

MEDIATION

**The procedure for appointing the mediator
challenged before the Court of First
Instance**

**R&D requests for the establishment of a
professional mediation service worthy of
the name**





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For some time now our institution seems to have specialized in announcing great changes... which systematically result in the absence of any concrete measures.

Thus, the motto of our administration seems to be now:

***"If we want everything to remain as it is,
everything must change"¹***

Zero tolerance against harassment, "Fit@work", "Well-being", "Talent management" ... so many beautiful slogans - beautiful by form but empty of substance - that put the staff on legitimate waiting for a Real implementation of these programmes ... while in fact "everything remains as it is" ...

Facta non verba

In our special [Renard Déchaîné "Harassment and other psychosocial risks"](#), we have already denounced the discrepancy between, on the one hand, political declarations and, on the other hand, the sad reality of a deplorable management of harassment seen by colleagues themselves, whether they have been abused or simply called to testify at IDOC, particularly when the allegations concerned members of the management.

We also emphasized, according to the unanimity of the experts, that a genuine anti-harassment strategy and an effective management of conflicts required, first of all, **the establishment of a genuine professional mediation service.**

In addition, we proposed prevention measures related to the analysis of the risks incurred and / or to come by our colleagues, including the establishment of a real "relational engineering" which would allow to intervene on managerial practices and anticipate dysfunctions within teams (see the special ["Renard Déchaîné" "Harassment and other psychosocial risks", Part IV, Prevention devices – page 48](#)).

We also stressed that, given the habit of trivializing the "management of conflicts" and the fatalism of adversity, it was essential to promote relational quality and otherness. It is necessary to be able to respond quickly and effectively to the difficulties encountered.

¹ *The Leopard* by Giuseppe Tomasi di Lampedusa,

It must be noted that at present the mediation service is unable to meet the needs of our institution and the expectations of our colleagues. It is very unfortunate that, instead of examining the measures that can ensure the smooth functioning of this service, the administration appears to be interested in it only at the occasion of each appointment procedure, primarily for the purpose of emptying the opinion of the Staff Committee imposed by the 2002 Decision.

It should also be noted that the procedure for appointing the mediator who took office on 1 October not only was contested by the Staff Committee but is also being appealed against before the Court of First Instance by an unsuccessful candidate.

Below you will find more details of the critical analysis of **R&D**.

R&D requests for the establishment of a real professional mediation service.

Cristiano Sebastiani,
President

The mediation service must be provided with sufficient resources in order to guarantee optimal functioning

It must be able to use procedures that enable it to carry out its tasks.

It must also be able to fulfil at all times the principles of neutrality, impartiality, independence and confidentiality, and be perceived as a service that fully respects these principles.

This is not the case at present: the Commission's mediation service is in no way able to give a satisfactory answer to the growing number of colleagues who wish to make use of its services.

An increasing number of requests that the mediation service is in no way likely to manage satisfactorily

In particular, according to all the annual activity reports of the mediation service, it appears that the number of cases dealt with has steadily increased in recent years. It increased by more than 20% between 2014 and 2015.

In addition, cases are becoming more complex with an increasing number of cases involving relational conflicts. 2014 was the first year these files far exceeded those dealing with financial rights and obligations. Unfortunately, 2015 has only confirmed this trend.

The specificity of these cases requires time and human resources that would be competent in the handling of this kind of problem, which this service, currently composed

of five persons ([SM — Mediation Service](#)), is far from having.

As acknowledged by all the colleagues who served as mediators in their meetings at the Staff Committee, due to the lack of adequate resources, tools and procedures enabling the mediation service to find a satisfactory solution, this service has been too often not in a position to ensure an appropriate response to the cases submitted, which only aggravates the dismay of the colleagues who have appealed to it.

And it has been years as well that the general recommendations of the mediation service, increasingly worrying, are not followed by effects.

Particularly, the recommendations of the 2015 report are all the more alarmist within the framework of :

- an compulsory mobility, especially for heads of unit,
- the reorganization of Directorates-General and services,
- the blocking any voluntary mobility...

It is obvious that in such a context the number of cases can only increase.

We have come to the point that the absence of means justifies the absence of "publicity" of the annual report.

This reveals another drastic dysfunction absolutely unacceptable!

Under these conditions, it is not surprising that colleagues increasingly prefer to address the European Ombudsman and R&D naturally offers them assistance.

The only time the administration seems to be interested in the mediator is at the occasion of the appointment procedure...

Rather than examining the functioning, the means and the resources made available to the mediation service ... the administration, faithful to its "appointment machine" vocation

seems to care about this service only in the course of each appointment of the mediator....

...every effort shall be made to undermine the Opinion of the Staff Committee imposed by the Commission Decision of March 2002 on the appointment of the Ombudsman

In particular, it is not surprising that an administration increasingly taking inspiration from the "act of the Prince" ("*Fait du Prince*") as a basic principle for its decisions, being more and more intolerant to criticism, could actually consider Staff Committee's opinion on the appointment of the mediator, imposed by the 2002 decision, as an unnecessary step and an unacceptable hindrance to his com-

plete freedom to choose the best candidate for the post.

Everyone should understand that the transparency of the appointment procedure and the involvement of the Staff Committee are essential prerequisites and crucial elements as they contribute to the perception of the independence of the mediator.

In 2013, it was the first time since the establishment of the mediation service that the administration had envisaged the appointment of the mediator without prior publication of the post to be filled by simple internal mobility in the absence of any appeal to candidatures.

Faced with the very strong reaction of the staff representatives who had denounced the visibly untenable nature of this approach, the administration refrained from designating the mediator by simple mobility and without any transparency.

However, **it was only in 2016, 3 years later**, that the administration finally published a vacancy notice.

Five applications were received. Following the pre-selection, only one was selected. The opinion of the Staff Committee was requested for this one candidate without the Committee having at its disposal:

- any detailed information on the conduct of the selection procedure,
- the slightest look at the analysis of the other four candidates and therefore, no possibility to pronounce on them,
- the relevant elements making it possible to assess the proposed choice.

The Staff Committee immediately denounced the unacceptability of this approach and asked for full information on the comparison of the candidates' merits, to be able to issue a detailed opinion.

DG HR rejected all the requests of the Staff Committee by taking out of its dusty drawers a SJ opinion dating from 10 years ago (sic!).

But it did not stop there! It declared that it was entitled to note the absence of an opinion from the CSC, thus proceeding without delay to the appointment of the successful candidate.

... Since the adoption of the Commission Decision of March 2002, this was the first time that the mediator was appointed without the opinion of the Staff Committee!

In these circumstances, and without prejudice to the merits of the appointed colleague, it is clear that the position and credibility of the new mediator can only be deeply impaired. **R&D** deeply regrets it given the importance of the challenges he will have to face.

And it is certainly not the decision to **re-qualify the post of mediator as a principal adviser**, which the suc-

cessful candidate will be able to benefit from, that will enable this service to overcome the operational difficulties stated in the latest activity report.

In particular, the unilateral decision of DG HR deprived the Staff Committee of the possibility of adopting a reasoned opinion on the proposed candidate, failing also to organize a previous meeting with the latter as in the past. This interview would have al-

lowed the elected representatives to raise all appropriate questions and to ask for any clarifications...

However, as the Committee rightly pointed out, on reading the CV of the selected candidate, these clarifications would have been all the more necessary in view of his long experience in DG HR, IDOC and as head of the medical service.

This is a professional experience which can raise questions about the perception of the independence of the future mediator in relation to services which are often the source of complaints submitted to the service which he will be responsible for.

Again it is unnecessary to point out that the confidence of the staff in the total independence of the mediator's service is a prerequisite for the colleagues to appeal upon it and for the staff representation to accompany these procedures with determination.

It is not enough to claim it. The principle of independence is not an empty slogan; it must be established in a visible way.

It starts with an indisputable appointment procedure where the opinion of the Staff Committee could actually fully fulfil its role.

The procedure for appointing the contested mediator before the Court of First Instance

In these circumstances it is not surprising that, in addition to the very tough criticisms expressed by the staff representation, the procedure for appointing the mediator is now being contested before the Court of First Instance by an unsuccessful candidate for the post.

A complaint was filed before the Court of First Instance (<http://curia.europa.eu/juris/document/document.jsf?docid=185190&doclang=FR>) to seek annulment of the Commission's decision of 15 June 2016 on the appointment of the mediator and to order the Commission to pay the sum of **one hundred thousand euros in material and moral damages suffered as compensation**.

In support of the applicant's action, the following was specifically cited: misuse of power, manifest error of assessment, breach of the principles of legitimate expectation, proportionality and good administration committed by the Commission and lack of effective consultation of the Staff Committee.

Without prejudice to the decision to be taken by the Court of First Instance, and without prejudice to the merits of the colleague who was appointed to that post, it is clear that the mandate of the new mediator does not start under the best conditions, especially as this litigation settles within a service of such a small size.

R&D PROPOSAL

R&D, faithful to its commitment not to limit itself to criticism but to always accompany it with proposals inspired by the best practices known in this field, will shortly organize a conference with specialists in the field of professional mediation.

Our institution and staff deserve for a real professional mediation service to be finally set up; a service appointed and operating under conditions that fully guarantee the principle of impartiality and independence vis-à-vis the administration, essential conditions to earn the trust of staff.

A mediation service that must also have the necessary resources, procedures and tools to respond efficiently to the expectations of colleagues who appeal for its assistance.

