



Szczecin, 3 March 2010

Secretary General of the European Investment Bank

98-100, boulevard Konrad Adenauer
L-2950 Luxembourg

Complaint regarding the decision by the European Investment Bank to grant “Steel product and processing R&D Facility” loan.

1. Facts of the complaint

This complaint relates to a decision taken by the European Investment Bank to provide a loan for €250 million entitled “Steel product and processing R&D Facility” (referred to below as ‘the loan’) which was approved by the European Investment Bank’s Board of Directors on 21 October 2009.

Correspondence with the European Investment Bank relating to the loan:

Copies of all correspondence are annexed to this complaint.

The co-complainants are CEE Bankwatch Network (‘Bankwatch’), ClientEarth and Global Action on ArcelorMittal. Bankwatch is a member of the Global Action on ArcelorMittal coalition (‘the coalition’). ClientEarth is a non-profit public interest environmental law organisation whose work includes actions aimed at improving the transparency and environmental accountability of the European Investment

Bank. Global Action on ArcelorMittal is a network of community and environmental groups from around the world who are working to encourage ArcelorMittal to invest in pollution prevention and health and safety at its steel mills and coal and iron ore mines.

CEE Bankwatch Network wrote to the European Investment Bank ('the Bank') on 29 September 2009 requesting details of the recipient of the proposed loan. The Bank confirmed in a letter to Bankwatch on 14 October 2009 that ArcelorMittal was to be the beneficiary of the loan.

ArcelorMittal is the largest private steel company in the world, responsible for 10 percent of world steel production. ArcelorMittal's most recent financial report, for the last quarter of 2009, shows that the company made sales of \$18.6 billion and a profit of \$1.1 billion between September and December 2009. According to a briefing by Sandbag (a UK based NGO) entitled 'The case of ArcelorMittal,'¹ the company is also set to become the largest beneficiary of the EU Emissions Trading Scheme. The Sandbag briefing states that by 2012 the company will have received around 80 million permits which it does not need. If the company sells these permits it will make over £1 billion in windfall profits.

On 19 October the coalition wrote to the Bank asking them not to approve the loan to ArcelorMittal. In that letter the coalition suggested that, owing to the size of the company, ArcelorMittal would be able to either fund the project out of its own resources or would be able to access commercial loans. There was therefore no added value in the Bank providing a low-interest public loan to the company. The coalition also highlighted ArcelorMittal's poor environmental and social record and its poor stakeholder engagement record.

The Bank failed to respond to the coalition's letter before the loan was approved on 21 October. The Bank replied on 27 October stating that it had taken note of the coalition's concerns regarding ArcelorMittal's environmental and social record and lack of transparency. The Bank stated that the loan will support a research and development investment programme that is "...intrinsicly linked..." to ArcelorMittal's plans to improve the "...environmental standards of the operations of the ArcelorMittal Group and the reduction of CO₂ emission by 8% by 2020." The Bank stated that it "...clearly does not

¹Sandbag is a campaigning organisation focused on emission trading. The report can be found on the following page: http://sandbag.org.uk/files/sandbag.org.uk/The_Case_of_ArcelorMittal.pdf

claim that ArcelorMittal could not raise funds elsewhere." The Bank justified its decision to provide the loan on the basis that the project contains innovative research and development elements and will be important in the preparation from the ULCOS carbon reduction initiative. As this project is a part of a funding programme that is recognised as a priority by the Bank's stakeholders, the EU Member States, the Bank stated that the project is eligible for European Investment Bank finance.

On 27th November Bankwatch wrote to the Bank requesting details of the assessment process that led the bank to conclude that the project was eligible for the Bank's support. In particular Bankwatch asked whether the project was for the modernisation of an undertaking or was a project of common interest and therefore whether it fell under Article 267 (b) or (c) of the EC Treaty (now Article 309, Treaty on the Functioning of the European Union). Bankwatch also asked for details of the Bank's assessment that had concluded that the project could not be financed by means available in the Member States in which the project is to be carried out in accordance with Article 267 and how the Bank had concluded that funds would not be available from other sources 'on reasonable terms' in accordance with Article 16 of the Bank's statute (now Article 18).

In a response received on 22 December 2009 the Bank stated that the project was funded as a project of common interest under Article 267(c) EC Treaty. The Bank addressed Bankwatch's questions regarding the internal assessment of the project by stating that for every project financed by the Bank, its staff *"...carry out a due diligence in order to evaluate the Bank's contribution to the project."* They explained that this process *"...assesses the value added..."* by the Bank's involvement in a project and *"...takes into consideration the availability, terms and conditions of other sources of funding."*

2. Legal background

Please note that all statutory references below have been amended to take into account changes following the entry into force of the Treaty of Lisbon on 1 December 2009.

As such Article 267 of the Treaty establishing the European Community (TEC) has been replaced by Article 309 of the Treaty on the Functioning of the European Union (TFEU).

The Statute of the European Investment Bank has also been amended by the Treaty of Lisbon. For the purposes of the analysis below it is important to note that Article 11 of the statute annexed to the TEC has been replaced by Article 9 of the statute annexed to the TFEU with minor amendments, Article 18 of the statute annexed to the TEC has been replaced by Article 16 of the statute annexed to the TFEU without amendment, and Article 21 of the TEC statute has been replaced by Article 19 of the statute annexed to the TFEU with minor amendments. Where the provisions of these Articles differ between the statutes annexed to the TEC and the TFEU the changes are discussed below.

2.1. Statutory framework for Bank lending

The European Investment Bank obtains its legal personality from Article 308 of the TFEU. The statute of the Bank, which sets out its operational rules, is annexed to the TFEU and incorporated by Article 308.

Article 1 of the statute states that the Bank:

“...shall perform its functions and carry on its activities in accordance with the provisions of the Treaties and of this Statute.”

The Bank is obliged by this provision to act in accordance with the provisions of both the TFEU and the statute. Any acts that do not comply with both the TFEU and the statute are not authorised lending activities.

Article 2 of the Bank’s statute states:

“The task of the Bank shall be that defined in Article 309 of the Treaty on the Functioning of the European Union.”

This means that the Bank should **only** carry out tasks that comply with one of the three categories of projects set out in Article 309 TFEU.

Article 309 TFEU states that the task of the Bank is:

“...to grant loans and give guarantees which facilitate the financing of the following projects in all sectors of the economy:

(a) projects for developing less-developed regions;

(b) projects for modernising or converting undertakings ... where these projects are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States;

(c) projects of common interest to several Member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States.” (Emphasis added).

Under this Article, the Bank should not provide finance to projects for modernising undertakings or projects of common interest which could be funded from sources within the Member States in which the project is to be carried out.

Article 16 of the Bank’s statute sets further conditions on the circumstances in which loans are to be provided under TFEU Article 309. Article 16(1) states:

“Within the framework of the task set out in Article 309 of the Treaty on the Functioning of the European Union, the Bank shall grant finance, in particular in the form of loans and guarantees to its members or to private or public undertakings for investments to be carried out in the territories of Member States, to the extent that funds are not available from other sources on reasonable terms.”(Emphasis added).

The requirement under Article 16 that funds must not be available from ‘other sources on reasonable terms’ for a project to be eligible for funding from the Bank is not limited to sources of funding within the Member States in which the project is to be carried out. This means that the Bank should consider whether funding would be available from domestic or international sources on reasonable terms before agreeing to provide finance.

2.2. Internal procedures for ensuring statutory compliance

Article 19(4) of the Bank’s statute annexed to the TFEU requires the Management Committee to:

“...examine whether financing operations submitted to it comply with the provisions of this Statute, in particular Articles 16 and 18.”

Following this examination, the Management Committee is required to submit a proposal to the Board of Directors regarding the proposed financing.

The requirement for the Management Committee to examine whether applications for loans complied with the provisions of the Bank's statute was also found in the statute annexed to the TEC but the specific reference to Article 16 was added by the TFEU. The reference to Article 16 serves only to emphasise an important component of a pre-existing requirement for the Management Committee to ensure projects applying for Bank financing comply with *all* provisions of the Bank's statute.

The Management Committee is therefore required under Article 19(4) to investigate whether under Article 309 of the TFEU the project could be financed from sources within Member States, and under Article 16 of the Bank's statute whether funding could be available from other sources on reasonable terms.

Following this investigation, the Management Committee is required to produce a proposal (termed a 'draft contract' under the TEC statute), to the Board of Directors to inform its decision whether to approve finance for the project.

Decisions whether or not to grant finance are taken by the Board of Directors under Article 9(1) which states that "*The Board of Directors shall take decisions in respect of granting finance....*" Under the statute annexed to the TFEU the Board of Directors is able to delegate some of its functions, including taking decisions about granting finance, to the Management Committee. This was not available under the TEC statute and the extent to which this power of delegation will be exercised has not yet been clarified.

If the Management Committee recommends to the Board of Directors that the Bank should not finance a project, the Board can only approve a project if its decision is unanimous under Article 19(5). If both the Management Committee and the Commission deliver negative opinions on a project the Board cannot approve the project under Article 19(7). The opinion of the Management Committee has a direct impact on the decision making process of the Board.

2.3. Statutory requirements for loan to ArcelorMittal

The Bank stated in its letter of 22 December 2009 that it considers the loan to ArcelorMittal is a project of common interest. The Bank's intention is therefore to provide the loan under TFEU Article 309 (c).

The combined effect of TFEU Article 309 and Article 16 of the Bank statute mean that the Bank is prohibited from granting finance to projects under Article 309(c) when:

- (i) the project could be financed by other means available in the Member States in which the project is to be carried out; **or**
- (ii) finance is available from sources other than the Bank on reasonable terms.

Article 19(4) and Article 9 mean that on all projects the Management Committee is required to examine whether funding is available from alternative sources and to report its findings to the Board of Directors which is then required to take the Management Committee's report into account.

3. The complainants' allegations and justification

3.1. Alternative funding available

In their letter dated 27 October 2009, the Bank stated that it did "*...not claim that ArcelorMittal could not raise funds elsewhere.*" This letter went on to state that the project was part of a programme prioritised by Member States and that it was eligible for Bank finance "*...given its innovative R&D elements...*" The clear implication in this letter is that the project is eligible for funding because it is a priority project for Member States regardless of the availability of alternative funding.

This letter implies a fundamental failure to grasp the fact that if funding is available from other sources, either within Member States or internationally on reasonable terms, the European Investment Bank is not authorised under the TFEU to provide funding. This prohibition exists irrespective of the importance of a project to Member States.

3.2. Alternative funding was not appropriately assessed

On 27 November 2009 CEE Bankwatch Network wrote to the Bank and asked "*...what has been the procedure to assess the compliance of the financing of the project with article 267 b) or c) of the EC*

Treaty and article 16 of the Bank's statute?"

The Bank has not clarified how the assessment that a project is compliant with Article 267 TEC (now Article 309 TFEU) or Article 16 of the statute is carried out. The complainants consider that the Bank should have a clear procedure in place for carrying out such an assessment during the project appraisal process. Responding to Bankwatch's letter of 27 November should therefore have been a simple matter of outlining a procedure that is followed for all projects financed by the Bank.

To comply with its statutory obligations, the Management Committee should routinely carry out an assessment of all projects to ensure they comply with all provisions of the Bank's statute. This should include an assessment of compliance with Article 309 TFEU and Article 16 of the Bank's statute, details of which were requested by Bankwatch. The Bank's failure to provide full details of the assessment procedure raises concerns that a suitable process is not in place or is not being routinely followed.

Under the Bank statute this assessment should take place during the appraisal process. The results of the investigation should form part of the proposal report the Management Committee submits to the Board of Directors. The complainants consider it essential that all proposals prepared by the Management Committee contain a statement that the project complies with the statute of the Bank. This should be supported by an unequivocal statement that alternative sources of financing are not available on reasonable terms and that the project therefore complies with Article 16 of the Bank's statute and Article 309 of the TFEU. The Board of Directors should not approve projects when the proposal from the Management Committee does not contain these statements.

The complainants are concerned that the existing statutory procedures for examining and reporting on the eligibility of projects for Bank funding are not being followed.

The complainants also consider that the current statutory procedures should be revised to ensure that an assessment of potential alternative sources of funding is carried out at the earliest possible opportunity. The complainants consider that this assessment should be carried out during the pre-appraisal stage of project assessment. This would prevent staff resources being spent unnecessarily on full appraisals of projects that are ineligible for Bank financing.

3.3. Value added

The Bank has stated that it carries out “...a due diligence...” which “...assesses the value added to be achieved through the Bank’s involvement...” and takes into consideration “...the availability, terms and conditions of other sources of financing.” While the complainants recognise that it is important to assess what value the Bank can add to a project, a legal assessment of whether the project is eligible for Bank financing should be completed before any qualitative assessment of the Bank’s contribution. The two processes should not be conflated in the way this letter from the Bank indicates.

In its letter of 22 December 2009 the Bank set out three pillars for measuring the value added to beneficiaries of the Bank’s lending activities. The complainants support the Bank’s objectives outlined in these pillars, however the considerations outlined in these pillars are not relevant to the assessment of whether the project complies with Article 309 TFEU and Article 16 of the Bank statute. The assessment of the financial and non-financial value added by EIB involvement should not be confused with a necessary prior assessment of the legal eligibility of the project for EIB financing.

4. Conclusion

The complainants, CEE Bankwatch Network, ClientEarth and the Global Action on Arcelor Mittal coalition consider that the Bank’s responses have failed to adequately explain what assessment of alternative sources of funding has been carried out in relation to the ‘Steel product and processing R&D Facility’ loan. As a result of this failure to explain the assessment, and the apparent admission by the Bank that other sources of funding may be available, the complainants consider the Bank’s decision to approve the loan to ArcelorMittal has been taken in breach of both Article 309 TFEU and Article 16 of the Bank’s statute.

The complainants also consider that the Management Committee of the Bank has failed to comply with its statutory duty to examine whether the loan complied with all provisions of the Bank’s statute before submitting its report to the Board of Directors.

In relation to this loan, the complainants ask the Bank to:

- (i) Reassess the 'Steel product and processing R&D Facility' loan fully with particular reference to Article 309 TFEU and Article 16 of the Bank statute;
- (ii) Ensure the agreement to provide the 'Steel product and processing R&D Facility' loan is not signed until (i) above has been completed;
- (iii) Ensure no funds are disbursed to ArcelorMittal until (i) above has been completed; and
- (iv) Confirm in writing to the complainants that (i), (ii) and (iii) above will be complied with.

The complainants also ask the Secretary General to initiate an internal investigation into:

- (i) whether the statutory provisions relating to the investigation into project compliance with the Bank's statute and into eligibility for Bank financing are being complied with; and
- (ii) whether the current statutory provisions are adequate or should be revised.

The complainants ask that this investigation addresses whether the assessment should be carried out at the pre-appraisal or appraisal stage of project evaluation and whether the Management Committee is the appropriate body to carry out this assessment in light of its likely future role in making decisions about granting project finance under delegated authority from the Board of Directors. It should also consider how the findings of this assessment should be reported and whether specific assurances that projects comply with the Bank's statute should be required before finance can be approved.

The complainants ask the Secretary General to make any necessary amendments to project appraisal and internal reporting procedures following the outcome of this investigation.

The complainants do not consider that the initial investigation of this complaint should be complex and therefore expect the Bank's response within 40 days of the Bank acknowledging receipt of this complaint in accordance with Article 10.2 of the EIB Complaints Mechanism (as revised December 2009).

The complainants consider the facts outlined above are a clear example of a failure by the Bank to act in accordance with the applicable legislation and constitute maladministration. The complainants will therefore not hesitate to bring a complaint to the European Ombudsman if the Bank fails to take the appropriate actions to prevent disbursements being made to ArcelorMittal, to reconsider the decision to grant the 'Steel product and processing R&D Facility' loan and to ensure an appropriate assessment of eligibility for Bank financing is incorporated into the assessment procedure applied to all projects.

Anna Roggenbuck

CEE Bankwatch Network

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Rowan Ryrie

ClientEarth

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Sunita Dubey

Global Action on
ArcelorMittal

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Annexes:

1. CEE Bankwatch Network's letter of 29 September 2009
2. EIB's letter of 14 October 2009
3. Global Action on ArcelorMittal's letter of 19 October 2009
4. EIB's letter of 27 October 2009
5. CEE Bankwatch Network's letter of 27 November
6. EIB's letter of 22 December