

## Decision of the European Ombudsman closing the inquiry into complaint 349/2014/OV against the European Investment Bank (EIB)

Decision

**Case 349/2014/OV - Opened on 14/03/2014 - Recommendation on 05/12/2014 - Decision on 17/03/2015 - Institution concerned** European Investment Bank ( Critical remark ) |

In November 2012, the complainant, a UK-based NGO, requested access to a 2011 investigation report of the European Investment Bank's (EIB's) Inspectorate-General into allegations of tax evasion by a company to which the EIB had granted a loan for a mining project in Zambia. The EIB refused access to the report, a decision it subsequently maintained in July 2014 following an appeal by the complainant. However, the EIB published an update on the investigation on its website in July 2014. Considering that the relevant investigation was closed in 2011, that is nearly three years before the EIB definitively refused access to the investigation report, the Ombudsman made a recommendation to the EIB that it should reconsider its refusal and either grant access to a redacted version of the report or, should this not be possible, provide the complainant with a meaningful summary of the main findings of the report. In its reply, the EIB released to the complainant - and published on its website - a summary of the investigation report. However, since the summary did not contain any further information on the findings concerning the allegations, the Ombudsman concluded that the summary could not be considered as a meaningful summary. Furthermore, the Ombudsman noted that the EIB had failed to comply with the rules of its own Transparency Policy in its decision on this case. She therefore closed her investigation with two critical remarks.

## The background

1. On 31 May 2011, the European Investment Bank ("EIB") publicly announced on its website that it had launched an investigation into allegations of tax evasion in relation to the Mopani Copper Mines (MCM, "Mopani") project in Zambia. The background to the investigation is set out below.
2. In February 2005, the EIB signed a USD 50 million loan agreement with the Mopani company which is majority-owned by the Swiss group Glencore. The loan was made to partially fund the renovation and modernisation of the Mufulira copper smelter to reduce the emissions of sulphur dioxide at the industrial plant dating from the 1930s. In February 2011, a draft audit



report on allegations of tax evasion by Mopani and its parent company Glencore was leaked and published on the internet. The audit was commissioned by the Zambian Revenue Authority (ZRA). The draft audit report highlighted irregularities concerning operational costs, revenues, transfer pricing, employee expenses and overheads. Mopani strongly disputed the conclusions of the leaked report, stating that the auditors never gave it a chance to rebut the allegations. In accordance with the EIB's Anti-Fraud Policy of 2008, the EIB informed OLAF of the allegations contained in the report. The EIB also launched its own investigation which was conducted by its independent Inspectorate-General. The EIB's website statement of 31 May 2011 mentioned that, "[i]n the event that this investigation were to conclusively demonstrate tax evasion according to the Zambian authorities, this would clearly expose MCM to local financial penalties and lead to events that may trigger early repayment of the EIB loan".

3. The Inspectorate-General concluded its investigation in November 2011, and submitted its investigation report to the EIB's Management Committee. The EIB loan was repaid in full by Mopani in 2012. An update on the EIB's website of 25 July 2014 [1] specified that the borrower made an early repayment of the loan at its own request. It also mentioned that Glencore informed the EIB that the ZRA had completed an audit and that all outstanding issues were satisfactorily resolved, and that the EIB had not been able to obtain further details on this matter from the Zambian authorities, Mopani or the parent company Glencore. OLAF informed the EIB of its decision to close the investigation with no action because "no EU budget funds were involved". The update further stated that, given that the EIB no longer had any contractual relation with Mopani/Glencore and that these matters concern Mopani/Glencore's relations with the Zambian authorities, the EIB had not taken any further view on this and considered the case as closed.

4. On 8 November 2012, the complainant, a London-based development organisation which has been running a campaign about tax evasion in developing countries, requested the EIB to publicly disclose its report on the basis of the EIB's Transparency Policy [2]. In a telephone conversation, EIB officials informed the complainant that the EIB would not release the report. On 24 June 2013, the complainant then submitted a complaint, under the EIB's Complaints Mechanism (CM), against the EIB's decision refusing access to the report. Having received no reply to its complaint from the EIB Complaints Office, the complainant, on 20 February 2014, turned to the Ombudsman.

5. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

The EIB wrongly refused to grant access to its report into allegations of tax evasion in the framework of the Mopani Copper Mines project.

The EIB should grant access to the report.

6. In her letter opening the inquiry, the Ombudsman asked the EIB either to release the report or to explain, with reference to the exceptions in point A.5.2 of the EIB's Transparency Policy, why releasing the report would *specifically and effectively* undermine the protection of an



interest relied upon.

7. Following the opening of the inquiry, the EIB on 25 July 2014 replied to the complainant's complaint of 24 June 2013, thereby taking its final decision on the request for access [3]. The EIB decision, to maintain the earlier refusal decision, was contrary to the conclusion of its own Complaints Mechanism which had recommended the disclosure of a redacted version of the report or, should this not allow the EIB to disclose a meaningful document, a summary of the investigation and its outcome.

## **Alleged wrongful refusal to grant access to an investigation report and the corresponding claim**

### **The Ombudsman's draft recommendation**

8. The investigation report to which the complainant requested access was a 5-page report, dated 16 November 2011 and marked " *Strictly Confidential* ". It was drawn up by the EIB's Inspectorate-General and was addressed to the EIB's Management Committee. The report also contained as an annex a detailed audit report of 8 November 2011 which was classified as " *Privileged and Confidential Report of Audit at Mopani Copper Mines plc. For the eyes of EIB and its legal advisers only. Not to be copied to third parties* " (emphasis added in the original).

9. The Ombudsman noted that the EIB had not carried out a specific examination of the investigation report in order to refuse access. The EIB instead relied on a general presumption of non-disclosure of documents and information relating to its anti-fraud investigations (Article 5.2.3 of Part A of the Transparency Policy). In the Ombudsman's view, a general presumption of non-disclosure of documents contained in an EIB fraud investigation file in order to protect the *purpose* of that investigation would in principle apply only as long as the investigation is still on-going. In this case, however, the EIB had stated that its investigation was closed in November 2011, namely when the Inspectorate-General adopted its investigation report, that is, nearly three years before the EIB took its final decision of 25 July 2014 to refuse access to the investigation report. In these circumstances, the Ombudsman was of the opinion that the EIB could not validly rely on a general presumption of non-disclosure.

10. The Ombudsman further noted that the EIB - in accordance with Article 5.2.3 of part A of its Transparency Policy - had to consider whether there was " *an overriding public interest* " in disclosure of its investigation report. In that regard, the Ombudsman considered that the general public should be able to know, once the investigation is closed, and to the extent that disclosing the information in question does not undermine the protection of commercial interests, the outcome and at least the essential findings of such an investigation, in particular when considerable amounts of public money, as is the case with most of the EIB's lending operations, are involved.



11. In this case, the Ombudsman noted that the update published on the EIB's website on 25 July 2014 said very little about the outcome of the investigation as it did not contain any information on the *findings* of the Inspectorate General's investigation into the allegations of tax evasion by Mopani/Glencore. The update simply mentioned that (i) the loan was repaid by the borrower to the EIB in 2012 at its own request, (ii) OLAF had closed its investigation since no EU budget funds were involved, (iii) the EIB no longer had any contractual relation with Mopani/Glencore, and (iv) the case had been closed. In the Ombudsman's view, the update by the EIB therefore contained no meaningful information concerning the findings of the investigation.

12. This constituted an instance of maladministration. The Ombudsman was therefore of the view that the EIB should carefully reconsider the complainant's request for access to the investigation report.

13. The Ombudsman noted that, as correctly pointed out by its Complaints Mechanism, the EIB should also consider whether any of the other exceptions set out in its Transparency Policy might apply. Having inspected the report, the Ombudsman considered that this could be the case with regard to the exceptions relating to the protection of (i) the privacy and the integrity of the individual and (ii) the commercial interests of a natural or legal person

14. The Ombudsman also stated that, as a means to increase transparency and reinforce the public trust in the Bank's efforts to fight fraud and corruption, the EIB might be guided by the practice followed in similar cases by the World Bank's Integrity Vice-Presidency. The latter's website contains numerous examples of "*Redacted Investigation and Forensic Audit Reports*".

15. On the basis of the above findings, the Ombudsman on 5 December 2014 made the following draft recommendation to the EIB:

*" The EIB should reconsider its refusal to grant access to the investigation report of its Inspectorate-General and decide either to grant access to a redacted version of the report or, should this not be possible, to at least provide the complainant with a meaningful summary of the main findings of the investigation report ".*

16. In its detailed opinion, the EIB stated that it accepted the Ombudsman's draft recommendation and that it had decided to provide the complainant with a meaningful summary of the main findings of the investigation report. The EIB stated that the summary had also been published on its website on 29 January 2015 [4] .

17. The EIB stated that it carried out an assessment of the confidentiality of the information contained in the investigation report and came to the following conclusions:

- The disclosure of the report would undermine the protection of privacy and integrity of a number of individuals who are either directly identified or otherwise identifiable from excerpts of the text;



- The disclosure of the report would undermine the protection of *legitimate* commercial interests, since access would be granted to information which was available to the EIB because of its contractual relationship with the client and which would otherwise not be accessible to the public;
- The disclosure of the report would undermine the public interest as regards the international relations between the EIB and the Zambian authorities;
- Finally, the disclosure of details of the investigative methodology of the Inspectorate-General would also compromise the effectiveness of future investigations.

**18.** It therefore decided to provide the complainant with a summary of the main findings of the report.

**19.** With regard to the practice followed by the World Bank Integrity Vice-Presidency, the EIB pointed out that the World Bank and the EIB are subject to different legal frameworks which can explain the different practices in the publication of investigation reports. Whereas the World Bank enjoys sovereign immunity from countries with which it deals, thus releasing it from all legal liability for its actions, the EIB is subject to a complex regulatory framework consisting of primary and secondary EU legislation, international and domestic law, and to the jurisdiction of national and international courts. The EIB however said it will examine how it might draw on the practice of the World Bank.

**20.** In its observations, the complainant, while welcoming the EIB's decision to respond positively to the draft recommendation, stated that it was not convinced that the information disclosed by the EIB constituted a "meaningful summary" of the main findings of the investigation report in so far as it states that the information the investigators were able to examine did not allow the EIB " *to comprehensively prove or disprove the allegations raised in the Leaked Draft Report regarding Mopani's costs, revenues, transfer pricing, employee expenses and overheads* ".

**21.** In fact, according to the complainant, given that the whole case was triggered by allegations of systematic tax evasion by Mopani, the EIB should disclose details from the investigation report concerning the nature of the information that investigators sought in Zambia and the nature of the documents that they were actually able to see and to assess.

**22.** Whereas the complainant accepted the non-disclosure of information in order not to undermine the protection of individual privacy and integrity, it did not accept that the protection of commercial interests – however "legitimate" they may or may not be – could in this case override the public interest in knowing what the Bank knows about the tax behaviour of Mopani. The complainant argued that most countries – and developing countries in particular – lose huge sums every year as a result of multinational companies' tax avoidance and evasion.

**23.** The complainant argued that tax avoidance and evasion are such major problems now across the world that it would be hugely damaging for the EU and its official Bank to set a



precedent in favour of protecting the commercial interests of companies accused of such behaviour, against the interest of the public in financial transparency.

**24.** In conclusion, the complainant contested that the EIB's current summary could be seen as a meaningful summary of the main findings of the report.

## The Ombudsman's assessment after the draft recommendation

**25.** The Ombudsman notes that the EIB has decided, in reaction to the draft recommendation, to release, not a redacted version of the investigation report (since it considered that such a version would not be meaningful), but a summary. She therefore needs to assess, on the basis of her inspection of the investigation report, whether the relevant text is a meaningful summary of the main findings of the investigation report.

**26.** The summary of the investigation report reiterates some information which was already contained in the update on the EIB's website of 25 July 2014. It then provides the following additional information concerning the investigation by the EIB's Inspectorate General:

- The alleged tax irregularities highlighted in the leaked draft audit report commissioned by the ZRA concerned Mopani's operational costs, revenues, transfer pricing, employee expenses and overheads. A first EIB fact-finding mission to Mopani in Zambia was carried out in March 2011 and EIB representatives met with the Mopani management and the ZRA. Mopani confirmed that an audit had taken place, but pointed out that the conclusions of the draft audit report had not been communicated to it before the report was leaked to the press. The EIB asked the ZRA for a copy of the leaked draft audit report, but ZRA refused to provide it. The Inspectorate-General proposed to have an independent review, conducted by the EIB with the assistance of consultants (EIB Review Team), on the issues raised in the leaked draft audit report and Mopani accepted this proposal.

- An on-the-spot review by the EIB Review Team was initially planned to begin at the end of June 2011. However, on 17 June 2011, shortly before the review was due to start, Mopani advised the EIB Review Team that the ZRA had already planned a tax inspection to be conducted in the same period. The EIB's Inspectorate-General therefore had to postpone its review to the beginning of August 2011. A few days before the second agreed start date, Mopani again tried to postpone the review given that the ZRA's inspection was to continue into August. The EIB decided to proceed with its review without further delay. The review was conducted between 1 and 17 August 2011.

- Documents requested by the EIB Review Team more than two months in advance of the review were not made available and, despite repeated requests, access to essential information during the review was not provided. As a result, the number of issues investigated by the EIB Review Team had to be limited and the Inspectorate-General was forced to break-off the mission almost two days earlier than planned.



- The work of the EIB Review Team was non-conclusive due to the difficulties encountered in the investigation. Thus, it was not possible to comprehensively prove or disprove the allegations raised in the leaked draft audit report regarding Mopani's costs, revenues, transfer pricing, employee expenses and overheads. On the basis of the difficulties encountered, the Inspectorate-General concluded its investigation in November 2011, and the EIB started discussions with Mopani's parent company, Glencore, which resulted in the latter deciding to voluntarily repay the loan in 2012, thus closing its contractual relationship with the EIB.

**27.** The Ombudsman notes that, in addition to the above, the summary also contains some supplementary information which is not part of the investigation report. The EIB was in regular contact with the Zambian competent authorities on its investigation and offered to provide them with the appropriate information that they would require on this matter. Glencore informed the EIB that the ZRA had completed the audit and that all outstanding issues were satisfactorily resolved. Glencore and Mopani strongly disputed the conclusions of the leaked draft audit report on numerous occasions, stating that it was never publicly updated or finalised. They also stated that the EIB Review Team was not able to obtain all the requested documents from Mopani, because Mopani's staff prioritized the ZRA's audit which was ongoing at the same time. They also said that the ZRA's audit ultimately took 9 months to complete due to the high volume of transactions and documents to be audited.

**28.** The obligation on the EIB, arising from its commitment to follow the provisions of its own Transparency Policy, was to disclose as much information as possible from the report as would be consistent with the rules of that Transparency Policy. This Policy commits the EIB to taking the same approach to the application of exceptions as is set out in Regulation 1049/2001. To meet this obligation it would need to show that, in applying exceptions to the general presumption of disclosure, it was able to justify the application of any exception and, where relevant, that it had considered any overriding public interest consideration.

**29.** The EIB has relied on four separate exceptions in justification of its position. **Firstly**, it relies on the requirement to protect the privacy and integrity of a number of individuals. The complainant does not dispute this exception and no further comment is necessary. **Secondly**, it relies on the requirement to protect legitimate commercial interests. For this exception to apply, it is not sufficient simply to assert that disclosure would damage legitimate commercial interests; there must be some reasoning to support the assertion and, in particular, it must be clear that the commercial interest to be protected is a legitimate one which requires to be protected. [5] Furthermore, even if the EIB had identified a commercial interest which required to be protected, the ultimate decision on whether or not to protect that interest would depend on the outcome of the overriding public interest test. The Ombudsman has no reason to believe that the EIB applied this overriding public interest test in its decision to rely on the exception to protect a legitimate commercial interest.

**30. Thirdly**, the EIB relies on the exception protecting the public interest as regards international relations between the EIB and the Zambian authorities. This exception is not subject to an overriding public interest test. However, the EIB must nevertheless justify its





conclusion that disclosure of the report, or any portions of it, would undermine the public interest as regards international relations. Having inspected the report, it is not clear how its disclosure - dealing as it does with the actions of a commercial mining company majority owned by the Swiss Group, Glencore - has negative implications for international relations with Zambia or why the Zambian authorities would no longer cooperate with the EIB in future investigations. Of course it is conceivable that there might be some implications arising from disclosure; but the EIB would need to give some information on what these might be and on whether it had attempted to establish if the Zambian authorities would regard disclosure as detrimental. The EIB has thus not adequately justified its reliance on the exception which protects international relations.

**31. Fourthly** , the EIB relies on the exception protecting the purpose of investigations. Its position is that disclosure of the report would involve the disclosure of the investigative methodology of the Inspectorate -General and that this would serve to compromise that methodology. The Ombudsman has already pointed out in her draft recommendation (paragraph 47) that this was a very general argument which did not explain specifically why the investigation report could not be released three years after the investigation was closed. The EIB has not explained how disclosure would actually disclose details of the methodology nor has it explained why redaction of relevant portions would not be sufficient to withhold details of the methodology. Nor has the EIB explained how disclosure of details of the methodology would compromise the effectiveness of the methodology in future investigations. The Ombudsman notes that the EIB's website contains a copy of the 11-page document "*Procedures for the Conduct of Investigations by the Fraud Investigations Division of the Inspectorate General of the EIB Group*" [6] . Without further explanations, and in view of the above document being public, the EIB's argument is not convincing. The exception protecting the purpose of investigations is qualified by an overriding public interest test. Assuming that disclosure of some or all of the report would disclose details of the investigative methodology, and assuming that disclosure of these details would compromise future investigations, the EIB would still be required to consider whether there is an overriding public interest which defeats the exception. In relation to each of these steps, which are necessary steps before a decision to apply the exception may be taken, the EIB has failed to show that it has followed its own rules on transparency.

**32.** In summary, therefore, it is the conclusion of the Ombudsman that the EIB has not met its obligation to abide by the provisions of its own Transparency Policy.

**33.** On the basis of a careful comparison of the summary with the investigation report, the Ombudsman accepts that the summary correctly summarises that part of the investigation report concerning the difficulties the EIB's Inspectorate-General encountered in carrying out its investigation and in obtaining the requested information and documents. As regards the result of the Inspectorate-General's investigation into the allegations, the summary states that "*it was not possible to comprehensively prove or disprove the allegations raised in the Leaked Draft Report*". The Ombudsman considers that this statement does not adequately reflect the information contained in the investigation report on this issue.

**34.** The Ombudsman is not in a position to reveal fully the information which supports this





conclusion. This is one of those situations, which arise very occasionally in access to documents complaints, where providing a full explanation for the Ombudsman's conclusion would require some disclosure of the content of the document in question. In circumstances where the institution has chosen to refuse public access to the document, the Ombudsman is necessarily constrained in the extent to which she can explain her conclusion where that conclusion is based on the content of the disputed document. In this particular case, the Ombudsman will separately outline to the EIB the reason for her concluding that its summary does not adequately reflect the information contained in the investigation report in question and that the summary does not conform with what she had in mind when she asked the EIB to make available a 'meaningful summary' of the investigation report. She will therefore make the critical remarks below.

## Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following critical remarks:

- 1. The summary released to the complainant and published on the EIB's website on 29 January 2015 does not constitute, with regard to the substantive findings into the allegations of tax evasion by Mopani, a meaningful summary of the EIB's Inspectorate-General's investigation report of 16 November 2011.**
- 2. In its handling of the request for access to the report in question, the EIB failed to meet its obligations under its own Transparency Policy.**

The complainant and the EIB will be informed of this decision.

Emily O'Reilly

Strasbourg, 18/03/2015

[1]

<http://www.eib.org/infocentre/press/news/all/update-on-the-status-of-the-eib-loan-for-the-mopani-copper-project-zambia>  
[Link]

[2] The EIB's Transparency Policy states that it shall be interpreted in accordance with the provisions of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.

[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 draft recommendation available at:

<http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/58471/html.bookmark>  
[Link]

[4]

[http://www.eib.org/attachments/press/mopani\\_copper\\_mines\\_summary\\_of\\_the\\_main\\_findings\\_en.pdf](http://www.eib.org/attachments/press/mopani_copper_mines_summary_of_the_main_findings_en.pdf)  
[Link]

[5] It is conceivable that an institution would not wish to disclose information or a finding, detrimental to the commercial interests of a third party, where the institution was no longer certain of the accuracy of that information or was no longer confident in relying on the finding. However, the EIB has not said that this type of scenario applies in the present case.

[6] [http://www.eib.org/attachments/strategies/anti\\_fraud\\_procedures\\_20130703\\_en.pdf](http://www.eib.org/attachments/strategies/anti_fraud_procedures_20130703_en.pdf) [Link]