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## Working methods

### on the decision-making process of the Management Board relating to waiving of immunity requests at the Agency

<i>Document Type</i>	Working methods
<i>Activity Based Item</i>	Governance
<i>Applicable to</i>	All Units

<i>Process Deployment</i>	NA
<i>Process Owner</i>	MB
<i>Purpose</i>	The purpose of this document is to provide the working methods regarding the context and actions envisaged to be taken by the MB when a request for waiving the immunity of its staff is submitted to the Agency.
<i>Scope</i>	These working methods apply for waiving of immunity decisions regarding 1) members of its staff employed under the Staff Regulations and the Conditions of Employment of Other Servants (CEOS) <sup>1</sup> ; 2) members of Advisory Bodies

<i>Process Customers and other stakeholders</i>	<ul style="list-style-type: none"> <li>› Agency</li> <li>› MB</li> <li>› Other persons concerned by the request for waiving the immunity</li> </ul>
<i>Process Input</i>	Requests for waving of immunity addressed to the Agency
<i>Process Output</i>	Decision of the MB of the Agency to the above-mentioned requests
<i>Legal Basis</i>	<ul style="list-style-type: none"> <li>› <a href="#">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 (i) and recital No. 10.</a></li> <li>› <a href="#">Staff Regulations/CEOS</a></li> <li>› <a href="#">Treaty on the Functioning of the European Union, Article 4</a></li> </ul>

<sup>1</sup>.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.

	<ul style="list-style-type: none"><li>› <i>Treaty on the Functioning of the European Union, Protocols, Protocol (No. 7) on the privileges and immunities of the European Union</i></li><li>› <i>ERA Guide Staff Liability, GUI_LEG_001 V.1.0 dated 7 February 2020</i></li></ul>
<i>Performance Indicators</i>	Decisions taken
<i>Linked with other (Sub)Processes</i>	<ul style="list-style-type: none"><li>› -Procedure for cooperation by the Agency and its staff with Member States judicial authorities in the context of judicial proceedings</li></ul>
<i>Enablers</i>	NA

## A. Description of legal provisions on immunity waiving

### 1. Introduction

Article 51.1 of the Agency Regulation (EU) 2016/796 states that:

‘In order to ensure that the Agency carries out its tasks, the Management Board shall:  
....

*take duly reasoned decisions in relation to waiver of immunity in accordance with Article 17 of Protocol No 7 on the privileges and immunities of the European Union; ...”.*

Whereas (10) of the Agency Regulation (EU) 2016/796 emphasises the necessity for the Management Board to decide “without undue delay” to waive (or not) the immunity of a staff member:

- *“With regard to liability of the staff of the Agency when carrying out the tasks assigned to the Agency, Protocol No 7 on the privileges and immunities of the European Union should apply. The application of that Protocol should not lead to undue delays or the imposition of unjustified restrictions on the conduct of national judicial proceedings. In the event of judicial proceedings involving the staff of the Agency, in which a member of the staff is requested to appear before a national court, the Management Board should decide without undue delay to waive that member of the staff’s immunity, provided that such waiver will not compromise the interests of the Union. Such a decision should be duly justified and should be amenable to judicial review before the Court of Justice of the European Union”.*

Protocol No 7 on the privileges and immunities of the European Union<sup>2</sup> provides:

- *“In the territory of each Member State and whatever their nationality, officials and other servants of the Union shall: (a)....., be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office; ...” (Art 11(a));*
- *“Privileges, immunities and facilities shall be accorded to officials and other servants of the Union solely in the interests of the Union. Each institution of the Union shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union” (Article 17)<sup>3</sup>;*

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<sup>2</sup> « Protocol No 7 on the privileges and immunities of the European Union shall apply to the Agency and its staff” (Art 70 of Regulation (EU) 2016/796).

<sup>3</sup> See also Whereas (10) of Regulation (EU) 2016/796 : *“With regard to liability of the staff of the Agency when carrying out the tasks assigned to the Agency, Protocol No 7 on the privileges and immunities of the European Union should apply. The application of that Protocol should not lead to undue delays or the imposition of unjustified restrictions on the conduct of national judicial proceedings. In the event of judicial proceedings involving the staff of the Agency, in which a member of the staff is requested to appear before a national court, the Management Board should decide without undue delay to waive that member of the staff’s immunity, provided that such waiver will not compromise the interests of the Union. Such a decision should be duly justified and should be amenable to judicial review before the Court of Justice of the European Union”.*

- *“The institutions of the Union shall, for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned” (Art 18).*

## 2. Context

EU staff members are protected against (“immune from”) claims and legal proceedings in national courts for acts related to their work<sup>4</sup>.

On the contrary, individuals not working under the Staff Regulations or otherwise involved at the Agency, like members of the Management Board and of the Board of Appeal (BoA), seconded national experts(SNEs), NSA experts in the ‘pool of experts’ to assist the Agency in delivering SSC and VAs, other outside experts, trainees, not being governed by the staff regulations and the Conditions of Employment of Other Servants(CEOS), do not benefit of the same privileges and immunities as EU staff members or even have none (trainees, external independent experts).

The Protocol on the privileges and immunities of the EU provides only that “Representatives of Member States taking part in the work of the institutions of the Union, their advisers and technical experts shall, in the performance of their duties and during their travel to and from the place of meeting, enjoy the customary privileges, immunities and facilities. This Article shall also apply to members of the advisory bodies of the Union” (Article 10).

### 2.1 Waiver of the staff immunity by the Management Board

The Agency<sup>5</sup> has the obligation to waive (= to lift) the immunity of a staff member who would be personally summoned to appear before a national court whenever such waiver of immunity would not harm the interests of the European Union and, more specifically, the independence and proper functioning of the institutions, offices, bodies and agencies of the European Union.

According to the case-law, this is the only substantial criterion that would enable a waiver of immunity to be refused. Otherwise, immunity should be waived systematically, as Protocol No 7 does not permit EU institutions to verify whether the national legal proceedings underlying the request are well founded or fair<sup>6</sup>.

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<sup>4</sup> For matters relating to private life, the question of immunity does not even arise and the staff member is subject to national civil and criminal law. Article 23 of the Staff Regulations stipulates that staff members “shall not be exempt from fulfilling their private obligations or from complying with the laws and police regulations in force”.

<sup>5</sup> Represented for that purpose by the Management Board: see Article 51(1) (i) of Regulation (EU) 2016/796.

<sup>6</sup> See Judgement of the General Court 24 October 2018, case T 29/17, § 8. Myintracomm states the following in that respect: “In practice, when national judicial authorities request it, such immunity is systematically lifted”.

In such case, the staff member would have to comply with any order or judgement of the national court and face possible consequences as to his or her liability, within the limits however of the waiver of his immunity (which can be partial only<sup>7</sup>).

## ***2.2 Principle of sincere cooperation between EU bodies and national authorities***

In accordance with the EU principle of “sincere cooperation”<sup>8</sup> between EU institutions and national authorities, the Agency is obliged to cooperate with national authorities each time there is an issue concerning the privileges and immunities of the Agency and its staff. It would be contrary to the principle of sincere cooperation with the national authorities to refuse to waive a staff member’s immunity.

## ***3. Cooperation by the Agency and its staff in national judicial proceedings***

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.”

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<sup>7</sup> As was the case with the Director-General of OLAF whose immunity had been partially waived by the Commission (see Judgment of the General Court, 24 October 2018, case T 29/17, RQ vs European Commission, presently under Appeal with the Court of justice of the EU (case C-831/18 P)).

<sup>8</sup> « 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” (art 4(3) of the Treaty on the EU).

The relevant procedure has been adopted on 25 January 2018 Decision n°165 of the Management Board of the European Union Agency for Railways establishing a procedure for cooperation by the Agency and its staff with Member States judicial authorities in the context of judicial proceedings.

The details on how the Agency should cooperate in the context of requests emanating from the judicial authorities of the Member states are described in the said decision.

#### *4. Waiving immunities and requests for cooperation with national judicial authorities*

It is recalled here that requests for cooperation with national judicial authorities would concern normally the Agency or its staff to provide information in the context of relevant national judicial proceedings:

- 1) This could take the form of information to be given by the Agency for example either as questions or with the disclosure of Agency documents*

*The Agency should provide the information requested in line with the procedure for cooperation with national judicial authorities.*

*When disclosure of documents is requested in addition to the request for cooperation, Regulation 1049/2001 applies as well.*

- 2) The Agency staff could be called to testify as witnesses in judicial proceedings:*

*In this case when the jurisdiction does not make a nominative request for an Agency staff to it is the Agency to designate the staff considered the most appropriate to clarify to the national judicial jurisdiction the facts concerned by the proceedings. The Agency could also propose that other staff testify than the ones designated by the judicial authorities if this is corresponding better to the requirements to the principle of the loyal cooperation with the judicial authorities.*

*The conditions concerning Agency staff testifying during national judicial proceedings related to the following elements:*

- 1) Testifying concerns facts, the Agency staff are not authorized to interpret the EU legislation or express their personal appreciation regarding the validity of EU legislation or the responsibility of the EU/Agency.*
- 2) The need to consider the protection of sources of information or protect top secret or confidential information should be considered by the Agency when it designates or authorises staff to testify This is linked to the authorisation of the Agency staff to testify as envisaged in Article 19 SR/CEOS or with the designation of an Agency staff as the agent habilitated to testify when a person has not be designated by the national judicial authority.*

- 3) *While testifying the Agency staff benefit from the immunity envisaged in Article 12 of the PPI and from assistance by the Agency envisaged in Article 24 of SR/CEOS.*

Requests for waiving of immunity, which are different from the requests examined above, are proposed to be treated based on specified methods as described below.

## 5. Staff rights when immunity is waived

Right to be heard before the decision is taken and right to file a complaint under Art 90, §2 SR.

An MB decision to waive the immunity of a staff member is “an act affecting him/her adversely” in the sense of Article 90(2) of the Staff Regulations<sup>9</sup>. The staff member concerned can file an Article 90(2) complaint against an MB decision, which is to be addressed to the Management Board itself (as the authority empowered to conclude contracts) within three months of such decision. If the complaint is rejected, the staff member may file an appeal against such decision with the Court of Justice of the EU (its General Court) within three months of the rejection<sup>10</sup>.

The staff member concerned could also initiate “interim proceedings” to seek an order from the General Court to suspend the decision waiving his/her immunity<sup>11</sup>.

In principle, the staff member concerned by a request from a national court or other authority to have his/her immunity waived should be heard by the Management Board before the latter takes its decision<sup>12</sup>.

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<sup>9</sup> Civil Service Tribunal, 13 January 2010, Joined Cases F 124/05 and F 96/06, A. et G. vs Commission, §233. See also General Court, 24 October 2018, Case T 29/17, §40.

<sup>10</sup> A staff member could also file a complaint with the European Ombudsman on the basis of maladministration by an EU institution or Agency (for example, administrative irregularities, unfairness, discrimination or abuse of power). Such complaint must be made within two years of the date when the person affected became aware of the facts or decision. However contrary to the Court, the Ombudsman can only make recommendations to the institution or Agency concerned.

<sup>11</sup> In the case T-251/16 R, the director general of Olaf sought such an order from the President of the Tribunal but his claim was rejected considering in particular that there was no immediate risk of imprisonment and the official could continue to work at the Commission as he was still considered as innocent (Order of the President of the General Court quoted under footnote 15).

<sup>12</sup> “According to settled case-law, respect for the rights of the defense, especially the right to be heard, in all proceedings initiated against a person which may lead to a measure adversely affecting him, is a fundamental principle of EU law which must be guaranteed, even when there are no rules governing the procedure in question. That principle, moreover, has been enshrined in Article 41(2)(a) of the Charter” (General Court, 24 October 2018, Case T-29/17, RQ vs Commission, §52).

## **B. Working methods –**

### **B.1. Internal process with steps to be followed**

Steps to be taken to ensure how in practice the MB takes decisions to waive the immunity within the Agency:

- i. Receipt of a request for waiving the immunity by the Agency.
- ii. The request should be received in writing, it can be in any written form and received by any means (sent by letter, email etc. or through local enforcement authorities etc.)
- iii. Registration of the request in the Agency's mail registration system, including an indication of the date of submission of the request and subject matter.
- iv. If the request is addressed to the Executive Director or other Agency staff, the request should be forwarded to the Chair of the MB through the MB secretariat.
- v. Communication of the request 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 preparing a first analysis of the request in a specific timeframe that would depend on the deadline provided in the request itself. A time schedule will be drafted on the basis of this deadline in a way to allow the final decision to be take on time and all the steps to take place.
- vi. The person (s) concerned will be informed by the MB Secretariat that a request for waiving their immunity has been received. The obligations deriving from the applicable Staff Regulations/CEOS to be explained to the staff concerned as well as their rights regarding the right to be heard and right to launch a complaint against the MB decision If the request concerns persons not covered by the Staff Regulations, the same rights will be also explained.
- vii. A first analysis of the request will include a recommendation of on whether the aspects to be examined are precise enough and that the request is specific enough for a decision to be taken by the MB or whether additional explanations have to be requested in order for the MB to be able to decide.
- viii. Communication of the request to the MB members by any means that guarantee confidentiality of the document; the communication will indicate the next steps to be taken after the receipt of the request of immunity waiving.

- ix. If the analysis concludes that more information is necessary for a decision to be taken, a request for additional information will be drafted and sent by the Chair of the MB to the authority that requested the waiver of immunity.
- x. Upon receipt of the reply, the Chair of the MB will make it available through the MB secretariat to the Agency/Legal Service and Unit concerned.
- xi. A draft MB decision on immunity that includes statement of reasons justifying and motivating the conclusion to waive or not the immunity will be prepared by the Legal Service of the Agency;
- xii. Before concluding on whether the waiver request should be granted, the person concerned should be heard..
- xiii. The hearing would take place either in writing or if considered necessary after the written part during a meeting of the MB or EB whichever is planned sooner.
- xiv. The results of the hearing would be considered when drafting the final draft decision on immunity.
- xv. Before the final draft decision is made available, to be checked also whether a request with cooperation with national judicial authorities has been already issued on the same subject and consider it accordingly.
- xvi. Submission and approval of the decision by the MB, EB to discuss the text before depending on the dates of the EB meeting, if necessary either by remotely or extraordinary meeting.
- xvii. Communication of the MB Decision by the MB secretariat to the competent national judicial authorities.
- xviii. Communication of the MB decision by the MB secretariat to the person concerned.
- xix. Housekeeping: MB secretariat to keep a list of all MB Decisions on immunity waiving in order to have them easily available and be consulted in order to guarantee consistency and quality among decisions on waivers.

**B.2. Non-exhaustive elements to be considered on the substance on the waiver of the immunity:**

- a. Reasons for the waiver raised by the requesting authority, after the receipt of any additional information provided
- b. Right to be heard by the person concerned ( to be examined in each case on the basis of the case-law)
- c. Assessment on whether the interests of the Union and of the Agency would be harmed by waiving the immunity of staff member concerned

### **B.3. Templates / Forms**