

## **Besluit in zaak 805/2018/MIG over de weigering van de Europese Investeringsbank om publieke toegang te verlenen tot documenten met betrekking tot een lening aan Volkswagen**

Besluiten

**Zaak 805/2018/MIG - Geopend op 08/05/2018 - Aanbeveling omtrent 29/03/2019 - Besluit over 28/11/2019 - Betrokken instelling** Europese Investeringsbank ( Wanbeheer vastgesteld )

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De zaak betreft de weigering van de Europese Investeringsbank (EIB) om publieke toegang te verlenen tot een rapport en een aanbeveling van het Europees Bureau voor fraudebestrijding (OLAF) en aanverwante documenten. De documenten betreffen een lening van 400 miljoen EUR aan publieke gelden, die de EIB heeft vertrekt aan autofabrikant Volkswagen en die door dat bedrijf op frauduleuze wijze is gebruikt.

De Ombudsvrouw heeft vastgesteld dat de algehele weigering door de EIB van publieke toegang tot het rapport en de aanbeveling van OLAF neerkomt op wanbeheer. Zij is van oordeel dat er een hoger publiek belang is bij de openbaarmaking van op passende wijze bewerkte versies van de documenten en heeft dienovereenkomstig een aanbeveling gedaan. De EIB heeft echter geen gehoor gegeven aan de aanbeveling van de Ombudsvrouw.

De Ombudsvrouw heeft het onderzoek derhalve afgesloten en haar bevindingen nog eens herhaald.

## **Background to the complaint**

1. In 2009, the European Investment Bank (EIB) gave Volkswagen a loan to finance a research and development project aimed at reducing polluting car emissions. The loan was fully repaid. Concerns were raised that Volkswagen had used the loan to develop a “defeat device” producing 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. This investigation was finalised in 2017, with OLAF sending its final report and recommendation to the EIB.

2. In January 2018, the complainant - an investigative journalist - asked the EIB for public



access to the OLAF report and recommendation, and to internal documents related to the EIB's follow-up on the outcome of the OLAF investigation. [1]

3. As the EIB refused to disclose the requested documents, the complainant turned to the European Ombudsman in April 2018.

4. The Ombudsman inquired into the complainant's position that the EIB was wrong to refuse public access. She assessed the information provided by the complainant and the EIB, and inspected the requested documents.

**The Ombudsman's proposal for a solution**

5. The Ombudsman agreed that the disclosure of the internal documents at issue could undermine the EIB's follow-up whilst it was ongoing.

6. The Ombudsman was, however, not convinced by the EIB's arguments regarding the report and the recommendation. Whilst a general presumption against disclosure applies to OLAF reports that 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 reflect information that is already in the public domain.

7. The Ombudsman also found that there is a very strong overriding public interest in disclosure in this case, given the serious misuse of public funds and misrepresentations by a leading European company as to their purpose.

8. Therefore, the Ombudsman proposed that the EIB should grant public access to the OLAF report and recommendation with appropriate redactions only for personal data. [2]

9. The EIB indicated that it was, in principle, willing to grant public access to a redacted version of the OLAF report. However, it considered that the other public interests involved, such as the public interest in protecting OLAF's investigative function, should be protected by redacting the OLAF report beyond personal data. To this end, the EIB consulted with OLAF as the author of the report. OLAF objected to any disclosure, relying on the general presumption of non-disclosure and not accepting that there was an overriding public interest in disclosure.

10. The EIB considered that it depended on OLAF's cooperation properly to identify any information which would undermine OLAF's investigative function if disclosed. It took the view that it is required to ensure the confidentiality of OLAF's investigation even after it had been completed and the follow-up action had been taken.

11. The EIB also pointed to its unique status as an EU body, but also a bank. It argued that disclosing information on the interest rate on the loan in question or on Volkswagen's liquidity situation would undermine its clients' trust and confidence as well as its own position in future loan negotiations.

12. The EIB concluded that it was not in a position to make the necessary redactions for the protection of OLAF's investigative functions and rejected the Ombudsman's solution proposal.



[3] However, the EIB published a summary. [4]

**The Ombudsman's recommendation**

**13.** The Ombudsman maintained that there is an obvious and overriding public interest in making public the OLAF report and recommendation, including the information on the relevant timelines and the advantageous interest rate, which is not in the published summary. She considered that partial access could be granted to the report and the recommendation, especially since the follow-up action by the EIB had been completed in the meantime.

**14.** The Ombudsman noted that OLAF's investigative activities illustrated in the requested report appear to be quite normal and routine for any investigative body.

**15.** The Ombudsman remained convinced that transparency could be attained in this case without jeopardising the EIB's role or the trust placed in it. In particular, the Ombudsman found that the commercial information contained in the report was fairly old and thus no longer sensitive. She also considered that the release of the report and recommendation (appropriately redacted) would likely enhance the trust in the EIB.

**16.** The Ombudsman took the view that the information contained in the OLAF report and recommendation, although not itself within the definition of "environmental information", did relate to emissions into the environment and that, given the proven health risks from pollution caused by emissions, there was an overriding public interest in disclosure. [5]

**17.** The Ombudsman also remained convinced that partial access to the requested documents could be granted without undermining the privacy of the individuals mentioned in the documents.

**18.** The Ombudsman concluded that the EIB's refusal to grant public access to appropriately redacted versions of the OLAF report and recommendation constituted maladministration. The Ombudsman recommended that the EIB should grant public access to the requested documents, with appropriate redactions of personal data, that is, any text which could lead to individuals being identified. [6]

**19.** Given that the EIB's follow-up action had been completed, the Ombudsman also took the view that the internal documents at issue in the complainant's request for public access (two notes of the EIB of 5 October 2017 and 9 October 2017) should also be partially released.

**20.** In response, the EIB maintained that it was, in principle, willing to give the complainant partial access to the OLAF report and recommendation, but that it was not itself in a position properly to redact the documents.

**21.** The EIB stated that it had again consulted OLAF. OLAF continued to object to any release of the documents, even in redacted form, based on the need to protect the rights and privacy of the individuals concerned and to ensure the effectiveness of national administrative and judicial proceedings.



**22.** The EIB disagreed with the Ombudsman's view that the information contained in the requested documents qualifies as 'information related to emissions into the environment'. It therefore considered the case for an overriding public interest based on that argument to be unfounded.

**23.** The EIB also reiterated that its special role as a bank needs to be taken into consideration, and that the release of some of the information contained in the report would undermine the relationship of trust, which it has with its clients, and its capability to operate properly on the markets. Ultimately, this would undermine the financial and economic policy of the EIB and the EU. [7]

#### **The Ombudsman's assessment after the recommendation**

**24.** The Ombudsman takes account of the views which the EIB expressed in its response to her recommendation regarding information that it considered should be redacted beyond personal data. However, her views on the strength of the case for partial disclosure of the documents in the public interest, as outlined in detail in her recommendation, remain unchanged. She is therefore disappointed at the EIB's failure to accept her recommendation.

**25.** Whilst she does not share those views of the EIB, the Ombudsman commends the EIB for publishing, in the course of this inquiry, a summary of the OLAF report on its website. The Ombudsman also acknowledges the EIB's good cooperation in this case and its genuine intention to pursue the possibility of a solution.

**26.** Given that the EIB acknowledged that there is a considerable public interest in this case, the Ombudsman regrets that the EIB did not consider itself to be in a position to make the necessary redactions to the OLAF report and recommendation. She notes and regrets OLAF's continued opposition, as reported by the EIB, to any disclosure. However, in the circumstances, she considers that she cannot take the matter further and, therefore, closes her inquiry.

## **Conclusion**

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

**By not accepting the Ombudsman's recommendation, the European Investment Bank has failed to recognise the overriding public interest in the release (with appropriate redactions) of the OLAF report into the EIB's loan to Volkswagen.**

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

Emily O'Reilly

European Ombudsman



Strasbourg, 28/11/2019

[1] 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](https://www.eib.org/attachments/strategies/eib_group_transparency_policy_en.pdf) [Link].

[2] 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].

[3] The full text of the EIB's response to the Ombudsman's proposal for a solution is available at:

<https://www.ombudsman.europa.eu/en/correspondence/en/112007> [Link].

[4] See

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

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[5] Article 5.7 of the EIB's TP.

[6] The full text of the Ombudsman's recommendation is available at:

<https://www.ombudsman.europa.eu/en/recommendation/en/111836> [Link].

[7] The full text of the EIB's response to the Ombudsman's recommendation is available at:

<https://www.ombudsman.europa.eu/en/correspondence/en/115899> [Link].