



Recommendation of the European Ombudsman in case 146/2017/DR on how the European Investment Bank handled a complaint about breaches of environmental, health and safety requirements in a project it financed

Recommendation

Case 146/2017/DR - Opened on 26/01/2017 - Recommendation on 04/12/2018 - Decision on 27/03/2019 - Institution concerned European Investment Bank (Recommendation agreed by the institution) |

The case concerned how the European Investment Bank (EIB) handled a complaint about a project it financed in Madagascar for nickel-cobalt mining and processing. The complainant was concerned about the time taken to deal with his complaint. The complainant also raised concerns about whether the project had been monitored in terms of respect for environmental, health and safety requirements in an independent manner.

The Ombudsman found maladministration as the EIB took six years to finalise its investigation into the complaint. While some of the shortcomings identified have been addressed as part of the review of the EIB's Complaints Mechanism, the Ombudsman made a recommendation to avoid problems in the future. The Ombudsman also found issues in how the EIB monitors projects and made a corresponding recommendation.

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

Background to the complaint

1. This case concerned how the European Investment Bank (EIB) dealt with a complaint about a project it part-financed in Madagascar for nickel-cobalt mining and processing ('the project') [2] . The project was subject to environmental, health and safety requirements set out in the 'Finance Contract' between the company carrying out the project ('the promoter') and the EIB. An engineering, environmental and social consultancy ('the consultancy') assisted with the monitoring of the project. One of its tasks was to draw up regular reports on the implementation of the project, based on information provided by the promoter and on-site visits.



2. In April 2012, the complainant, a French citizen who owns a fruit production company domiciled in Madagascar, submitted a complaint about the negative environmental impacts of insecticides being used by the promoter [3] .

3. Between May and November 2012, the complainant raised additional concerns with the EIB. In essence, he took the view that the EIB had failed to ensure that the promoter complies with its contractual obligations and that, as a result, the project did not fulfil the EIB's environmental, health and safety requirements.

4. The EIB dealt with the complainant through its Complaints Mechanism Division (the 'EIB-CM') [4] . In June 2014, the EIB-CM issued an 'Initial Assessment Report', proposing to carry out a full investigation.

5. In January 2017, as he had not received the EIB-CM's final decision on his complaint (the 'Conclusions Report'), the complainant turned to the Ombudsman.

The inquiry

6. The Ombudsman opened an inquiry into the following aspects of the complaint:

a) The EIB-CM failed to handle the complaint in a timely manner.

b) The EIB failed to ensure independent monitoring of the project.

7. In February 2017, the EIB-CM informed the Ombudsman that a decision had not yet been taken as to whether to consult the EIB Management Committee [5] on the EIB-CM's Conclusions Report.

8. On 28 and 29 March 2017, the Ombudsman's inquiry team met with representatives of the EIB-CM and the EIB's relevant departments, and inspected the file on the complaint.

9. On 30 October 2017, the Ombudsman received the EIB's reply on the complaint and, in December 2017, the comments of the complainant on the EIB's reply.

10. On 6 April 2018, that is, six years after the complaint had been submitted, the EIB-CM sent its Conclusions Report to the complainant [6] . The EIB-CM apologised for the delay and explained that this was due to the number and complexity of the concerns raised in the complaint.

How long it took to handle the complaint

Arguments presented to the Ombudsman

11. **The EIB** acknowledged that the time taken to deal with the complaint was "*excessively long*". The EIB-CM needed 17 months to finalise its Initial Assessment Report; the investigation lasted 22 months; consultations (the so-called 'clearance process') between the EIB-CM and the relevant EIB departments on the Initial Assessment Report and on the draft Conclusions Report took 9 and 15 months respectively; one month was needed to consult the Management Committee [7] .



12. The EIB identified two major factors which caused the delay. The first was **the complexity of the complaint** , which led to problems in the **process management by the EIB-CM** and notably to misunderstandings with the relevant EIB departments. The EIB also referred to the fact that the complainant had raised additional concerns after submitting the complaint, and that the EIBCM's procedures lacked clear "cut-off" rules on how to deal with them.

13. The second major factor was related to the **consultation process** between the EIB-CM and the relevant EIB departments [8] . The EIB had failed to take steps to address the disagreements between its departments and the EIBCM. Specifically, the EIB did not make appropriate use of the 'escalation options', that is, the possibility to submit the EIB-CM's reports to the Management Committee in case of disagreements with the relevant EIB departments. This led to numerous rounds of consultation. The fact that the EIB-CM's procedures were not sufficiently clear caused additional delays [9] .

14. The EIB also referred to other factors, such as the EIB-CM's **resource constraints** , as well as its **workload** , and the fact that the staff member dealing with the complaint had changed.

15. The EIB stated that it was reviewing how the EIB-CM operates, with a view to clarifying and streamlining certain procedures. It also expressed its intention to reflect, in this context, on the lessons learnt from this complaint.

The Ombudsman's assessment

16. The EIB-CM took **six years** to reach a final decision. This is a considerably longer period than envisaged in its own internal rules [10] .

The complexity of the case

17. The Ombudsman's inspection confirmed that the case was complex. It also revealed that the investigation was made more complex by the reluctance of the project promoter to cooperate [11] , and as a result of a subsequent complaint the project promoter made against the EIBCM.

The internal consultation process

18. In addition to missed deadlines by the relevant EIB departments to provide comments on the EIB-CM's draft Conclusions Report, much of the delay was due to disagreements between these departments and the EIB-CM on several issues [12] . These included the scope of the complaint (and, consequently, of the EIB-CM's investigation) and various quality and confidentiality issues. Specifically, the EIB-CM had difficulty obtaining information and documents from the promoter, who opposed their disclosure on confidentiality grounds.

19. In the Ombudsman's view, however valid the points raised by the EIB departments may have been, after a certain point in time the delay they caused could no longer be justified. The disagreements could and should have been resolved much earlier. In particular, the EIB could have made use of the internal procedures for resolving such disagreements by



involving the Management Committee [13] much earlier in the process.

20. The Ombudsman understands that EIB senior management chose to wait until the comments made by the relevant EIB departments had been taken into account by the EIB-CM before submitting the draft Conclusions Report to the Management Committee. This was not required by the EIB-CM's rules [14], which state that the EIB-CM must respond to critical comments, but does not have to obtain the agreement of all parties consulted before proceeding [15].

21. The Ombudsman appreciates that the EIB needs to be cautious when it deals with confidential information from its contractual counterparts, including borrowers and other lenders. However, this should not prevent the EIB-CM from doing its work. To be effective, its reports need to be evidence-based, objective and sufficiently persuasive so as to lead, if necessary, to changes being made.

22. The EIB-CM is designed to act *independently* [16]. Good internal cooperation and support from the rest of the EIB administration is *essential*. The EIB is a public institution, which must be held accountable. The EIB-CM plays a key role in ensuring this accountability. *For its part, the EIB-CM must liaise constructively with the other EIB departments in order to function effectively.* **Where there are disagreements between the EIB-CM and the EIB departments, the EIB should resolve the matter as quickly as possible, submitting it to the Management Committee if necessary.**

The procedures applying to the EIB-CM

23. The inquiry revealed that the lack of clarity surrounding how the EIB-CM deals with complaints seriously hampered this process, and led to long delays [17].

24. When it provided its reply to the Ombudsman, the EIB was in the process of reviewing the EIB-CM's policy and procedures. It had already identified, in its reply to the Ombudsman, some of the provisions that needed to be improved. This process is now finalised. The EIB adopted, in November 2018, the revised EIB Group Complaints Mechanism Policy [18] and Procedures [19].

25. The Ombudsman's Office provided input to the review process [20]. While the EIB did not follow up on all the points raised, **the Ombudsman expects that the new Policy and Procedures will help remedy the shortcomings identified in this inquiry.** In particular, the review has helped clarify the procedural issues surrounding the initial assessment of complaints [21] and should help speed up the process by limiting internal consultation.

The EIB-CM's resource-constraints and workload

26. While staffing does not appear to have been a significant cause of delay in this case, it is likely to have been a contributing factor. The EIB has committed to ensuring sufficient



resources for the EIB-CM [22] .

27. Resource constraints are an issue for all public administrations, requiring difficult choices to be made about how work is done, what takes priority and what matters cannot be pursued. It will be for the EIB-CM, going forward, to determine its priorities and its working methods on the basis of the resources allocated to it.

Overall assessment

28. The serious delays that occurred in this case were mainly due to internal working methods at the EIB, which undermined the ability of the EIB-CM to carry out the investigation effectively and in a timely manner. The EIB failed to take a final decision on the complaint within a reasonable timeframe [23] . This amounts to maladministration.

29. There are other cases where the EIB-CM has exceeded the timelines set out in its rules on handling complaints [24] and the Ombudsman has received a number of complaints. As such, delays in the EIB's complaint-handling process appear to be systemic.

30. The Ombudsman will therefore make a corresponding recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman. The Ombudsman's recommendation takes into account the fact that the EIB has already taken measures to address a number of problems through its review of the EIB-CM's Policy and Procedures. Monitoring the project

Arguments presented to the Ombudsman

31. The complainant stated that the EIB had failed to ensure that the project was monitored in an independent manner. This was because the consultancy assisting the EIB in this matter was paid by the project promoter. In the complainant's view, this amounts to a conflict of interests.

32. In its reply to the Ombudsman, **the EIB** contested the view that there was a lack of independence in how the project was monitored. It stated that it is common practice in international financing arrangements, involving several lenders, to make use of an independent consultant to monitor projects. Typically, the consulting fees are paid by the project promoter (the borrower).

33. In the EIB's view, the contractual arrangements between the promoter, the lenders and the consultancy in this case were sufficient to avoid or, if necessary, resolve potential conflicts of interests [25] . In addition, the EIB's 'Projects Directorate' was responsible for reviewing the consultancy's work and also carried out monitoring work itself. The EIB also proposed concrete measures to improve the EIB's monitoring procedures.

The Ombudsman's assessment



34. The Ombudsman can understand how the complainant perceived there to be a problem, given the fees of the consultancy monitoring the project were paid by the promoter, whose activities it was supposed to monitor. This situation **could give rise to justifiable doubts** about the independence of the consultancy, and whether it reviewed the project and drew up reports in an objective manner. **This could, in turn, give rise to justifiable doubts as to whether the EIB was able properly to monitor the project**, given it relied in part on monitoring reports drafted by the consultancy.

35. Although the complainant raised specific concerns in his correspondence with the EIB [26], the EIB-CM merely concluded, in general and succinct terms, that, overall, the EIB had fulfilled its monitoring obligations and that the contractual arrangements were sufficient to avoid or, if necessary, resolve potential conflicts of interests [27].

36. Under the terms of reference, the consultancy was responsible to the lenders (including the EIB) and not to the promoter. The Ombudsman also notes the contractual provisions regarding possible conflicts of interests, mentioned by the EIB.

37. The EIB essentially argued that the fact that its Projects Directorate reviews consultancies' reports and carries out its own monitoring is a sufficient safeguard. The Ombudsman is not convinced that, in this case, this addressed the justifiable doubts raised by the complainant. The Ombudsman also notes that the EIB has proposed measures to improve its monitoring procedures.

38. As the EU's bank financing projects within and outside the Union, the EIB's activities have an impact on the EU's reputation. Given its monitoring activities are based, in part, on reports prepared by private companies, it is important that these companies are perceived to be acting independently from the promoters whose activities they monitor. If their fees and expenses are paid by those promoters from the project's budget, appropriate safeguards need to be in place to deal with any risks arising from this situation. This is essential for the EIB to maintain public trust.

39. In this case, the EIB did not provide convincing reasons to demonstrate that it had appropriately addressed the complainant's concerns about whether the monitoring of the project was sufficiently independent. This constitutes maladministration. The Ombudsman will therefore make a corresponding recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman.

Recommendations

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendations:

The Ombudsman welcomes the EIB's efforts to improve the rules governing how the EIB-CM deals with complaints. She expects that its new Policy and Procedures will help remedy the shortcomings identified in this inquiry. Where there are disagreements between the EIB-CM and other EIB departments, the EIB should resolve the matter as quickly as possible, submitting it to the Management Committee if necessary.



When an external company is engaged to help monitor the implementation of a project and its fees and expenses are paid by the promoter(s), the EIB should ensure that it has in place appropriate safeguards to deal with any risks arising from this situation .

The European Investment Bank and the complainant will be informed of these recommendations. In accordance with Article 3(6) of the Statute of the European Ombudsman, the European Investment Bank shall send a detailed opinion **by 5 March 2019**

Emily O'Reilly

European Ombudsman

Strasbourg, 04/12/2018

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] The project comprised the construction and development of a new cobalt mine, a large-scale hydrometallurgical refinery and a pipeline connecting the mine and refinery. It also included the construction of a tailings facility and the expansion of the port of Toamasina (Madagascar). <http://www.eib.org/en/projects/pipelines/pipeline/20060398>

[3] This allegedly led to a high level of mortality for bees, which in turn affected the production of plantations in the area.

[4] According to the Memorandum of Understanding signed between the Ombudsman and the EIB, "*before turning to the EO, complainants should have recourse to an effective internal EIB complaints procedure.*" The Complaints Mechanism deals with complaints against the EIB by individuals, organisations or corporations affected by EIB activities. The EIB-CM is independent from the other operating sections of the EIB.

[5] The Management Committee is the EIB's permanent executive body.

[6] The Conclusions Report is available at:
<http://www.eib.org/en/about/accountability/complaints/cases/sg-e-2012-04-ambatovy-nickel-project>



[7] This timeline was calculated up to July 2017, when the EIB was preparing its reply to the Ombudsman.

[8] Namely, the Projects Directorate, the Legal Directorate, the Operations Directorate and the Transaction Management and Restructuring Directorate.

[9] The EIB noted that the time needed for the internal consultation process for both the Initial Assessment Report and the Conclusions Report represented “only” two out of the five years the EIB-CM took to deal with the complaint (at the time of its reply to the Ombudsman).

[10] The rules applicable at the time were set out in the EIB-CM’s ‘ Operating Procedures ’, and in the ‘ Principles, terms of reference and rules of procedure ’ that applied to the EIB-CM. According to this, a response to a complaint should be sent within 40 working days after the date of the acknowledgement of receipt. For complex issues, or for reasons beyond the control of the EIB-CM, the deadline for providing a final reply may be extended by an additional maximum period of 100 working days. This may, in turn, be extended for an unspecified period (Article 10.3).

[11] The Conclusions Report mentions that there had been “ numerous ”, unsuccessful attempts to obtain information from the promoter. The EIB-CM noted that this had delayed a detailed review of the compliance of the project with the applicable standards (see point 4.3 - text box 1 of the Conclusions Report).

[12] The inquiry revealed that there had been, in total, eight rounds of internal consultations on the EIBCM’s reports (four for the Initial Assessment Report and four for the draft Conclusions Report).

[13] Under the EIB-CM’s Operating Procedures in place at the time (Articles 4.7 and 5.4), when the EIB departments disagree with the findings and conclusions of the EIB-CM, the EIB can refer the matter to the Management Committee (thus accelerating the complaint-handling process). The inspection revealed that this was not done for the Initial Assessment Report and was done only at a very late stage for the draft Conclusions Report.

[14] Article 4.7 of the EIB-CM’s Operating Procedures in place at the time.

[15] There are other cases dealt with by the EIB-CM where the internal consultation process appears to have lasted more than six months. See, for example, cases SG/E/2011/03 (the investigation was completed on 8 June 2012, but the case appears to be still ongoing), SG/E/2013/01 (the investigation was completed on 10 December 2014, but the case appears to be still ongoing), SG/E/2013/12 (almost 19 months in consultation), SG/E/2013/09 (almost 9 months in consultation), SG/P/2010/08 (7 months in consultation), SG/E/2010/05 (the investigation was completed on 19 July 2011, consultations were completed on 19 April 2012, and the case was closed on 12 March 2014). (Source:

<http://www.eib.org/en/about/accountability/complaints/cases/index.htm> , last consulted on 29 November 2018).



[16] Article II.2.2 of the EIB-CM Principles, terms of reference and rules of procedure , in place at the time, states that it shall be independent of the services which are responsible for the activities challenged by a complainant.

[17] According to the EIB, the fact of having many allegations in one single complaint was due to the lack of clarity of some provisions in the EIB-CM's procedural rules in place at the time.

[18] Available at:

http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf .

[19] Available at:

http://www.eib.org/attachments/consultations/eib_complaints_mech_procedures_en.pdf .

[20] See the European Ombudsman contribution to the revision of the EIB Group Complaints Mechanism Policy, available at:

<https://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/80161/html.bookmark#hl2> , <https://www.ombudsman.europa.eu/en/letter/en/102896> and

<https://www.ombudsman.europa.eu/en/letter/en/102897> .

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[21] For instance, the decision whether to handle multiple allegations separately or together should be taken by the EIB-CM alone and should not be called into question by other departments in the EIB, as happened in this case.

[22] Article 7 ('Resources') of the EIB-CM Principles, terms of reference and rules of procedure in place at the time. This commitment was maintained in the reviewed Policy (Article 5.1.13).

[23] According to Article 41(1) of the Charter of Fundamental Rights (establishing the right to good administration), the EIB has a duty to assess the complaints it receives within a reasonable timeframe.

[24] See the list of the closed and ongoing EIB-CM cases annexed to the EIB's Activity Report 2017: http://www.eib.org/attachments/complaints_mechanism_annual_report_2017_en.pdf .

[25] The terms of reference governing the consultancy's work included specific provisions for replacing the consultancy should a conflict of interests arise.

[26] For instance, in a letter of 11 August 2014, the complainant raised concerns about some instances, which he claimed demonstrated bias or an incomplete approach by the consultancy in how it reviewed the project promoter's work.

[27] The EIB-CM referred to "*the independent function of the [consultancy], ensured by the*



contractual relationship between the [consultancy], *the promoter and the lenders, including the EIB. The EIB-CM deem [ed] this relationship to be sufficient to avoid and/or resolve any potential conflicts of interest of the [consultancy]"* - see Conclusions Report (point 4.3 - text box 1).