissible for mediation”.

With regards to Article 3(2), the question was raised on whether the outcome of the mediation procedure will be binding. The Chair clarified that the outcome of the mediation procedure is a non-binding opinion, as provided in the founding Regulation.

Article 4

On Article 4 (2), a request was made to add the principles of ‘neutrality’ and ‘impartiality’. With regards to Article 4 (3), a clarification was asked on whether the ROP should include a reference to social partners in this paragraph.

Article 5

On Article 5(2), a discrepancy was highlighted between Article 13(9) of the founding Regulation, which states that stating that the mediation shall be suspended in case court proceedings are initiated, and not that the procedure shall end as stated in the ROP. It was pointed out that the two text should be aligned.

With regards to the anonymisation of personal data foreseen in Article 5(3), it was asked how the Member State receiving anonymised data will be able to recognize the case or the persons concerned to be referred to ELA for mediation. The Chair clarified that the anonymisation of personal data is provided in Article 13(8) of the founding Regulation.

Clarifications regarding who will organise the discussions between the Member States during the direct contact and dialogue stage were raised. The Chair explained that during this stage, no involvement is foreseen for ELA, pursuant to the majority views expressed on this point by the experts in their written views following the first meeting of the Group.

A suggestion was made to include in Article 5(3) that all other actors who will send cases to ELA should anonymise data. The Chair clarified that the text could be indeed modified to state that all other actors, such as SOLVIT and the AC, should anonymise data prior to sending it to ELA.

Article 6

On Article 6, clarifications were asked on the practical meaning of this article, and on who will have access to the relevant documents. The Chair explained that any requests for access to documents in relation to the mediation procedure shall be handled in accordance with the applicable rules, i.e. Regulation (EC) No 1049/2001.

Article 7

A recommendation was made that Article 7(1) should mention the consent from the Member State as a requisite to engage in the second stage of mediation, and that Article 7 (3) should state that mediators and experts ‘shall’ receive training, rather than ‘may’. It was also suggested that the social partners should have a role in providing training to experts on matters pertaining to topics such as

industrial relations and collective agreements. Lastly, a request was made to make a distinction between ‘nomination’ and ‘appointment’ of the members of the Mediation Board.

Article 8

Clarifications were raised *inter alia* on Article 8(1), that the ROP do not need to state that one panel of the Mediation Board shall be established; on Article 8(2), to clarify the voting rules in the appointment of the Chair and Deputy Chairs, and on Article 8(5), to clarify whether the rapporteur will be chosen from among the experts of the Mediation Board, whom to inform in case the situation of an expert changes as regards the issue of conflict of interest – with obligation on experts not on the Chair, and whether the Chair should consult the Deputy Chair in performing the functions specified in Article 8(5).

Article 9

On Article 9, there were no comments.

Article 10

A suggestion was made to swap the first and second paragraphs of Article 10. ELA should inform the Member State that it intends to launch a mediation procedure, and then ask the Member State if they plan to engage (or have been engaged) in direct contact and dialogue. If the Member States engage in direct contact and dialogue, they will inform ELA of the outcome, so ELA can then launch its mediation procedure on its own initiative if the dispute cannot be solved bilaterally.

The Chair clarified that the way the ROP have been proposed, in case ELA would like to launch a mediation on its own initiative, it will first ask the Member States concerned whether they want to take part in this mediation, and if all Member States confirm, then ELA will invite them to start the direct contact and dialogue procedure, if they have not yet engaged in such a procedure. If from the outset the Member States concerned are not willing to take part in the mediation procedure, then there would be no point in pursuing the procedure further.

Another suggestion was made that the confirmation period provided for in Article 10 (1) should be extended from 10 to 15 working days. Lastly, clarifications were asked on why the text does not foresee the possibility of the submission of cases by social partners to ELA for mediation. The Chair clarified that the founding Regulation does not foresee a role for social partners in sending cases to ELA. Nevertheless, ELA may take any input from the social partners into consideration, and decide to start a mediation on its own initiative.

Article 11

On Article 11, there were no comments.

Article 12

On Article 12 (1), it was pointed out that the text ‘shall’ should be replaced by ‘may’, with regards to the SOLVIT Network’s referral to ELA. The possibility of a reverse referral whereby ELA would be able to send a case to SOLVIT was also mentioned.

Article 13

On Article 13, it was suggested that the deadline for a Member State who decides not to participate in mediation to inform ELA and the other Member States that are party to the dispute should be extended from 10 to 15 working days from receipt of request.

Conclusions and next steps

The Chair concluded by informing the experts that the summary of the deliberations will be drafted by the Secretariat and submitted to the experts via written procedure within 21 calendar days. The experts may provide their comments, if any, within 14 calendar days after receiving the summary. They may submit suggestions, contributions and questions through the new functional mailbox mediation@ela.europa.eu, which, since 7 June 2021, replaces the mailbox formerly in use.

As regards the next steps, the Chair informed that on 29 June ELA will participate in the second technical meeting between **ELA – Leading Delegations of the AC** to present to each other the views exchanged in writing and to have a discussion and exchange views on the way forward. According to the initial planning, following this meeting the first draft of the cooperation agreement will start being drafted.

With regards to relations with the **SOLVIT Network**, a first draft of the Memorandum of Understanding between ELA and the SOLVIT Network will also start being prepared, on the basis of WD4.0, and also taking into account the comments expressed by the experts.

Finally, the Chair informed that the **next Group meeting will take place in the beginning of October 2021**. ELA is also looking at the possibility to hold this meeting in a physical format in Bratislava, and more details will be sent in due course, and as soon as the decision is taken, in particular as regards the COVID-19 situation and measures taken by the Slovak government with regards to the organisation of meetings.

On behalf of ELA's Executive Director, the Chair thanked all the experts for their participation and closed the meeting.