

CIRCLE I

Working Document 09

NOTE

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from :	Secretariat
to :	Members of Discussion Circle 1 "Court of Justice"
Subject :	Right of appeal against agencies created by secondary legislation <sup>1</sup>

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1. Regulations creating agencies generally contain provisions establishing channels for appeal to the Court of Justice against the agencies concerned (see Annex). Comparison of these provisions shows that:
  - appeals in respect of contractual and non-contractual liability are always provided for, using identical wording.
  - however, the "legality review" proceedings under Article 230 TEC (in actions brought by individuals, institutions and Member States) are sometimes made possible by an express provision (of broadly identical wording in all such cases) <sup>2</sup>, while sometimes no such provision is made <sup>3</sup>.
  - for some agencies, review of the legality of their acts, on the basis of proceedings analogous to the fourth paragraph of Article 230 TEC, is entrusted to the Commission; of course, the

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<sup>1</sup> This note does not concern bodies set up under the EU Treaty, such as Europol.

<sup>2</sup> This is the case of the European Monitoring Centre for Drugs and Drug Addiction, the European Monitoring Centre on Racism and Xenophobia, the European Aviation Safety Agency, the Community Plant Variety Office and the Community Trade Marks Office (in these latter cases, the remedy is available to persons who have been party to proceedings before an internal board of appeal and who have been adversely affected by the board of appeal's decision; in the case of the Trade Marks Office, the Court of Justice not only has jurisdiction to annul the decision but to alter it).

<sup>3</sup> European Maritime Safety Agency, European Food Safety Authority, European Agency for the Evaluation of Medicinal Products, European Environment Agency.

Commission's decisions are themselves subject to appeal before the Court under the fourth paragraph of Article 230 TEC <sup>1</sup>.

- lastly, in the single case of the European Aviation Safety Agency, an additional provision makes it possible to appeal against failure to act (Article 232 TEC).
2. These variations in review of legality might appear at first sight to have a simple explanation: the legislator felt no need to afford a remedy under Article 230 in the case of agencies with no power to adopt acts having legal effect (i.e. "adversely affecting" acts). This could in particular explain the distinction made between the European Aviation Safety Agency on the one hand and the Maritime Safety Agency and the European Food Safety Authority on the other.
  3. However, this logic does not seem to have been followed consistently. Thus, one may wonder why the legislator afforded remedies under Article 230 in the case of the two European monitoring centres when neither has received any formal power to adopt legal acts. This fact notwithstanding, the drafters of this legislation apparently felt that the possibility of these monitoring centres adopting adversely affecting acts could not be ruled out in practice. Of course, the same concern could also apply to other agencies, such as the Maritime Safety Agency and the European Food Safety Authority. Although they do not take formal decisions themselves, they prepare the decisions taken by the Commission and have missions susceptible of affecting the rights of individuals, for example through their communications to the public.
  4. It should be noted that in view of the inconsistent approach to the review of legality, the Commission, in a 2002 Communication (COM 2002 (718) final) recommended the European Parliament and the Council to standardise the system by making Article 230 TCE applicable to the acts of all agencies on the grounds that the principle of legality and effective legal redress, as established in consistent case law (and incorporated in Article 47 of the Charter), requires agencies to observe the institutional system within which they operate, meaning that they cannot escape judicial review of legality.

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<sup>1</sup> CEDEFOP, European Foundation for the Improvement of Living and Working Conditions, European Agency for Safety and Health at Work.

6. In view of the foregoing, the discussion circle could recommend that Article 230 TEC be made applicable to legal acts adopted by the institutions *and the bodies and agencies*. Naturally, in this event an action against a body or an agency would only be admissible if the agency had adopted, in the specific case, a "legal act" within the meaning of the case law of the Court <sup>1</sup>. Furthermore, such an approach would not necessarily prevent the legislator from providing for specific arrangements on a case-by-case basis, such as additional powers for the Court (the power to alter a contested act in the case of the Trade Marks Office) or widening the range of persons to whom the remedy is available (in the case of the Trade Marks Office and the Community Plant Variety Office) or of establishing preliminary referral to the Commission if it were desired to maintain that specific system <sup>2</sup> (which is currently in place at CEDEFOP, the European Foundation for the Improvement of Living and Working Conditions and European Agency for Safety and Health at Work). However, if it were deemed appropriate in the interests of legal certainty, a paragraph could be added to Article 230 TEC to clarify that the legislator may establish specific arrangements for bringing proceedings against agencies.

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<sup>1</sup> See in this connection Case 60/81, IBM v. Commission (ECR 1981, p. 2639, paragraph 9): "in order to ascertain whether the measures in question are acts within the meaning of Article 173 it is necessary, therefore, to look to their substance. According to the consistent case-law of the court any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that Article."

<sup>2</sup> Exists currently for the agencies mentioned in footnote 1 on page 2.

**Regulation (EEC) No 337/75 of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training**

*(Official Journal L 39, 13.2.1975, p. 1-4)*

Article 17

1. The contractual liability of the centre shall be governed by the law applicable to the contract in question.

The Court of Justice of the European Communities shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by the centre.

2. In the case of non-contractual liability, the centre shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by the centre or its servants in the performance of their duties.

The Court of Justice shall have jurisdiction in disputes relating to compensation for any such damage.

3. The personal liability of servants towards the centre shall be governed by the relevant provisions applying to the staff of the centre.

Article 18

Member States, members of the Management Board and third parties directly and personally involved may refer to the Commission any act of the centre, whether express or implied, for the Commission to examine the legality of that act.

Referral shall be made to the Commission within 15 days of the day on which the party concerned first became aware of the act in question.

The Commission shall take a Decision within one month. If no Decision has been taken within this period, the case shall be deemed to have been dismissed.

**Regulation (EEC) No 1365/75 of the Council of 26 May 1975 on the creation of a European Foundation for the Improvement of Living and Working Conditions**

*(Official Journal L 139, 30.5.1975, p. 1-4)*

Article 21

1. The contractual liability of the Foundation shall be governed by the law applicable to the contract in question.

The Court of Justice of the European Communities shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by the Foundation.

2. In the case of non-contractual liability, the Foundation shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by the Foundation or its servants in the performance of their duties.

The Court of Justice of the European Communities shall have jurisdiction in disputes relating to compensation for any such damage.

3. The personal liability of servants towards the Foundation shall be governed by the relevant provisions applying to the staff of the Foundation.

## Article 22

Member States, members of the Administrative Board and third parties directly and personally involved may refer to the Commission any act of the Foundation, whether express or implied, for the Commission to examine the legality of that act.

Referral shall be made to the Commission within 15 days of the day on which the party concerned first became aware of the act in question.

The Commission shall take a decision within one month. If no decision has been taken within this period, the case shall be deemed to have been dismissed.

## **Council Regulation (EEC) No 1360/90 of 7 May 1990 establishing a European Training Foundation**

*(Official Journal L 131, 23.5.1990, p. 1-5)*

## Article 15

### Legal liability

1. The contractual liability of the Foundation shall be governed by the law applicable to the contract in question.

2. In the case of non-contractual liability, the Foundation shall, in accordance with the general principles common to laws of the Member States, make good any damage caused by the Foundation or its servants in the performance of their duties.

The Court of Justice shall have jurisdiction in disputes relating to compensation for any such damage.

3. The personal liability of servants towards the Foundation shall be governed by the relevant provisions applying to the staff of the Foundation.

**Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network**  
(Official Journal L 120, 11.5.1990, p. 1-6)

Article 18

1. The contractual liability of the Agency shall be governed by the law applicable to the contract in question. The Court of Justice of the European Communities shall have jurisdiction to give judgment pursuant to an arbitration clause contained in a contract concluded by the Agency.
2. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by the Agency or its servants in the performance of their duties.  
The Court of Justice shall have jurisdiction in disputes relating to compensation for any such damage.
3. The personal liability of servants towards the Agency shall be governed by the provisions applying to the staff of the Agency.

**Council Regulation (EEC) No 302/93 of 8 February 1993 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction**  
(Official Journal L 36, 12.2.1993, p. 1-8)

Article 16

Liability

1. The contractual liability of the Centre shall be governed by the law applicable to the contract in question. The Court of Justice shall have jurisdiction pursuant to an arbitration clause contained in a contract concluded by the Centre.
2. In the case of non-contractual liability, the Centre shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by the Centre or its servants in the performance of their duties. The Court of Justice shall have jurisdiction in disputes relating to compensating for any such damage.
3. The personal liability of servants towards the Centre shall be governed by the provisions

applying to the staff of the Centre.

## Article 17

### Jurisdiction of the Court of Justice

The Court of Justice shall have jurisdiction in actions brought against the Centre under the conditions provided for in Article 173 of the Treaty.

**Council Regulation (EEC) No 2309/93 of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products**

*(Official Journal L 214, 24.8.1993, p. 1-21)*

## Article 60

1. The contractual liability of the Agency shall be governed by the law applicable to the contract in question. The Court of Justice of the European Communities shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by the Agency.

2. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or its servants in the performance of their duties.

The Court of Justice shall have jurisdiction in any dispute relating to compensation for such damages.

3. The personal liability of its servants towards the Agency shall be governed by the relevant conditions applying to the staff of the Agency.

**Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark**

*(Official Journal L 11, 14.1.1994, p. 1-36)*

## Article 63

### Actions before the Court of Justice

1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals.

2. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power.
3. The Court of Justice has jurisdiction to annul or to alter the contested decision.
4. The action shall be open to any party to proceedings before the Board of Appeal adversely affected by its decision.
5. The action shall be brought before the Court of Justice within two months of the date of notification of the decision of the Board of Appeal.
6. The Office shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

#### Article 114

##### Liability

1. The contractual liability of the Office shall be governed by the law applicable to the contract in question.
2. The Court of Justice shall be competent to give judgment pursuant to any arbitration clause contained in a contract concluded by the Office.
3. In the case of non-contractual liability, the Office shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties.
4. The Court of Justice shall have jurisdiction in disputes relating to compensation for the damage referred to in paragraph 3.
5. The personal liability of its servants towards the Office shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.

#### **Council Regulation (EC) No 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work**

*(Official Journal L 216, 20.8.1994, p. 1-8)*

#### Article 21

##### Liability

1. The Agency's contractual liability shall be governed by the law applicable to the contract in question. The Court of Justice of the European Communities shall have jurisdiction to give judgment pursuant to an arbitration clause contained in a contract concluded by the Agency.



2. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by the Agency or its servants in the performance of their duties.

The Court of Justice shall have jurisdiction in disputes relating to compensation for any such damage.

3. The personal liability of servants towards the Agency shall be governed by the provisions applying to the staff of the Agency.

## Article 22

### Examination of legality

Member States, members of the Administrative Board and third parties directly and personally involved may refer to the Commission any act of the Agency, whether express or implied, for the Commission to examine the legality of that act.

Referral shall be made to the Commission within fifteen days of the day on which the party concerned first became aware of the act in question.

The Commission shall take a decision within one month. If no decision has been taken within this period, the case shall be deemed to have been dismissed.

## **Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights**

*(Official Journal L 227, 1.9.1994, p. 1-30)*

## Article 33

### Liability

1. The contractual liability of the Office shall be governed by the law applicable to the contract in question.

2. The Court of Justice of the European Communities shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by the Office.

3. In the case of non-contractual liability, the Office shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties.

4. The Court of Justice shall have jurisdiction in disputes relating to compensation for the damage referred to in paragraph 3.

5. The personal liability of its servants towards the Office shall be governed by the provisions laid

down in the Staff Regulations or Conditions of Employment applicable to them.

#### Article 73

##### Further appeal

1. A further appeal to the Court of Justice of the European Communities shall lie from decisions of the Board of Appeal.
2. The further appeal may be lodged on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation, or of any rule of law relating to their application or misuse of power.
3. The further appeal may be made by any party to the appeal proceedings who is adversely affected by its decision, or by the Commission or the Office.
4. The further appeal shall be lodged with the Court of Justice within two months of service of the decision of the Board of Appeal.
5. If the Court of Justice remits the case for further action to the Board of Appeal, the Board shall, in so far as the facts are the same, be bound by the ratio decidendi of the Court of Justice.

#### Article 74

##### Direct appeal

1. A direct appeal to the Court of Justice of the European Communities may lie from decisions of the Office pursuant to Articles 29 and 100 (2).
2. The provisions laid down in Article 73 shall apply mutatis mutandis.

#### **Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia**

*(Official Journal L 151, 10.6.1997, p. 1-7)*

#### Article 15

##### Jurisdiction of the Court of Justice

1. The contractual liability of the Centre shall be governed by the law applicable to the contract in

question.

The Court of Justice shall have jurisdiction pursuant to an arbitration clause contained in a contract concluded by the Centre.

2. In the case of non-contractual liability, the Centre shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by the Centre or its servants in the performance of their duties.

The Court of Justice shall have jurisdiction in disputes relating to compensation for any such damage.

3. The Court of Justice shall have jurisdiction in actions brought against the Centre under the conditions provided for in Article 173 of the Treaty.

**Council Regulation (EC) No 2454/1999 of 15 November 1999 amending Regulation (EC) No 1628/96 relating to aid for Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia, in particular by the setting up of a European Agency for Reconstruction**

*(Official Journal L 299, 20.11.1999, p. 1-8)*

Article 25

1. The contractual liability of the Agency shall be governed by the law applicable to the contract in question.

2. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to laws of the Member States, make good any damage caused by the Agency or its servants in the performance of their duties.

The Court of Justice shall have jurisdiction in disputes relating to compensation for any such damage.

3. The personal liability of servants towards the Agency shall be governed by the relevant provisions applying to the staff of the Agency.

**Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety**

*(Official Journal L 31, 1.2.2002, p. 1-24)*

## Article 47

### Liability

1. The contractual liability of the Authority shall be governed by the law applicable to the contract in question. The Court of Justice of the European Communities shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by the Authority.
2. In the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or its servants in the performance of their duties. The Court of Justice shall have jurisdiction in any dispute relating to compensation for such damage.
3. The personal liability of its servants towards the Authority shall be governed by the relevant provisions applying to the staff of the Authority.

## **Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency**

*(Official Journal L 208, 5.8.2002, p. 1-9)*

## Article 8

### Liability

1. The contractual liability of the Agency shall be governed by the law applicable to the contract in question.
2. The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by the Agency.
3. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties.
4. The Court of Justice shall have jurisdiction in disputes relating to the compensation for damage referred to in paragraph 3.
5. The personal liability of its servants towards the Agency shall be governed by the provisions laid down in the Staff Regulations or Conditions of employment applicable to them.

**Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002  
on common rules in the field of civil aviation and establishing a European Aviation Safety**

**Agency**

*(Official Journal L 240, 7.9.2002, p. 1-21)*

Article 22

Liability

1. The contractual liability of the Agency shall be governed by the law applicable to the contract in question.
2. The Court of Justice of the European Communities shall have jurisdiction to give judgement pursuant to any arbitration clause contained in a contract concluded by the Agency.
3. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties.
4. The Court of Justice shall have jurisdiction in disputes relating to compensation for the damage referred to in paragraph 3.
5. The personal liability of its servants towards the Agency shall be governed by the provisions laid down in the Staff Regulations or Conditions of employment applicable to them.

Article 41

Actions before the Court of Justice

1. An appeal may be brought before the Court of Justice against decisions of the Boards of Appeal on the terms and conditions laid down in Article 230 of the Treaty.
2. Should the Agency fail to take a decision, proceedings for failure to act may be brought before the Court of Justice on the terms and conditions laid down in Article 232 of the Treaty.
3. The Agency shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

Article 42

Direct appeal

Member States and the Community institutions may lodge a direct appeal before the Court of Justice against decisions of the Agency.