

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

Recommendation

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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The case concerned a loan of EUR 400 million of public money granted by the European Investment Bank (EIB) to Volkswagen, one of Europe's largest companies, and which was subsequently used fraudulently by that company.

The loan was granted to co-finance a research and development project aimed at reducing polluting car emissions. In 2015, following worldwide news coverage of the 'Dieselgate' scandal, concerns were raised that Volkswagen had used the loan to develop a "defeat device" which would produce misleading results on emissions tests. The European Anti-Fraud Office (OLAF) opened an investigation into the loan in November 2015. This investigation was finalised in the summer of 2017, when OLAF sent its final report and recommendation to the EIB. The report found that Volkswagen had misled the EIB in the acquisition of the loan.

The complainant, an investigative journalist, requested from the EIB, under EIB transparency rules, public access to the report and recommendation, along with related internal documents of the EIB. The Bank refused public access. Dissatisfied, the complainant turned to the European Ombudsman.

The Ombudsman found that there was a very strong public interest in disclosure of the relevant documents and that this overrode the EIB's concerns. She therefore proposed to the EIB in December 2018 that it should grant public access to the report and recommendation, with appropriate redactions only for personal data. In February 2019, the EIB published a summary of the report and recommendation.

The Ombudsman considers that release of the summary by the EIB is insufficient, particularly as the report contains several facts which are in the public interest to be disclosed.

She therefore recommends that the EIB should grant public access to the report and recommendation, as well as the internal notes drawn up by the Bank, with redactions only for



personal data and any other information which could lead to individuals being identified.

Made in accordance with Article 3(6) 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 aimed at reducing polluting car emissions, “*Volkswagen Antrieb RDI*”. The loan was fully repaid in 2014. Concerns were raised that Volkswagen had used the loan to develop a “defeat device” which would produce misleading results on emissions tests. In November 2015, the European Anti-Fraud Office (OLAF) opened an investigation into the alleged misuse of EIB loans by Volkswagen and the alleged misrepresentations by representatives of Volkswagen to obtain these EIB loans. This investigation was finalised in the summer of 2017, with OLAF sending its final report and recommendation to the EIB.

2. On 18 January 2018, the complainant - an investigative journalist - requested [2] from the EIB public access 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. The EIB refused to grant public access to the requested documents, taking a decision on 2 March 2018 which it confirmed on 17 April 2018.

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

5. The Ombudsman opened an inquiry into the EIB’s refusal to grant public access to the documents requested by the complainant. The Ombudsman considered the documentation provided by the complainant and inspected the documents provided by the EIB. The EIB provided additional views in order to explain its reasons for refusing public access.

The Ombudsman’s proposal for a solution

6. The Ombudsman was not convinced by the EIB’s arguments. Whilst a general presumption against disclosure applies to OLAF reports which are being followed up by an EU institution or by a national body, the Ombudsman considered that this general presumption was rebutted in this case. She noted that significant parts of the report and recommendation merely reflected information which was already in the public domain. Release of that information had not undermined the EIB’s follow-up action. Similarly, release of an appropriately redacted version of



the report and recommendation would not undermine such follow-up action.

7. The Ombudsman found that there was a very strong public interest in disclosure in this case. The case concerned serious misuse of EUR 400 million of public funds and misrepresentations by a leading European company as to their purpose. The public interest therefore in knowing the details of how such money was acquired and used was both obvious and significant. Having carefully examined the documents, the Ombudsman found that this public interest would override any other claimed concerns i.e. the potential risk of undermining future investigations and audits or the protection of personal data.

8. The Ombudsman proposed that the names of persons who worked for Volkswagen should be redacted for the protection of their personal data rights.

9. As regards internal correspondence relating to the follow-up, the Ombudsman found that it would be reasonably foreseeable that the release of such documents would undermine that follow-up whilst it is ongoing. The Ombudsman did not consider therefore that there was any overriding public interest in releasing such internal correspondence at the time at which she made her proposal for a solution in December 2018.

10. The Ombudsman found that disclosure would enhance the public's capacity to make an informed view of the accountability of Volkswagen and of any follow-up action undertaken. The report and recommendation were by then already well over one year old. Given the importance of the issues involved, the Ombudsman considered that it was appropriate to set a short deadline for release.

11. The Ombudsman proposed in December 2018 that the European Investment Bank should grant public access to the OLAF report and recommendation with appropriate redactions only for personal data. [3]

The response of the European Investment Bank to the Ombudsman's proposal for a solution

12. In response, the EIB indicated that it was in principle willing to grant public access to a *redacted version* of the OLAF report because of the extraordinary level of public interest in this case and provided a fair balance was made between the public interest in disclosure and other public interests. These other public interests should be protected by redacting the OLAF report *beyond* personal data.

13. The EIB had requested OLAF's opinion on disclosure of the report. The EIB said that OLAF had expressed strong opposition to the (even partial) disclosure of the report. OLAF relied on the general presumption of non-disclosure of such reports to oppose disclosure of the documents. OLAF was also of the view that "*purely general considerations cannot provide an appropriate basis for establishing that an overriding public interest ... prevails over the reasons justifying the refusal to disclose the documents at stake*". The Bank stated that it could not



ignore the formal opinion of OLAF and indicated that the EIB depended on OLAF's cooperation properly to identify any information which would undermine OLAF's investigative function if disclosed.

14. The EIB agreed with the Ombudsman that there is a strong public interest in the disclosure of information, pointing to the high level of media interest in the Dieseltgate scandal, the importance of the automobile sector, the scale of the case and the impact of the case on the public's trust in business ethics.

15. The EIB stated that it was concerned that disclosure of the information with redactions only for personal data would not “ *sufficiently protect public interests whose protection shall be ensured even in the presence of an overriding public interest* ” and would not “ *be proportionate with regard to the public interest to protect investigations* ”.

16. The EIB pointed to its unique status as an EU body, but also a bank. As a bank, it is required to exchange information with its clients as part of a banking relationship based on trust and confidence. In the light of this, the EIB stated that “ *disclosing information on the interest rate of the loan or the liquidity situation of VW throughout the project cycle would concretely and seriously affect respectively the EIB's margins of negotiation on its loan conditions in the future as well as the clients' trust and confidence, a fundamental condition for the Bank to properly operate on the markets and attract future clients. These concrete risks cannot be neglected in order to preserve the role of the EIB as the financial arm of the EU* ”.

17. As regards protection of privacy, the Bank argued that “ *the mere removal of names of persons concerned from the document would not prevent possible identification of these individuals* ” since “ *the identity of persons can be derived from other information contained in the report* ”.

18. Concerning the protection of investigative functions, the EIB stated that disclosure of investigative reports risks revealing the methodology or modus operandi of investigations, with a consequent risk of weakening the impact of the investigation. “ *Disclosure of information on investigative methodology poses the risk of discouraging individuals (potential complainants or witnesses), as well as national authorities, from cooperating and providing information concerning possible cases of prohibited conduct thereby depriving OLAF and the EIB of information that is of use for the purpose of undertaking investigations* ”. The Bank highlighted that it is required to ensure the confidentiality of OLAF's investigations and that an exception to disclosure, when to do so would undermine the protection of the purpose of investigations, is established under its Transparency Policy (TP). The exception applies after the investigation has ended or the follow-up action has been taken. The EIB stated that in the current case, the exception to the presumption of transparency would “ *extend beyond any action taken by the Bank concerning the follow-up of the VW case* ” and referred to the possibility in its TP of publishing a summary of investigations that have been closed.

19. The Bank therefore informed the Ombudsman: i) that it had decided to publish a summary of the OLAF report and recommendation, which it did on 18 February 2019; and ii) that it was “



in principle willing to grant public access, on an exceptional basis, to a redacted version of the OLAF report. However, the strenuous opposition of OLAF to the disclosure of the report cannot be neglected. In this context, the EIB is not in a position to ensure that the necessary redactions for the protection of OLAF's investigative functions are made without the cooperation of OLAF, which carried out the investigation at stake ”.

20. The Bank invited the Ombudsman and OLAF to “ *a formal inter-institutional meeting ... with a view to achieving a mutually agreed solution on which redactions are necessary for the protection of OLAF's investigative functions ”.*

The response of the complainant to the Ombudsman's proposal for a solution

21. The complainant welcomed the Ombudsman's proposal to grant public access to the report and recommendation and accepted necessary redactions for personal data, as this did not form part of his request.

22. As regards the EIB's published summary of the OLAF report and recommendation, the complainant indicated that he could not confirm whether the summary included “ *all information relevant to the public interest* ” and could not rely on the Bank's assessment that it did. The complainant pointed to public statements made by the EIB's top management which he considered gave reason to doubt the EIB's commitment to provide all information relevant to the public interest. Whilst it was “ *commendable that the EIB had taken some steps towards transparency by publishing the summary on 18 February 2019* ” the complainant indicated that it was “ *not clear the EIB would have done so without the Ombudsman's investigation* ”.

23. The complainant pointed to the EIB's TP, and in particular paragraph 2.3 which reads: “ *The EIB Group understands transparency to refer to an environment in which the objectives of policies, its legal, institutional and economic framework, policy decisions and their rationale, and the terms of its member institutions' accountability are provided to the public in a comprehensive, accessible and timely manner* ”. The complainant emphasised that he could not consider the publication of a summary “ *1 year, 6 months and 22 days after the EIB had received the OLAF report and recommendation, as 'timely'* ”.

The Ombudsman's assessment after the proposal for a solution

24. The Ombudsman's proposal for a solution has not been accepted by the EIB. The Ombudsman declined to attend the proposed inter-institutional meeting with the EIB and OLAF as this is not her practice in access to documents inquiries. She however notes the good co-operation of the EIB on this case, and appreciates the genuine intentions of the EIB in offering a meeting.



25. The Ombudsman notes that the EIB's TP is “ *guided by openness and the highest possible level of transparency with the underlying presumption that information concerning the Group's operational and institutional activities will be made available to third parties (the public) unless it is subject to a defined exception* ”. She notes the TP states “ *improving the transparency of its institutions and bodies is a key European Union policy aimed at bringing them closer to the publics they serve* ”.

26. The Ombudsman notes the public interest inherent in the fact that air pollution is estimated to cause over 430 000 premature deaths in the EU yearly and costs up to an estimated EUR 940 billion annually in health impacts. [4] The Ombudsman further notes that international scientists estimate that “ *Volkswagen's excess emissions will lead to 1,200 premature deaths in Europe* ”. [5]

27. In that public health context, and given the time elapsed already and the very exceptional circumstances of a case concerning significant public funds, and misrepresentation and fraud on the part of a leading European company, the Ombudsman is convinced of the obvious and overriding public interest in making public the facts contained in these documents, including the relevant timelines and the advantageous interest rate (according to OLAF [6]) which are not in the published summary.

28. The Ombudsman is also convinced that the general presumption which applies to 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, is overridden given the overwhelming public interest involved. The Ombudsman notes the case-law which allows for a demonstration of a “higher public interest” to justify disclosure of OLAF reports [7] . Also as she stated in her proposal for a solution, significant parts of the report and recommendation merely reflect information which is already in the public domain. The Ombudsman considers that an appropriately redacted version of the report and recommendation (see below) could be provided to the public without undermining any follow-up action. This is especially the case now, given that follow-up action by the Bank has been completed . The Bank's statement of 20 December 2018 [8] says that “ *the European Investment Bank and Volkswagen AG have come to an agreement ... According to this agreement, the European Investment Bank will conclude its investigation and Volkswagen AG will in turn voluntarily not participate in any European Investment Bank project during an exclusion period of 18 months . Since October 2015, the consideration of loans by the European Investment Bank to Volkswagen AG had been under suspension. Volkswagen AG is committed to its sustainability initiatives including environmental protection activities and, in this context, will contribute EUR 10 million to environmental and/or sustainability projects in Europe. Volkswagen AG will continue to inform the European Investment Bank regarding its Compliance Programme and cooperate with the European Investment Bank in the exchange of best practices in relation to compliance standards and the fight against fraud* ”.

29. The Ombudsman accepts that it was incumbent on the EIB to consult OLAF on the possible release of the report and recommendation under Article 5.9 of its TP, which states that “ *As regards third-party documents (including EU Member States and EU institutions and bodies), the Bank shall consult with the third party whether the information in the document is confidential* ”.



according to this Policy”. However the Ombudsman does not consider these documents to be confidential under the EIB TP, taking into account Articles 5.4 to 5.8. The Ombudsman notes that fraud investigations conducted by the EIB, or on their behalf, are covered by an exception under Article 5.5 (including footnote 6), however she also notes that the investigation in question was one conducted by OLAF, and not by the EIB. Neither was the investigation conducted on behalf of the EIB, as OLAF investigates in full independence according to EU law.

30. The Ombudsman would also remind the EIB of her Decision 1316/2016/TN [9] where she encouraged the EIB “ *to reflect the wording of Article 4.2 third indent of Regulation 1049/2001 in its TP and to remove the presumption of non-disclosure related to information and documents collected and generated during inspections, investigations and audits, including after these have been closed* ”.

31. The Ombudsman shares the EIB concerns about the importance of protecting the methodology and modus operandi of OLAF investigations. However, having inspected the OLAF report in this particular case, the Ombudsman considers all of the investigative activities listed under Section 2.2.1 of the report to be quite normal and routine for any investigative body.

32. The Ombudsman understands and appreciates the EIB’s arguments concerning its unique role within the EU institutional infrastructure by virtue of its status as, and the functions which flow from it being, a bank. However the Ombudsman remains convinced that transparency can be attained in this case *without* jeopardising the Bank’s role or the trust placed in the Bank. Indeed, as was clear from her proposal from a solution, the Ombudsman finds that release of the report and recommendation (appropriately redacted) in this case will likely enhance trust in the Bank. The Ombudsman understands the EIB concerns as regards any disclosure of the interest rate, when the conditions of loan were originally agreed, or the liquidity situation of Volkswagen at the time. However, this commercial information is now over a decade old and market conditions and other factors have significantly changed. The Ombudsman believes a strong overriding public interest exists for the “ *advantageous interest rate compared to the market conditions applicable at the time of the conclusion of the finance contract* ” [10] to be now made known to the public.

33. The Ombudsman also notes that the complainant raised with the EIB the Aarhus Convention [11] in support of his right of access to the documents. The EIB contended that “ *the requested information does not relate to emissions into the environment* ” for which under EU law an overriding public interest in disclosure is deemed to exist. [12] However, while the Ombudsman agrees that the documents do not provide environmental information as such, they are very obviously related to emissions into the environment. The OLAF investigation was directly prompted by the emissions scandal, Volkswagen’s culpability in that scandal, and public and others’ concern that EIB funding had contributed to the development of devices that directly led to the production of noxious emissions into the environment.

34. The Ombudsman furthermore does not share the EIB’s assertion that it would be difficult to protect the interests of the individuals involved in this case. Having carefully analysed the documents, the Ombudsman finds that it would be possible to protect these individuals through



redaction of their personal data and any text which could lead to them being identified. The Ombudsman notes that, in fact, much of the information concerning the roles of the identified individuals is already in the public domain, for example in US Department of Justice public documents. Nevertheless, the Ombudsman accepts that the EIB should redact the personal data in the documents and is satisfied that public disclosure of such a redacted version would provide sufficient transparency concerning the fundamental issues which are the focus of the complainant's request and are the object of the public interest here. She also notes that the complainant has confirmed that he is not interested in the names of individuals mentioned in the report.

35. In addition, as the Bank's follow-up action has been completed and it is therefore no longer reasonably foreseeable that release would undermine any follow-up action, the Ombudsman is of the view that the internal notes of the EIB of 5 October 2017 and 9 October 2017 should also be released, with appropriate redactions of personal data and any text which could lead to individuals being identified.

36. Finally, the Ombudsman highlights that if she had considered the complaint about the denial of public access to the same OLAF documents by OLAF itself, she would have reached exactly the same conclusions.

37. The Ombudsman therefore finds that the refusal of the EIB to grant public access to the (appropriately redacted) report and recommendation of OLAF constituted maladministration. She therefore makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendations to the European Investment Bank:

The EIB should grant public access to the OLAF report and recommendation concerning the EIB loan to Volkswagen , with appropriate redactions of personal data, that is any text which could lead to individuals being identified .

The EIB should also grant public access to their internal notes of 5 October 2017 and 9 October 2017 , with appropriate redactions of personal data, that is any text which could lead to individuals being identified.

The European Investment Bank and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the EIB shall send a detailed opinion by 29 June 2019.



Emily O'Reilly

European Ombudsman

Strasbourg, 29/03/2019

[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] Under the European Investment Bank Group Transparency Policy of 6 March 2015, available at https://www.eib.org/attachments/strategies/eib_group_transparency_policy_en.pdf [Link]

[3] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's proposal for a solution available at: <https://www.ombudsman.europa.eu/en/solution/en/111782> [Link]

[4] [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603237/EPRS_BRI\(2017\)603237_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603237/EPRS_BRI(2017)603237_EN.pdf) [Link]

[5] <http://news.mit.edu/2017/volkswagen-emissions-premature-deaths-europe-0303> [Link]

[6] <https://www.eib.org/attachments/press/summary-olaf-report-antrieb-rdi-volkswagen-ag.pdf> [Link]

[7] Judgment of the General Court of 26 May 2016 in case T-110/15, *International Management Group v European Commission*, ECLI:EU:T:2016:322, paragraph 38, available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=CB987AA79DDC4066EF92DFA27E34C8A8?text=&d> [Link]

[8] Agreement reached between the European Investment Bank and Volkswagen AG in relation to EIB loan "Antrieb RDI", available at: <https://www.eib.org/en/infocentre/press/news/all/agreement-reached-between-the-european-investment-bank-and-v> [Link]

[9] Available at <https://www.ombudsman.europa.eu/en/decision/en/95520> [Link]

[10] See the EIB Summary of 18 February 2019, above

[11] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, available at



<https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> [Link]

[12] The EIB wrote in response in April 2018 that it is indeed subject to Regulation 1367/2006 which applies the Aarhus Convention to EU bodies. The EIB implements Article 6(1) of Regulation 1367/2006 via Article 5.7 of its TP