



Decision 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

Decision

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 raised concerns about the time taken to deal with his complaint, and also 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 identified issues in how the EIB monitors projects and made a corresponding recommendation.

The EIB accepted the Ombudsman's recommendations. Therefore, the Ombudsman closed the case.

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') [1]. The complainant raised issues in relation to the project's compliance with environmental, safety and health requirements. The EIB dealt with the complaint through its Complaints Mechanism Division (the 'EIB-CM').

2. The complainant was unhappy with the time it took the EIB to take a final decision on his complaint. He was also concerned that the EIB had failed to ensure independent monitoring of the project. This was because the EIB had monitored the implementation of the project with the assistance of an external consultancy ('the consultancy'), whose fees and expenses were paid by the company carrying out the project ('the promoter'). In the complainant's view, this amounted to a conflict of interest.

3. The complainant turned to the Ombudsman in January 2017 to raise these issues.



The Ombudsman's recommendations

[2]

How long it took to handle the complaint

4. The Ombudsman found that the serious delays that occurred in the EIB's handling of this case were mainly due to internal working methods at the EIB. She concluded that the EIB had failed to take a decision on the complaint within a reasonable period of time. This was maladministration.

5. While taking into account the fact that the EIB had already taken measures to address a number of problems by reviewing, during the Ombudsman's inquiry, the EIB-CM's *Policy* and *Procedures* [3], the Ombudsman made the following recommendation to the EIB:

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.

6. In its reply, **the EIB** pointed out that its revised rules deal with the matter of cooperation between the EIB-CM and the EIB Group's departments. The new *Procedures* set strict deadlines for these departments to provide comments [4], while the new *Policy* ensures that these deadlines are met [5]. The revised rules no longer allow for repeated consultations between the EIB's relevant departments and the EIB-CM. Similarly, there is a stricter framework regarding the internal consultation carried out before the final Conclusions Report is submitted by the EIB-CM to the top management for information or decision [6]. In addition, the revised rules also ensure that possible disagreements between the EIB-CM and EIB departments are resolved quickly [7].

7. **The complainant** did not make comments on the EIB's reply on this aspect of the case.

Monitoring the project

8. The Ombudsman found that the situation, whereby the fees of the consultancy monitoring the project were paid by the promoter, whose activities it was supposed to monitor, could give rise to justifiable doubts about the independence and objectivity of the consultancy. 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. As the EIB had not convincingly addressed the complainant's concerns about whether the monitoring of the project was sufficiently independent, the Ombudsman found maladministration.



9. The Ombudsman thus made the following recommendation to the EIB:

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 .

10. **The EIB** replied that it would see to it that its practices and processes are effectively employed to ensure compliance with this recommendation.

11. The EIB contended that, according to best banking practices, the use of an external consultancy, paid for using project funds, to monitor the implementation of a project on behalf of the lenders, is a common practice of project finance operations, in particular those financed by a group of lenders, like in this case. In the EIB's view, the engagement of an external consultancy under such terms cannot – in principle – give rise to a situation of a conflict of interest.

12. According to the EIB, it thoroughly re-examined its practices and processes in light of the Ombudsman's inquiry, in order to ensure that they are in line with her recommendation. The EIB assured the Ombudsman that it already has in place appropriate safeguards to ensure that consultancies selected by lenders work in the interest of lenders. This happens both during the process of selecting consultancies [8] and after consultancies have been selected [9] . It committed, however, to further strengthening the selection process as follows. The EIB will:

- (i) review and, if necessary, refine the wording of contracts to avoid any potential misunderstanding as to the consultancies' independence in assessing, monitoring and reporting on projects;
- (ii) reinforce the supervision of consultancies to ensure stronger emphasis on independence;
- (iii) reinforce the monitoring of the outcome of consultancies' work, including with regard to their independence;
- (iv) ensure that, where possible and necessary, the contractual provisions governing the replacement of consultancies can be triggered, where their independence is put into serious doubt;
- (v) include a contractual condition, where possible, to stipulate that only lenders can request suspension or refusal of payment of consultancies.

13. In his comments on the EIB's reply, **the complainant** maintained that the EIB had made a " *serious fault* " by accepting that the consultancy that monitored the project be paid by the promoter. He stated that the lack of proper monitoring of this project had serious environmental and social consequences. He disagreed with the EIB's view that this practice did not imply a conflict of interest. The fact that the EIB proposed several measures to improve this aspect of its work was clear proof that this practice is wrong. The complainant also asked that the EIB apply the proposed measures to the specific project he complained about.



The Ombudsman's assessment after the recommendations

14. Regarding her **first recommendation**, the Ombudsman recognises the efforts made by the EIB to improve the way it deals with complaints, and welcomes the review of the EIB's *Policy* and *Procedures*. She will assess the effectiveness of the new *Policy* and *Procedures* based on complaints received in future.

15. Regarding her **second recommendation**, the Ombudsman takes note of the safeguards that the EIB has in place and welcomes the additional measures it sets out in its reply.

16. As regards the project in question, the Ombudsman's finding of maladministration was that the EIB had not convincingly addressed the complainant's concerns about whether the monitoring of the project was sufficiently independent. The EIB has sought to remedy that shortcoming in its response to the Ombudsman's recommendation by setting out the safeguards it had in place at the time. To fully address the Ombudsman's recommendation, which was about the EIB's practice in general, the EIB set out the further measures it would take. On this basis, the Ombudsman's view is that the EIB has accepted her recommendation. The effectiveness of those measures is, again, something that can be verified only on the basis of complaints the Ombudsman deals with.

17. Regarding the complainant's request that the EIB apply the proposed measures to the project he complained about, the Ombudsman considers that, given the nature of the measures set out, this is unlikely to be feasible at this stage. This is, however, ultimately for the EIB itself to determine.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

The European Investment Bank has accepted the Ombudsman's recommendations. The Ombudsman will determine the effectiveness of the improvements the EIB has set out on the basis of future complaints.

Emily O'Reilly

European Ombudsman

Strasbourg, 27/03/2019

[1] <http://www.eib.org/en/projects/pipelines/pipeline/20060398>

[2] The full text of the Ombudsman's recommendation is available at: <https://www.ombudsman.europa.eu/en/recommendation/en/107214>



[3] The EIB adopted, in November 2018, the revised EIB Group Complaints Mechanism Policy (http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf) and the EIB Group Complaints Mechanism Procedures (http://www.eib.org/attachments/consultations/eib_complaints_mech_procedures_en.pdf).

[4] For instance, the relevant EIB Group departments shall provide any comments within 10-15 working days from circulation (Point 1.6.1 of the *Procedures*).

[5] The relevant part of the *Policy* reads: "[...] *the process cannot be blocked by a failure to respond to the consultation. If no comments are received by the deadline, EIB-CM will proceed to the next stage based on a tacit agreement .*" (Point 6.3.2 of the *Policy*).

[6] In particular, to the EIB's Management Committee (points 1.6, 1.7 and 1.8 of the *Procedures*).

[7] In such cases, the EIB Inspector General will submit the final Conclusions Report and the relevant departments' response to the EIB Management Committee for decision without further delay (point 1.8.2 of the *Procedures*).

[8] For instance, during the selection process, the EIB is actively involved in developing and agreeing on the Terms of Reference for the consultancies, as well as in finding an agreement on a list of possible consultancies to be selected; it also evaluates the bids and makes the final selection with the other lenders.

[9] Following the selection of consultancies, the EIB may review and comment on the contract to ensure that its terms and conditions provide explicit undertakings for the consultancy selected to perform duties in the interests of, and in accordance with, the requirements of the lenders. For example, the contract will typically include a clause outlining the consultancy's duty of care to the lenders. To this end, if it is perceived that the consultancy is not performing appropriately, the lenders generally have the contractual right to request a change.