

Proposal of the European Ombudsman for a solution in case 805/2018/THH on the European Investment Bank's refusal to grant public access to documents regarding a loan to Volkswagen

Solution - 13/12/2018

Case 805/2018/MIG - Opened on 08/05/2018 - Recommendation on 29/03/2019 - Decision on 28/11/2019 - Institution concerned European Investment Bank (Maladministration found)

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Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

Background to the complaint

1. In 2009, the European Investment Bank (EIB) gave Volkswagen a loan of EUR 400 million to finance a research and development project called “ *Volkswagen Antrieb RDI* ” that aimed to reduce polluting car emissions. The loan was fully repaid by 2014. As concerns were raised that Volkswagen had used the loan to develop a “defeat device” which would produce misleading results on emissions tests, OLAF opened an investigation in November 2015. In the summer of 2017, the European Anti-Fraud Office (OLAF) finalised its investigation on the loan and sent its “Final Report” to the EIB. According to the EIB, OLAF found that Volkswagen had misled the EIB “about the use of the defeat device”. [2] The use of the defeat device by Volkswagen is currently the subject of administrative and judicial proceedings in various jurisdictions worldwide.

2. On 18 January 2018, the complainant, a journalist, requested the EIB to give him public access, in accordance with Regulation 1049/2001 [3] , to “ *the OLAF report about the €400m loan to Volkswagen (Volkswagen Antrieb RDI); the administrative recommendation received from OLAF regarding the loan to Volkswagen* ”; and “ *EIB internal documents, including but not limited [to] memo's, papers, e-mails, and letters, discussing the above-mentioned report and/or recommendation from OLAF regarding the loan to Volkswagen* ”.

3. On 2 March 2018, the EIB refused to grant public access to the OLAF report and recommendation, or to internal emails and exchanges. As regards other internal documents, such as memos, the EIB stated that it had not produced any specific internal documents related to the OLAF report and recommendation.



4. Dissatisfied with this decision, the complainant requested a review, a so-called “ *confirmatory application* ”, on 2 March 2018.

5. On 17 April 2018, the EIB confirmed its previous decision, refusing public access to the requested documents. It referred to the EIB Group Transparency Policy (EIB TP) [4] and noted that it refused access in order to protect the EIB’s decision-making process; the purpose of investigations; ongoing court proceedings; and the privacy and integrity of the individuals named in the report.

6. The complainant turned to the European Ombudsman on 26 April 2018, requesting that the Ombudsman review the documents and issue a decision on public disclosure of those documents.

The inquiry

7. The Ombudsman opened an inquiry into the EIB’s refusal to grant public access to the report and recommendation of OLAF, which was sent to the EIB, concerning a loan provided to the Volkswagen Group, as well as the EIB’s internal documents concerning the report and recommendation.

8. In the course of the inquiry, the Ombudsman considered the documentation provided by the complainant and inspected the OLAF report and recommendation. Following the Ombudsman’s request for a reply, the EIB provided its additional views, including information which was relevant to the inquiry but confidential, in order to explain its reasons for refusing public access.

Arguments presented to the Ombudsman

9. The EIB stated that, on the basis of OLAF’s findings, it “ *knows that the EIB was misled by Volkswagen* ” and that “ *the OLAF report recommends that the EIB applies all relevant measures vis-à-vis Volkswagen AG as provided for under the Bank’s Anti-Fraud Policy* ”. [5] On those grounds, the EIB argued [6] that the requested documents contain “ *opinions for internal use, which are the subject of ongoing deliberations and preliminary consultations within the Bank and with other stakeholders* ” and that the EIB “ *is considering potential actions on this matter* ”. In the light of this, since the EIB’s ongoing decision-making process is based on the requested documents, the EIB concluded that their disclosure would seriously undermine this decision-making process. Accordingly, the EIB invoked Article 5(6) of EIB TP, which provides an exemption from disclosure of documents for the purpose of protecting the decision-making process.

10. The complainant, however, argued that the EIB has not set a deadline for concluding its internal discussions and decision-making process, nor had it indicated when the disclosure of the documents might cease to undermine the protected interests. He stated that the EIB’s



argument that the requested documents need to remain confidential so that the EIB's "*decision on future actions*" is not jeopardised, "*is a gratuitous argument that could always be applied*".

11. The EIB also stated that, since the report and recommendation constitute the outcome of OLAF's investigation, it consulted with OLAF in accordance with Articles 5(1) and 5(9) of EIB TP. On the basis of that consultation the EIB concluded that disclosure of the documents would undermine criminal investigations and court proceedings which are ongoing worldwide. According to the EIB, Article 5(5) third and fourth bullet sets out the obligation to protect the principle of "*sound administration of justice*" in ongoing court proceedings, as well as ongoing criminal investigations which are essential for the future prevention and deterrence of financial misconduct. The EIB also noted the fact that the German authorities, in court proceedings ongoing in Germany, have acknowledged the judicial relevance of the report. This, the EIB said, supports the case for the documents remaining confidential.

12. Similarly, the EIB argued that, for the same reasons as apply to the OLAF report and recommendation, its internal emails and exchanges could not be disclosed. The EIB considered that the disclosure of these documents would undermine the protection of the privacy and the integrity of individuals, ongoing court proceedings, the purpose of investigations and the bank's decision making process.

13. The complainant said that he had contacted the public prosecutor in Germany, in a case concerning the EIB's loan to the Volkswagen Group and alleged fraud in the emission tests. The prosecutor stated that access to OLAF's report had been granted to the defence. Based on this, the complainant argued that the disclosure of the documents could not possibly jeopardise court proceedings since those accused of wrongdoing are already familiar with the content of the report.

14. The complainant argued that the exceptions set out in Articles 5(5) and 5(6) of EIB TP do not apply if an overriding public interest in disclosure of the documents is established, according to Article 5(7) of EIB TP. The complainant claimed that an overriding public interest exists, because the documents give an insight "*as to how a company was able to mislead the EIB and acquire a loan based on incorrect information*" and as to "*whether the EIB has learned from the experience*". The complainant supported his claim by referring to the European Parliament's resolution on the Annual Report on the Financial Activities of the European Investment Bank from 8 February 2018, [7] which called for the report and recommendation to be made public. The complainant argued that the EIB has not comprehensively taken note of Parliament's call.

15. The EIB argued that the potential public interest invoked by the complainant "*does not outweigh the specific and concrete harm that the disclosure of such information would cause*" to the EIB's decision-making process and to the ongoing court proceedings and investigations; interests which are protected by the EIB TP. It also added that "*the OLAF Investigation did not identify any failure in the EIB processes linked to the appraisal, approval, and monitoring of the EIB loan*". Nevertheless, the EIB acknowledged the public interest in being informed about the outcome of OLAF's investigation and made a public statement [8] following the finalisation of the OLAF investigation. The EIB also stated, in its additional views provided to the



Ombudsman, that it will consider further communications to the public to the extent possible and in accordance with the EIB TP. The EIB addressed the Resolution of the European Parliament, stating that it had taken this into consideration and had provided a response to the interested Members of Parliament in line with the response provided to the complainant.

The Ombudsman's assessment

16. The complainant has sought access to the OLAF report, and the related OLAF recommendation. He has also sought access to internal documents of the EIB discussing the report and/or recommendation.

17. For the reasons set out below, the Ombudsman is convinced by the EIB's arguments for its refusal to grant public access to the internal emails and exchanges of the EIB. However, the Ombudsman is not convinced by the EIB's arguments for its refusal to grant public access to the OLAF report and the related OLAF recommendation.

18. The EU courts have ruled that a general presumption applies as regards the non-disclosure of an OLAF report **during the period when that OLAF report is being followed up by an EU institution, or by a national body, such as national courts**. The Ombudsman has confirmed that such a "follow-up" is indeed on-going at the EIB. Therefore, there does exist a general presumption that the OLAF report (and the related recommendation) cannot be disclosed while that follow-up is on-going.

19. However, having analysed the OLAF report and recommendation, the Ombudsman considers that the general presumption that it would undermine the follow-up of the EIB is rebutted in this case. She notes that significant parts of the report and recommendation merely reflect information which is already in the public domain, including through the EIB's public statements on the report. [9] Release of that information by the EIB has not undermined the EIB's follow-up action. The same would apply as regards the release of an appropriately redacted version of the report and recommendation (see below).

20. Furthermore, the Ombudsman is of the view that there is a very strong public interest in disclosure in this case. This case does not only concern the misuse of public funds, nor even the more serious matter of misrepresentations by a company leading to that misuse of public funds. In this case, EUR 400 million of public money - acquired on the understanding that it would be used in a way which does *not* damage public health - was misused in a manner which *directly damages* public health. The public interest in knowing the details of how public money was used in a manner which impacts negatively upon public health is overwhelming. It is in the public interest that the public be as fully informed as possible as regards OLAF's investigation on the contribution that Volkswagen has made to this threat to public health and how the public's money has in fact been used by Volkswagen to the detriment of public health. The disclosure will enhance the public's basis for having an informed view on Volkswagen's accountability and any follow-up actions.



21. Having carefully examined the documents, the Ombudsman takes the view that this public interest would override any possible concerns relating to the disclosure of the report and recommendation.

22. As regards appropriate redactions, the Ombudsman notes that the requested documents contain the names of persons who worked for Volkswagen. These names should be redacted, thereby eliminating any risk to those individuals' personal data rights.

23. The OLAF report has also been forwarded to courts in Germany for the purposes of on-going court proceedings related to the diesel-gate scandal. The Ombudsman has been provided with no information which would demonstrate that the OLAF report would be central to those court proceedings. In any case, the Ombudsman is of the view that redacting the names of persons contained in the OLAF report would eliminate any risk to the serenity of the ongoing court proceedings should they involve such persons.

24. As noted above, the complainant also sought access to the internal documents of the EIB discussing the report and/or recommendation. The EIB has clarified that no such documents have been created. In the Ombudsman's view, it is reasonably foreseeable that the release of any internal correspondence, such as emails or memos, relating to the follow-up would undermine that follow-up whilst it is on-going. The Ombudsman does not consider that there is any overriding public interest in releasing such internal correspondence at this stage.

25. As noted above, it is the Ombudsman's view that disclosure of the report and recommendation will enhance the public's basis for having an informed view of the accountability of Volkswagen and any follow-up actions. The OLAF report and recommendation are now over one year old. Given the importance of the issues involved, there is a certain urgency. Thus, the Ombudsman considers it appropriate to set a short deadline for the release of the report and the recommendation.

The proposal for a solution

Based on the above assessment, the Ombudsman proposes that the European Investment Bank should grant public access to the report and recommendation of the European Anti-Fraud Office concerning the EIB loan to Volkswagen, with appropriate redactions only for personal data.

The EIB is invited to inform the Ombudsman by 18 January 2019 of its response to the above solution proposal. In the event that the EIB has not released the documents by this date, the Ombudsman will make her views public through a Recommendation that the documents be released.

Emily O'Reilly



European Ombudsman

Strasbourg, 13/12/2018

[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] EIB Statement following the finalisation of the OLAF investigation into the possible misuse of EU funds and European Investment Bank loans by the Volkswagen Group, 1 August 2017, available at:

<http://www.eib.org/infocentre/press/news/all/eib-statement-following-the-finalisation-of-the-olaf-investigation-into-the> [Link].

[3] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1> [Link].

[4] European Investment Group Transparency Policy, 6 March 2015, available at:

http://www.eib.org/attachments/strategies/eib_group_transparency_policy_en.pdf [Link].

[5] See

<http://www.eib.org/en/infocentre/press/news/all/eib-statement-following-the-finalisation-of-the-olaf-investigation-into-the> [Link]

[6] In its decision of 17 April 2018 refusing access to the documents.

[7] European Parliament resolution of 8 February 2018 on the Annual Report on Financial Activities of the European Investment Bank, available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0039+0+DOC+XML+V0//EN> [Link].

[8] EIB Statement following the finalisation of the OLAF investigation into the possible misuse of EU funds and European Investment Bank loans by the Volkswagen Group 1 August 2017, available at:

<http://www.eib.org/infocentre/press/news/all/eib-statement-following-the-finalisation-of-the-olaf-investigation-into-the> [Link].

[9] See above, EIB Statement.