

CER Position Paper

Brussels, 08 December 2016

Board of Appeal (BoA)

1. References

[1] Draft COMMISSION IMPLEMENTING REGULATION (EU) 2016/... of ... [date]
Laying down the rules of procedure of the Board of Appeal of the European Union Agency for Railways

2. Summary

With this Position Paper the Community of European Railway and Infrastructure Companies (CER) summarises its thoughts on the Draft COMMISSION IMPLEMENTING REGULATION laying down the rules of procedure of the Board of Appeal of the European Union Agency for Railways.

CER disagrees to the basic principle that the Executive Director does not have to follow the findings of the Board of Appeal.

3. General Comments

CER regrets that the decisions taken by the Board of Appeal are finally not binding according to Article 93 (2). Even though the Board of Appeal states that the appeal is justified, the Executive Director may decide not to follow. This leads to uncertainty for the appealing party from the very beginning of the appeal process. Before lodging an appeal, the appealing party needs to assess the risk of eventually prolonging an uncertain situation of the concerned project and the necessary efforts for an appeal including additional costs (Board of Appeal's procedures).

CER is concerned about the decisions of the Executive Director on the appeal. We object to the final decision power by the Executive Director as outlined in Articles 57 (3) and 93. Such power is not part of the duties listed in Article 54 of Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways. It undermines the principle of separation of powers.

4. Detailed comments

Article 10 - Responsibilities of the chairperson

The mandate shall be renewed only once for both the chairperson and the members of the Board.

The members of the Board of Appeal have a 4-year mandate (Article 56 of Regulation (EU) 2016/796) renewable once; therefore, the mandate of the Chairman shall be of same duration, as well only renewed once.

Article 18 – Extended composition

CER strongly supports this provision. The extended composition can be also necessary when there is a need to have one or more members who have a detailed specific knowledge which is needed.

Article 72 – Summary

If still required, the English version of the appeal shall not be at the charge of the appealing party.

Article 93 – Decision of the Executive Director on the appeal

There is no purpose of having a Board of Appeal in the first place if the Executive Director can simply ignore any of its decisions.

Further, minor aspects:

- Art. 2 (5): The comma could imply that the first part of the sentence is absolute: no other activity during their term of office, could be for 8 years → a clarification is needed
- Art. 3 (3): Alphabetical order may be deleted – another person could be better suited, depending on expert knowledge, background or other reasons.
- Art. 15 (2): The BoA should decide on the meeting venue independently of the MB, but with regard to the case and justify another venue.
- Art. 16 (3): Junior member? Junior by age, BoA-membership, experience → a clarification is needed.
- Art. 49 (2), (3) Regarding the reimbursement of costs to witnesses and experts (art. 49 (2) and (3)): The third party shall only bear the costs if the BoA finds the report/results as non-relevant for its decision.

5. Conclusion

CER is mainly concerned by the nature of decisions taken by the Board of Appeal and the opportunity for the Executive Director not to follow. Therefore CER objects to this main principle laid down in the rules of procedure. Decisions must be binding. The separation of powers must be ensured.

About CER

The Community of European Railway and Infrastructure Companies (CER) brings together more than 70 railway undertakings, their national associations as well as infrastructure managers and vehicle leasing companies. The membership is made up of long-established bodies, new entrants and both private and public enterprises, representing 73% of the rail network length, 80% of the rail freight business and about 96% of rail passenger operations in EU, EFTA and EU accession countries. CER represents the interests of its members towards EU policy makers and transport stakeholders, advocating rail as the backbone of a competitive and sustainable transport system in Europe. For more information, visit www.cer.be or follow us via Twitter at @CER_railways.

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