

Decision of the European Ombudsman on own initiative inquiry OI/4/99/OV against the European Investment Bank

Decision

Case OI/4/99/OV - Opened on 29/06/1999 - Decision on 14/05/2001

Strasbourg, 14 May 2001

Dear Mr A.,

On 24 May 1999 you made a complaint to the European Ombudsman on behalf of Aluminium Enterprises Limited (AEL) concerning an alleged mismanagement of the loan granted by the European Investment Bank to your company in the framework of the Lomé III Convention.

As you are not a citizen of the Union or residing in a Member State, I informed you by letter of 29 June 1999 that I had no power to deal with your complaint. I however decided to investigate your allegations in the framework of an own initiative inquiry on basis of Article 195 of the EC Treaty (registered as OI/4/99/OV).

On 29 June 1999, I forwarded the complaint to the President of the European Investment Bank. On 4 August 1999 you sent me a letter enclosing a copy of the audit Report prepared by Deloitte & Touche. The European Investment Bank sent its opinion on 7 September 1999 and I forwarded it to you with an invitation to make observations, if you so wished. On 26, 29 October and 22 November 1999, I received your observations on the European Investment Bank's opinion. On 6 April 2000 you wrote a letter inquiring about the outcome of your complaint. I replied to you on 18 May 2000.

On 26 April 2000 I sent a letter to the President of the European Investment Bank asking for detailed information on the appointment of the manager of AEL and for clarifications of the responsibilities of the Bank with regard to this procedure. You were provided with a copy of this letter. On 23 May 2000, the European Investment Bank sent its additional opinion which was forwarded to you with an invitation to make observations, if you so wished. On 24 July 2000, I received your observations on the European Investment Bank's additional opinion. On 12 January 2001, you sent final comments. On 26 March 2001 you sent a letter inquiring about your complaint. On 9 April 2001 I replied to you that your complaint was still under consideration.

I am writing now to let you know the results of the inquiries that have been made. I apologise for



the time it has taken to deal with your complaint.

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

The complainant is Managing Director of AEL, a small aluminium and non-ferrous smelting company in Tema, Ghana, with a branch and Head Office in Accra (hereafter "the company"). The complaint concerns alleged mismanagement of the loan granted in the framework of the Lomé III Convention by the European Investment Bank (EIB) for the expansion and modernisation project of the Tema plant of the company. The loan was approved by the Western Africa and Caribbean Department of the European Investment Bank in 1991, sanctioned by the Bank of Ghana and Ministry of Finance & Economic Planning. The total amount was USD 6.5 million, 2 million of which was contributed by the company as equity.

Soon after the approval of the loan, the EIB appointed two British consultants (Mr. F. and Mr. R.) to manage the project and supervise the loan disbursement. However, given that they engaged in illicit deals and possessed practically no technical knowledge, the complainant persuaded the EIB to terminate their appointment by the end of 1992. The project was immediately suspended. The EIB demanded, as a condition for the resumption of the loan, that another European consultant should be appointed as Managing Director and have a free hand to run the company, including the full control of its finances. Both the company and the EIB wrote to many European Aluminium experts, one of which proposed T, a German expert. In 1993 the EIB accepted and approved T's appointment as the new consultant and the Managing Director of the company. On 18 July 1994 a memorandum was signed at the EIB headquarters in Luxemburg appointing T. as the Managing Director of the company with a monthly salary of 12.000 USD. However, T. had in the year 1992 ran a German company into bankruptcy. On his arrival in Ghana, T. took over the entire management of the project, loan and company. The complainant vacated his office and retired to his private residence as requested by the EIB which asked him to give T. a free hand to manage the company and not interfere in his decisions.

T. colluded with W., a Lebanese resident in Ghana, who terminated the appointments of almost all the key personnel and instead appointed workers of his choice. He became a Director on the board of the company. T. also appointed two men as his co-managers and together they ran the company.

The complainant detected that T. operated against the company's interests, placing orders for insignificant and non-existing items for which huge amounts were transferred. He therefore informed the EIB of T's maladministration. The EIB however replied that it was on a mutual agreement with the company that T. was wholly in charge of the loan disbursement, the company and the project. The complainant had only to countersign the transfers of funds for the orders.



The complainant alleged that the EIB completely went beyond the terms of the Finance Contract signed with the company and unilaterally imposed numerous instructions which the complainant was obliged to follow.

The complainant alleged that, because of the unlimited powers the EIB vested in T, the latter diverted almost the whole disbursed funds and the two million USD equity contribution of the company, transferred all the working capitals, sold the materials and equipment which led the company into a huge debt. The complainant gives detailed information in his complaint of huge amounts of money which were spent by T. for inappropriate purposes, such a 1 million DM transfer to the nominated account of an Austrian manager, with 95 % of the ordered items which were never supplied, and supply orders to his Lebanese collaborator's clandestine companies for 700.000 DM. The latter case was dealt with by the Accra High Court which delivered a judgement in the complainant's favour. The complainant believes that one million dollars was wasted on the three consultants.

T. subsequently dismissed the personnel, destroyed documents and fled the country at the end of 1996 leaving a list of huge debts behind, including debts to two primary aluminium smelters in Ghana and Cameroun. The complainant used his family assets to settle some of these debts.

After T. left, the EIB started an audit report into the loan disbursement. The report incriminated the complainant, who thinks that T. influenced the auditors in order to have him incriminated.

The National Investment Bank Accra-Ghana launched a legal action against the complainant's company to recover the loan which T. obtained in 1994. All other banks refuse to do business with the company.

On 14 August 1998, the EIB stated that the complainant would remain liable for the reimbursement of the loan which should start as soon as an improved financial situation of the company permits.

Not satisfied with this situation, the complainant wrote on 24 May 1999 to the Ombudsman. In his complaint to the Ombudsman the complainant made one single allegation which is that the EIB has appointed T. as Managing Director of his company and has vested unlimited powers in him, and that as a result of this, namely T. taking over the entire management of the project, the loan and the company, the EIB has misled, impoverished and ruined the complainant's company.

If his allegation was found to be true, the complainant asked the Ombudsman to kindly order a) that the EIB should compensate adequately for having impoverished the company and the lives of the staff and their families, b) that the 2 million USD equity contribution should be refunded, c) that the EIB should stop with the threats of closing down the company by recalling the loan which benefited the consultants and their associates which the EIB unilaterally mandated to manage the company; d) that the EIB should give assistance to recover the funds from T. now somewhere in Europe and e) to investigate the violation of the complainant's human rights by the EIB and the consultants.



THE INQUIRY

The European Investment Bank's opinion

The EIB first commented on the admissibility of the investigation, referring to Article 2.4 of the Ombudsman's Statute according to which a complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint. The EIB also referred to Article 9 of the Implementing Provisions which stipulates that the procedural rules regarding complaints apply by analogy to own-initiative investigations. The complainant's letter of 24 May 1999 was sent to the Ombudsman more than 2 years after the date on which the EIB informed the complainant of its last decision concerning the suspension of the disbursement of the loan for a second time on 7 February 1997. The EIB therefore observed that no investigation may be carried out in relation to this matter. The EIB however attached an opinion which it considered to demonstrate that there were no grounds for suspecting maladministration on its behalf:

The EIB first recalled the background of the complaint: In 1989, the complainant requested the EIB to fund an expansion project of the aluminium foundry in Tema. The EIB accepted the project on the condition that adequate technical assistance (including engineering, metallurgical, financial and accounting consultancy services) was available for project implementation and operation, none of which were available within the complainant's company at the time of the project appraisal. On 18 October and 28 November 1991 the Finance Contract for a loan of 2.8 million ECU from the European Development Fund was signed between the EIB and the complainant.

The complainant agreed to retain the services of Mr F., an aluminium consultant who had previously made a feasibility study on the project, to advise on all technical and commercial aspects of the project and ensure implementation and start up. The complainant also agreed on Mr R. for providing plans for office and factory buildings.

The Bank became aware of certain difficulties as regards the missions of the various consultants. Both Mr F. and Mr R. complained to the Bank that the complainant was negatively interfering in the project. Given the complete lack of co-operation and confidence between the complainant and the consultants appointed by him, the Bank decided on a temporary suspension of the loan and notified the complainant by fax in June 1993. The Bank's decision on the possible cancellation of the loan was to be subject to the outcome of a re-assessment study requested by the complainant and authorised by the Bank.

Following approval of the terms of reference by the company, T. carried out a reassessment study from June till October 1993. The complainant had informed the Bank earlier of his decision to employ T., an expatriate general manager. From October 1993 to August 1994, T. carried out several additional short-term assignments. In September 1994, the complainant concluded an agreement whereby T. became a shareholder of the company and one of its Managing Directors for a period of three years. The Bank obtained that all future correspondence relating to the project execution had to be signed by both partners, the



complainant and T.

On the basis of those arrangements, the Bank accepted in early 1995 to resume the disbursement of the loan.

In November 1996, the complainant wrote to the Bank expressing his dissatisfaction with the work of T. He more particularly complained about the way in which T. handled procurement of certain equipment and gave a detailed account of what he considered to be malpractices and fraud by T. After a mission and meetings with the company, the Bank informed the complainant that it was withholding further disbursements of the loan.

The Bank asked the complainant to commission an external audit which was carried out by Deloitte & Touche. In the audit report of 7 May 1997 it was stated that:

- there was *"strong collaboration between [the complainant], T. and W. that made it possible for the irregularities in the use of EIB funds to have persisted"*. (page 5).
- *"[The complainant] approved all orders and signed the disbursement letters"*. (page 13).
- *"[The complainant] failed to report defaulting suppliers to EIB"*. (page 13).

The auditors' findings appeared to suggest the complainant's own responsibility for the collapse of the project.

In July 1997, after a mission, the Bank confirmed to the complainant its earlier decision to suspend further disbursement of the loan. On 28 January 1998, the Bank considered that the proposals made were insufficient to deblock the situation.

As regards the assertions made by the complainant, the Bank stated the following:

The Bank observed that the allegation that it unilaterally mandated consultants was incorrect. T. was proposed to the complainant by an old acquaintance of him. It is incorrect that the Bank asked the complainant to vacate his office. It is incorrect that the Bank vested unlimited powers in T. The complainant introduced T. to the Bank as his new partner. From letters it appears that the complainant was, also internally, considered to be the Managing Director. The complainant failed to inform the Bank of the ongoing staff retrenchment of which the Bank was unaware. As the correspondence by the company was always co-signed by the complainant, including equipment purchase orders, the Bank has always considered the complainant be the Managing Director of the company, to be thus fully aware and responsible for supervising the activities of his management staff.

The Bank has not threatened the complainant, but has just informed him that it would have to cancel the loan. The Bank rejected the complainant's allegation that it went "far beyond the terms of the Finance contract", as its action were fully consistent with the provisions of the contract.

The Bank observed that it did not wish to comment, in the absence of clear and full evidence, on claims of malpractices and fraud allegedly committed by T. and W. The Bank's information,



including the auditors' findings, do not provide sufficient basis for the Bank to pursue the complainant's allegations.

The Bank's fundamental duty, as a financial institution, is to verify that the implementation of the contract fully complies with the provisions of the Finance Contract and the Bank's actions were fully consistent with this duty. The Bank has nevertheless shown extreme flexibility in its dealings with the company. However, the company's management style, characterised by a lack of transparency and accountability and by a tendency to confuse company and private business has stalled the transformation process into a modern industrial concern using sound management and production techniques.

In the light of the above, the Bank rejected the allegations of the complainant.

The complainant's observations

The complainant maintained his complaint in 18 pages observations, the substance of which can be summarised as follows:

The complainant was obliged by the Bank to accept Mr F. as a technical assistant, otherwise there would be no funding. The complainant protested against this. The inclusion of Mr R. as a mere architect in the project was totally wrong.

The complainant stated again that T. became the Managing Director upon insistence of the Bank and that he was fully responsible for the implementation of the project and the running of the company. He observed that most of the correspondence to the Bank was prepared by T. and countersigned by him, but that his role as a mere signatory to the correspondence did not give him the authority to supervise T., the loan and the project. T. and W. influenced the auditors to incriminate the complainant.

The complainant totally disagreed with the impression created by the audit Report of Deloitte & Touche about the alleged "strong collaboration among the complainant, T. and W., that made it possible for the irregularities in the use of EIB funds to have persisted".

The complainant repeated his point that the Bank went beyond the terms of the finance contract and unilaterally imposed various instructions which the company was compelled to adhere. The Finance contract does not mention that the company had to employ a European Managing Director, allot shares to him and make him responsible for the project implementation.

It is true that the Bank asked the complainant to vacate his office and hand over his functions to T. The complainant could just not refuse to counter-sign as this would go against the Bank's instructions.

In meetings in Ghana and Luxemburg, the Bank openly instructed the complainant not to interfere with T. who was imposed by the Bank as a European management director. The Bank vested unlimited powers in the consultants which lead to the collapse of the project and the disappearance of the company's funds. The complainant demands a compensation from the Bank.



Further inquiries

After careful consideration of the EIB's opinion and the complainant's observations, it appeared that further inquiries were necessary. On 26 April 2000, the Ombudsman asked the EIB to inform him in detail of the procedure which was followed to appoint T. and to clarify the responsibilities of the Bank with that regard.

The European Investment Bank's additional opinion

The EIB observed that from time to time the Bank requires among the conditions of its agreement to provide finance that the promoter puts in place technical assistance acceptable to the Bank. Such a condition is included if the project appraisal carried out by the Bank reveals that consultants or technical assistance are necessary for successful project implementation. However, the Bank would never impose a particular consultant. The promoter is under no obligation whatsoever to take on board any candidate earmarked in a selection process, if the promoter considered the candidate in question unacceptable.

As indicated in paragraph 12 of the explanatory note attached to the Bank's letter of 7 September 1999, the Bank decided on a temporary suspension of its loan to the company in June 1993, because it was concerned that the condition of its loan agreement regarding the availability of technical assistance and know-how within the company was no longer met, given the difficulties between the complainant and the consultants he had appointed earlier. The subsequent retention by the company of T. as a consultant to carry out the reassessment study of the project is described in the above mentioned note and documented in appendices B and C to the note. The Bank recalled that the complainant had recommended T. to the Bank as a suitable consultant and had indeed confirmed his resolution to employ T. as an expatriate general manager.

As indicated in paragraph 15 of the note, the Bank held extensive discussions with T. and the complainant: the Bank found T.'s work useful and, in view of the contractual condition regarding technical management, was satisfied to note T.'s willingness not only to be involved in the management of the company over a certain period of time, but also to underline his good faith by making a personal financial commitment to the company. The terms and conditions of T.'s appointment were therefore discussed by all parties involved. They were incorporated into a Memorandum of Understanding, the purpose of which was to lay down the parties' agreement to the minimum conditions under which the Bank could accept T.'s appointment and, therefore, the resumption of loan disbursements. The Bank attached a copy of this document dated 12 July 1994 which twice mentions "with the consent of the EIB". The Bank also annexed the Agreement dated 29 September 1994 between the complainant and T., setting out the terms of T.'s appointment as Managing Director of the company Tema plant.

The Bank concluded that the procedure followed to appoint T. was based on a proposal made by the complainant. This was followed by discussions among all parties involved on the terms and conditions of the appointment, the conclusion of a Memorandum of Understanding and, finally, an Agreement. As regards the Bank's responsibilities in this procedure, it approved a proposal made by the complainant, after ensuring that the terms and conditions of the appointment which were relevant to the effective implementation of the project it was financing were acceptable to it.



The complainant's additional observations

The complainant maintained his complaint and repeated the earlier allegations. The complainant observed that it was true that he agreed to employ T. as stated in the EIB's comments, but for the post of General Manager and not for the post of Managing Director, as the complainant was himself occupying that post. He had to accept T. under pressure from the EIB which would recall the loan otherwise.

THE DECISION

1 The alleged inadmissibility of the inquiry

1.1 In its opinion, the European Investment Bank first alleged that the own initiative inquiry was inadmissible, because the complainant's letter of 24 May 1999 to the Ombudsman was sent more than 2 years after the date on which the EIB informed the complainant of its last decision concerning the suspension of the disbursement of the loan for a second time on 7 February 1997. The EIB referred to Article 2.4 of the Ombudsman's Statute according to which a complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint. The EIB then referred to Article 9 of the Implementing Provisions which stipulates that the procedural rules regarding complaints apply by analogy to own-initiative investigations.

1.2 With regard to the question of admissibility, the Ombudsman states that the time-limit of 2 years provided for in Article 2.4 of the Statute does not apply to own initiative inquiries. The idea behind own initiative inquiries is that the Ombudsman can launch them whenever he thinks they are necessary. Article 9.3 of the Implementing Provisions which stipulates that "the procedures followed in inquiries instituted following a complaint also apply, by analogy, to own initiative inquiries" does not concern time-limits for own initiative inquiries, but only deals with the procedural rules for own initiative inquiries once they are initiated.

1.3 The Ombudsman would nevertheless like to note that the last fact raised by the complainant is a letter of the EIB dated 14 August 1998. The complaint to the Ombudsman of 24 May 1999 was therefore sent less than two years after this date. However, the Ombudsman notes with satisfaction that the EIB responded in detail to the allegations of the complainant, as well as to the request for further information sent on 26 April 2000.

2 The alleged mismanagement of the loan by the EIB

2.1 The complainant alleged that the EIB has appointed T. as Managing Director of his company and has vested unlimited powers in him, and that as a result of this, namely T. taking over the entire management of the project, the loan and the company, the EIB has misled, impoverished and ruined his company.

2.2 The EIB rejected the allegation of the complainant. It observed that it did not wish to comment, in the absence of clear and full evidence, on claims of malpractices and fraud allegedly committed by T. and W. The Bank's information, including the auditor's findings, do not provide sufficient basis for the Bank to pursue the complainant's allegations. The Bank's actions were fully consistent with its duty, as a financial institution and as mandatory, to verify that the implementation of the contract fully complied with the provisions of the finance contract.



2.3 It appears that the framework of the complaint is the execution of the Finance Contract signed between the EIB and the company on 18 October and 28 November 1991. It has therefore to be recalled that the European Ombudsman does not seek to establish whether either party has acted in conformity with the contract. This question can only be dealt with effectively by a court of competent jurisdiction which would have the possibility to hear arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on the disputed issues of fact. From Article 10 of the contract it appears that the contract is governed by the laws of England and that all disputes concerning the contract shall be submitted to the Court of Justice of the European Communities.

2.4 However, as a matter of good administration, a public authority engaged in a contractual dispute with a private party should always be able to provide the Ombudsman with a coherent account of the legal basis for its actions and why it believes its view of its position to be justified. The Ombudsman shall therefore verify whether the EIB did so in the present case.

2.5 As regards the appointment of T., the EIB twice pointed out that the procedure followed for that purpose was based on a proposal made by the complainant himself: The complainant had recommended T. to the Bank as a suitable consultant and had confirmed his decision to employ T. as expatriate general manager. This appears from a telex from the complainant to the EIB dated 28 April 1993. In his additional observations, the complainant observed that it was true that he agreed to employ T, but for the post of general manager. From the documents of the file it appears however that the complainant signed all documents which led to the appointment of T. as Managing Director: the complainant signed the Memorandum of Understanding dated 12 July 1994 which states that "with the consent of the EIB, T. has been engaged by [the company] to direct [the company's] project as Managing Director for periods ranging from two, three or more years". On 29 September 1994, the complainant and T., in the presence of an EIB official, signed the Agreement which states that the company agreed to engage T. as the Managing Director of the company's Tema plant for a period of 2 years renewable.

2.6 From the EIB's opinion it appears that, further to a mission to Ghana end January 1997 and meetings with the company and its Board of Directors, the Bank decided to withhold further disbursements of the loan and to commission an external audit. From the executive summary of the audit by Deloitte & Touche dated 7 May 1997 which the Ombudsman could inspect it appears that "there existed at the time of these disbursements a strong collaboration between [the complainant], T and W. that made it possible for them to operate the current account they kept and for the irregularities in the use of EIB funds to have persisted for so long" (page 3). The audit equally stated that "the [complainant's] signature of these disbursement orders is therefore indicative of his consent and approval of both the companies awarded the contracts and the approved purchase prices". (page 13).

2.7 After the audit, the Bank, in a fax dated 7 August 1997, confirmed to the complainant its previous decision to suspend the further disbursement of the loan. In this fax, the Bank also repeated that it had informed the complainant on 11 June 1997 that the loan, amounting to 321.292,77 should be reimbursed by 30 September 1997 and that a failure from the



complainant's side to fulfil the repayment obligations would result in appropriate action from the Bank which might include recourse to Article 9 of the Finance Contract. In a fax dated 28 January 1998, the EIB informed the complainant that the disbursement of the loan remained suspended.

2.8 In a letter dated 14 August 1998 the EIB informed the complainant that it decided to allow the company to temporarily suspend the servicing of the loan to the Bank. The Bank however stressed that the company would remain liable to reimburse the loan and that repayments would resume as soon as an improved financial situation of the company permits. The letter stated that a new agreement would then need to be reached with the Bank on a new repayment schedule, and that in this context the company would send to the Bank on a semi-annual basis a complete set of audited accounts and any financial, commercial and technical information that the Bank might request.

2.9 From the above, it appears that the Bank's decisions to discontinue the disbursement of the loan and to order the reimbursement of it at a later time were decisions that it was entitled to take in order to protect the Community's financial interests.

2.10 The Ombudsman considers that the EIB provided him with a coherent account of the legal basis for its actions and decisions in this matter. No instance of maladministration was therefore found with regard to the complainant's allegations.

3 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Investment Bank. The Ombudsman has therefore decided to close the case.

The President of the European Investment Bank will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN