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Annex

Procedure for cooperation by the Agency and its staff with Member States judicial authorities in the context of judicial proceedings

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| <i>Document Type</i> | Procedure |
| <i>Origin</i> | ERA |
| <i>Activity Based Item</i> | 05. Evaluation, Management and Resources |
| <i>Applicable to</i> | All Units |

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| <i>Process Deployment</i> | NA |
| <i>Process Owner</i> | MB |
| <i>Purpose</i> | The purpose of this procedure is to provide an overview of the actions envisaged to be taken by the Agency in the field of cooperation with national authorities in judicial proceedings in the Member States. |
| <i>Scope</i> | <p>This procedure applies to the Agency and to :</p> <ol style="list-style-type: none"> 1) members of its staff employed under the Staff Regulations and the Conditions of Employment of Other Servants (CEOS)¹; 2) staff employed by the Agency which is not covered by the Staff Regulations and the Conditions of Employment of Other Servants (CEOS), such as National seconded experts (Article 69 of the Agency Regulation) etc; 3) members of the Board(s) of Appeal although they are not staff of the Agency; <p>The above categories under 1-3 are hereinafter referred to, exclusively for the purposes of this procedure, as “staff of the Agency lato sensu”.</p> |

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| <i>Process Customers and other stakeholders</i> | <ul style="list-style-type: none"> › Agency › Agency staff employed under the SR/CEOS and seconded national experts Art.69 of the Agency Regulation › Board(s) of Appeal members |
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¹. Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, OJ L 56, 4.3.1968, p. 1.

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| | Stakeholder for adoption of the procedure: Management Board |
| <i>Process Input</i> | Requests for cooperation submitted to the Agency by national authorities in judicial proceedings either in the form of requests for information or request for participation in such proceedings. |
| <i>Process Output</i> | Response of the Agency to the above-mentioned requests for cooperation |
| <i>Legal Basis</i> | Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, Articles 51 § 1 point (v) and 73 and recital No. 11. Staff Regulations/CEOS, in particular Article 19 Treaty on the Functioning of the European Union, Article 4 Treaty on the Functioning of the European Union, Protocols, Protocol (No. 7) on the privileges and immunities of the European Union, in particular Article 18 |
| <i>Performance Indicators</i> | Information provided for and participation in national judicial proceedings should be handled : <ol style="list-style-type: none"> 1. with due diligence 2. within a reasonable period of time (in accordance with the timeframe set in the relevant national judicial proceedings). |
| <i>Linked with other (Sub)Processes</i> | N/A |
| <i>Enablers</i> | MB consultation in two stages/meetings |

1. Description and legal provisions

Article 51 § 1 point (v) of the Agency Regulation stipulates that: “In order to ensure that the Agency carries out its tasks, the Management Board shall: [a], [b], [...], (v) establish procedures for cooperation by the Agency and its staff in national judicial proceedings”.

Furthermore, the principle of cooperation with national judicial authorities is introduced in Article 73 of the Agency Regulation which specifies that ‘ In the case of national judicial proceedings involving the Agency by reason of the Agency having exercised its tasks in accordance with Article 19 and Article 21(6) of Directive (EU) 2016/797 and 10(6) of Directive (EU) 2016/798, the Agency and its staff shall cooperate without undue delay with the competent national judicial authorities. Appropriate procedures to be applied in such situations shall be established by the Management Board in accordance with point (v) of Article 51(1).’

Finally, Recital No. 11 of the Agency Regulation reads as follows: “The Agency should cooperate loyally with the national judicial authorities, in particular in cases in which the participation of the Agency is necessary by reason of the Agency having exercised its powers in relation to vehicle authorisations, single safety certificates issued by it and decisions for the approval of European Rail Traffic Management System (ERTMS) trackside equipment projects.

Where the Agency or a member of its staff is requested to provide information in the context of relevant national proceedings, the Agency should ensure that such request for information or, if necessary, participation in proceedings, is handled with due diligence and within a reasonable period of time. To that end, the Management Board should adopt appropriate procedures to be used in such cases.”

It is recalled that Article 4§3 of the Treaty on European Union (TEU)² expressly provides for the mutual nature of the duty of loyal and sincere cooperation between the national authorities and the Union:

“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives”.

The obligation of the EU institutions, bodies and agencies to duly cooperate with national courts has been acknowledged in the case law³ of the Court of Justice of the EU (CJEU).

This case law is also in line with Article 18 of the Protocol No. 7 on the privileges and immunities of the EU⁴, according to which, “[t]he institutions of the Union shall, for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned”.

² Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 1 – 390.

³ See case C-2/88 Imm., Order of the Court of 13 July 1990, J.J. Zwartveld and Others, ECLI:EU:C:1990:315, paragraph 17, case C-94/00, Judgment of the Court of 22 October 2002, Roquette Frères, ECLI:EU:C:2002:603, paragraph 93 and joined cases C-200/07 and 201/07, Judgment of the Court (Grand Chamber) of 21 October 2008, Alfonso Luigi Marra v. Eduardo De Gregorio (C-200/07) and Antonio Clemente (C-201/07), ECLI:EU:C:2008:579, paragraphs 41-42.

⁴ Consolidated version of the Treaty on the Functioning of the European Union, Protocols, Protocol (No. 7) on the privileges and immunities of the European Union, OJ C 326, 26.10.2012, p. 266 – 272.

The Agency's duty of sincere cooperation with the national authorities constitutes a general principle which governs the relations between, on the one hand, EU institutions, bodies and agencies and, on the other hand, Member States.

2. Scope

This document intends to establish the procedures to be applied by the Agency and its staff in its cooperation with the Member States authorities in judicial proceedings.

This procedure applies to the Agency and to :

- 1) members of its staff employed under the Staff Regulations and the Conditions of Employment of Other Servants (CEOS)⁵;
- 2) staff employed by the Agency which is not covered by the Staff Regulations and the Conditions of Employment of Other Servants (CEOS), such as National seconded experts (Article 69 of the Agency Regulation) etc;
- 3) members of the Board(s) of Appeal although they are not staff of the Agency;

The above categories under 1-3 are hereinafter referred to, for the purposes of this procedure, as “staff of the Agency lato sensu”.

Furthermore, the judicial proceedings in the Member States, regulated in this procedure, should take place should concern the performance by the Agency in the framework of its tasks concerning:

- vehicle authorisations according to Article 21(6) of Directive (EU) 2016/797
- single safety certificates issued by the Agency according to Article 10(6) of Directive (EU) 2016/798
- decisions for the approval of ERTMS trackside equipment projects according to Article 19 of Directive (EU) 2016/797

The purpose of this document is not to introduce working procedures with binding effect upon the national judicial authorities inasmuch as the procedure envisaged here is applicable solely to the Agency.

2.1. Context of national judicial authorities and judicial proceedings

It is settled case law⁶ of the CJEU that the judge investigating criminal matters or the investigating magistrate constitute a “court” or “tribunal” in so far as they are appointed to give a ruling independently and in accordance with the law in cases falling within the jurisdiction conferred on them by law through proceedings intended to culminate in decisions of a judicial nature.

However, it should be pointed out that the scope of Article 4 § 3 TEU is not limited to the national “judicial” authorities; on the contrary, the applicability of the this provision extends to the Member States’ authorities in general, i.e. including the administrative authorities. This is in line also with the provision of Article 18 of

⁵. Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, OJ L 56, 4.3.1968, p. 1.

⁶. See case 14/86, Judgment of the Court (Fifth Chamber) of 11 June 1987, Pretore di Salò v Persons unknown ECLI:EU:C:1987:275, paragraph 7 and case C-235/02, Order of the Court (Third Chamber) of 15 January 2004, Criminal proceedings against Marco Antonio Saetti and Andrea Frediani, ECLI:EU:C:2004:26, paragraph 23.

the Protocol on the privileges and immunities of the EU which stipulates the obligation of the Union to cooperate with the “*responsible authorities*” of the Member States concerned.

Therefore, any requests addressed to the Agency for cooperation in national judicial proceedings may reasonably be expected to originate mainly from national judicial authorities⁷, i.e. courts, tribunals, prosecutors and investigating authorities of the Member States.

Nevertheless, in light of the wording of Article 4 §3 TEU, requests originating from other authorities of the Member States with assimilated judicial powers at national, regional or local level as well, cannot be excluded from the scope of such provision a priori.

An additional element to be taken into account in that regard is the fact that, in certain national jurisdictions, investigating duties are mainly entrusted to and exercised by administrative authorities (e.g. the police or even national safety authorities).

2.2. Requests of national judicial authorities for cooperation with the Agency in judicial proceedings of Member States

It has been considered that there is no specific procedure in EU law governing the means by which a national judicial authority in the Member States may contact and seek cooperation with the Agency in judicial proceedings.

However, the following considerations could reasonably be taken into account:

- › In cases where the cooperation is requested in relation to a matter falling within the ambit of the Agency’s activities specified in Articles 19 and 21(6) of Directive (EU) 2016/797 as well as Articles 10(6) of Directive (EU) 2016/798, contact is expected to firstly be established with the Executive Director who, by virtue of Articles 3 § 3 and 54 § 4 of Regulation (EU) 2016/796, is supposed to be acting as the legal representative of the Agency e.g. as regards any decisions, recommendations, opinions and other formal acts adopted by the Agency.
- › If the issue in relation to which the need for cooperation with the Agency has arisen entails the personal liability of one or more of its staff members when carrying out the tasks assigned to the Agency contact should be expected to be established both with the Agency and with the staff member(s) concerned.
- › Where cooperation is sought in relation to an issue falling within the scope of the Agency’s activities and the personal liability of non-staff members i.e. the members of the Board(s) of Appeal is also thereby incurred, it may reasonably be expected that the national judicial authorities concerned will seek to establish contact both with the Agency and with the person concerned.
- › Where the issue in relation to which the cooperation of the Agency is requested entails the personal liability of one or more of its staff members lato sensu which is not incurred in connection with or during the performance of their official duties (e.g. a car accident), the person concerned should most probably be the first contact point in such cases. Should the national judicial authority in

⁷. The criteria which determine whether a national authority constitutes “judicial” authority, i.e. a court, were established by the CJEU in relation to the preliminary rulings procedure provided for under Article 267 TFEU and are the following: whether the body is established by law i.e. arbitration courts are excluded; whether it is permanent i.e. ad hoc courts are excluded; whether its jurisdiction is compulsory i.e. mediation proceedings are excluded; whether the decisions issued are binding i.e. opinions are excluded; whether it applies rules of law; whether such body is independent.

question encounter any difficulty in contacting the said person or prefer to establish cooperation with the Agency, it could still address its request by contacting the Agency through the above-mentioned official channels and request the necessary information. In the latter case, the Agency is under the obligation to cooperate with the national judicial authority concerned⁸ and the Executive Director, in his capacity as a legal representative of the Agency, should be in a position to provide the requested feedback. However, such cases are normally considered as being out of the scope of the procedure envisaged here.

- › Any requests for cooperation should be made formally and submitted in writing. This means that any requests which would be addressed to the Agency in a verbal form or which would be submitted through informal exchange of emails would also have to be subsequently confirmed formally and in writing. Any member of the Agency's staff who would directly receive such informal request should inform the Executive Director and ask its counterpart to confirm its request to the Executive Director formally and in writing. The Agency will inform the requestor in case of lack of form.

3. Nature of cooperation between the Agency and its staff and the national authorities in the framework of judicial proceedings

The subject matter of the requested cooperation may vary depending on the circumstances of each individual case and the existing legal system in the EU Member State where the request for cooperation originates from.

Such requests for cooperation may include, among others, requests for testimony in judicial proceedings, invitation of expert witnesses or submission of documents, etc., depending on the facts of each individual case.

The relevant case law holds that it is incumbent upon every EU institution to give its active assistance to national legal proceedings by producing documents to the national court and authorising its officials to give evidence in the national proceedings⁹.

The request for cooperation might require that the Agency provide its assistance as a legal entity or that only the Agency staff member(s) concerned cooperate or that both the Agency staff member(s) concerned and the Agency itself be involved in the proceedings.

The addressee of the request for cooperation may depend on the content of such request. For instance, it cannot be excluded that both the Agency –with regard to its field of activities– and the staff member(s) concerned in the broad sense defined above, e.g. member(s) of the Board of Appeal, may be called to provide testimony in ongoing national judicial proceedings.

However, in cases where the request falls exclusively within the scope of the Agency's activities, e.g. regarding a decision issued by the Agency, the Executive Director shall be its legal representative in the relevant national judicial proceedings in accordance with Articles 3§3 and 54 § 4 of the Agency Regulation as already mentioned above.

⁸. See case 180/87, Judgment of the Court (Second Chamber) of 5 October 1988, *Richard Hamill v Commission of the European Communities*, ECLI:EU:C:1988:474, paragraphs 10-11, as to certain limits on this cooperation.

⁹. See case *J.J. Zwartveld and Others*, *op. cit.*, paragraphs 22 and 26.

4. Principles governing the duty to cooperate with national judicial authorities

When a request for cooperation issued by national judicial authorities is addressed to the Agency and/or its staff member(s) lato sensu, the following principles shall be taken into account:

- › A reply to the national judicial authorities shall be provided by the Agency accurately, comprehensively and with due diligence¹⁰;
- › The response shall be given as quickly as possible¹¹ and efforts should be made to provide such response within a deadline set by the authority itself or if not deadline has been set within fifteen (15) working days which may be extended as appropriate depending on the complexity of the facts surrounding the case.
- › The response provided shall be adequately reasoned and formulated in the language used for the submission of the request made by the national authority, in line with Regulation 1/58¹². Relevant supporting documents shall be translated into the language used for the submission of the request. Costs shall be borne by the Agency.

5. Members of the Board(s) of Appeal, Agency staff members and duty to cooperate with national judicial authorities in judicial proceedings

Although Article 62§3 of the Agency Regulation clearly stipulates that the Board(s) of Appeal issues findings, it is the Executive Director of the Agency who takes the binding “final decision” in a case falling within the scope prescribed under Article 58 of the Agency Regulation.

However, the possibility that a MS may extend its request for cooperation to the members of the Board(s) of Appeal which issued the findings in the relevant case, despite the fact that such members do not, under Article 56 § 3 of the Agency Regulation, form part of the Agency’s staff stricto sensu, cannot be excluded a priori.

It could be envisaged that a national judicial authority may contact members of the Board(s) of Appeal also after the termination of their mandate. The Board(s) of Appeal members concerned would, in such a case, be under the obligation –which would be clearly stipulated their contract with the Agency– to inform the Agency of any such communication received from a national judicial authority in relation to the exercise of his or her duties as a member of the Board(s) of Appeal of the Agency and to cooperate with the national judicial authorities as requested.

Therefore, this procedure applies also to the members of the Board(s) or Appeal despite the fact that they are not staff of the Agency.

In that regard, it should be borne in mind that the national judicial authorities may not be in a position to make a clear distinction between the staff of the Agency employed under the Staff Regulations/CEOS and staff of the Agency not under by the Staff Regulations and the CEOS as such and to perceive the exact allocation of duties within the Agency.

The Agency may identify the staff that are better suited in each case to appear before the national judicial authorities if the request from these authorities is not nominative as well as to propose another staff in the

¹⁰. See also the wording of recital No. 11 of the Agency Regulation in that regard.

¹¹. See case C-39/94, Judgment of the Court of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, ECLI:EU:C:1996:285, paragraph 50.

¹². Official Journal 017 , 06/10/1958 P. 0385 – 0386, Regulation No 1 determining the languages to be used by the European Economic Community as amended

stead of the one indicated by the authorities if this serves better the principle of loyal cooperation with the judicial authorities.

Therefore, requests for cooperation will most probably be addressed both to the Agency as a legal entity and to its staff members *lato sensu* as natural persons notwithstanding of the precise legal nature of the relationship between the Agency and the staff member(s) concerned in that respect.

It should be emphasised that staff members *lato sensu* as described under point 2, whenever summoned by a national judicial authority, are under the obligation to comply with the request for cooperation addressed to them and that any failure to comply with such a request will, in most cases, incur the criminal and/or civil liability of the incumbent staff member(s).

When Agency staff members under the Staff Regulations/CEOS are requested personally to appear in national judicial proceedings in Member States they should be given a prior-authorisation by the Agency.

In all cases of cooperation the Agency and its staff shall pronounce themselves solely on the materiality of the facts bearing in mind that they are not allowed to interpret legislation because they lack authority to do so. The provisions of the Staff Regulations/CEOS and related ECJ jurisprudence apply.

6. Follow-up

The Executive Director is requested to put in place an internal process and/or to issue, if necessary, relevant work instructions with a view to ensuring the effective implementation of this procedure and shall be bound to report regularly to the Management Board on the steps taken in response to requests for cooperation with the national judicial authorities submitted to the Agency in each individual case.

The Chairperson (s) of the Board of Appeal(s) shall report to the Management Board about the requests for cooperation with national judicial authorities that have been addressed to the members of the Board(s) of Appeal (due to the fact that they are appointed by the MB).

7. Revision

This procedure shall be revised when appropriate in order to accommodate needs after the return of sufficient experience on its effectiveness.

Appendix

Internal process with indicative steps to be followed

Indicative steps to be developed further, as necessary, mainly in the form of work instructions to be issued by the Executive Director with the aim of ensuring the practical applicability of this procedure within the Agency:

1. Receipt of a request for cooperation in national judicial proceedings in writing either by the Agency as a body or by one or more of its staff member(s) lato sensu;
2. Registration of the request in the Agency's mail registration system, including an indication of the date of submission of the request;
3. Communication of the request for cooperation to the relevant Agency Unit dealing with the specific issues mentioned in the text of the request as well as and to Legal Service of the Agency for the purpose of preparing the reply to the request; the obligations deriving from the applicable Staff Regulations/CEOS shall be explained to the staff and indicated clearly to all Agency actors concerned.
4. Consultation of any other Units directly concerned or affected by the relevant request for cooperation;
5. Provision of information about the draft reply to be sent in response to the request for cooperation to the staff member(s) involved if such requirement is clearly and explicitly mentioned in the request;
6. Approval of the draft reply by the Executive Director;
7. Communication of the signed reply by the relevant Agency Unit to the competent national judicial authorities;
8. Delivery of regular reports to the Management Board on the procedure followed by the Agency in dealing with requests for cooperation in judicial proceedings submitted by the competent national authorities.

Templates / Forms

Records and other outputs

To be developed by the Executive Director, as appropriate, in future work instructions to be issued on the matter.