

## CONCLUSIONS REPORT

### Complainant:

Ms. Anna Roggenbuck on behalf of CEE Bankwatch Network

### Subject of complaint:

Allegedly unfair refusal to provide access to documents pertaining to the Slovak Motorways D1 Phase I Project (hereinafter "the Project").

### 1. Complaint:

1.1 On 20 October 2009 Ms Anna Roggenbuck on behalf of CEE Bankwatch Network (hereinafter, the complainant) lodged a complaint by e-mail to the EIB Complaints Inbox. In her message, she alleged that the EIB would have unfairly refused to provide access to documents concerning the Project she had requested within the framework of preceding public disclosure procedures.

1.2 In particular, the complainant alleged that the EIB would have failed to comply with the EIB Public Disclosure Policy (PDP) and Regulation 1049/2001 insofar as it would not have consulted the Slovak authorities as regards the complainant's application for access to the Public Sector Comparator calculation and the affordability assessment for the public budget. Moreover, the complainant alleged that the EIB would not have adequately motivated the refusal to disclose the documents provided by the Slovak authorities (including the concession agreement) and used by the EIB's competent services in their appraisal of the economic and financial feasibility of the Project. Finally, the complainant contested the EIB's decision not to disclose a full copy of the Appraisal Report including the cost-benefits analysis on the basis of the fact that the disclosure of the Appraisal Report would seriously undermine the internal decision-making process of the EIB. The Complainant assumed that the Appraisal Report would not contain opinions for internal use only, as part of deliberations and preliminary consultations within the Bank. In that regard, the complainant argued that following the decision of the EIB Board of Directors (hereinafter, the Board) on the basis of the Management Committee's proposal to finance the Project, the EIB competent services' appraisal of the Project would be deprived of its confidential nature.

1.3 On 3 November 2009 the EIB Complaints Office (CO) acknowledged the receipt of the complaint. The complainant was informed to the fact that the CO was carrying out a review of her complaint as well as of the date by which she may expect an official reply from the EIB. Following a preliminary analysis on the admissibility of the complaint, the CO deemed appropriate to carry out further inquiries with a view to gathering additional information on the complaint. In this context, the CO reviewed the information provided by the complainant as well as the submissions by the competent services of the EIB. Finally, it conducted an inter-services consultation on the issue raised by the complainant.

1.4 On 1<sup>st</sup> of December 2009, the Complainant was informed by letter of the EIB Secretary General that, due to the complexity of the inquiry, it was necessary to extend its time-frame pursuant to article 11.10.3 of the EIB Complaints Mechanism Policy for the Complaints Office to form its reasoned opinion on the allegations formulated by the Complainant.

### **Box 1 – Allegations**

- 1) Failure to consult the Slovak authorities with regard to the disclosure of the Public Sector Comparator Calculation and the Affordability Assessment for the public budget.
- 2) Failure to adequately motivate the refusal to disclose the documents provided by the Slovak Authorities including the concession agreement and any other document used for the economic and financial appraisal of the Project.
- 3) Failure to adequately motivate the refusal to disclose the Appraisal Report and costs-benefits analysis



## **2. Background information**

2.1 Prior to the assessment of the Complainant's allegations, it appears appropriate to integrate the information provided by the latter in the complaint and provide a chronology of the events pertaining to the contested and related public disclosure procedures.

2.2 On 11 February Ms Barbora Cernusakova, CEE Bankwatch Network National Coordinator for the Slovak Republic, contacted the EIB in order to request access to the following documents pertaining to the Project:

- Appraisal Report
- Proposal of the Management Committee to the Board of Directors ("Board's Report")
- Cost-benefit analysis
- European Commission's opinion

2.3 On 27 February 2009 the Complainant contacted the EIB in order to request, *inter alia*, the following documents pertaining to the Project at stake:

- Public Sector Comparator calculation
- Affordability assessment for the public budget
- Information on the payment structure
- Explanation of the reasons why four Non-Technical Summaries were available for one project

2.4 On 17 March 2009, the EIB's competent services replied to Ms Barbora Cernusakova by providing access to the opinion of the European Commission, to a copy of the Board's Report edited in accordance with the provisions of §§26-27 of the PDP, a summary of updated non-confidential information contained by the Appraisal Report as well as an outline of the loan conditionality. The remaining information contained in the Appraisal Report, including the cost-benefit analysis, was not disclosed to the Complainant as it was considered to be confidential pursuant to §§ 26 and 34 of the PDP. Finally, the EIB drew the Complainant's attention to the fact that some previously requested information on the Project had been already been provided to her association with a last update in December 2008.

2.5 On 24 March 2009 the EIB's competent services replied to the request of the Complainant by informing her that it could not disclose the Public Sector Comparator calculation and the Affordability Assessment for the public budget since they were by definition documents which the national authorities do not submit to the Bank; the EIB thus advised the complainant's association to refer to the Slovak authorities in order to obtain the requested documents. In its reply, the EIB also provided the association with information on the outline of the payment structure as well as on the Non-Technical Summaries.

2.3 On 21 July 2009 the complainant sent another request for information to the EIB whereby she requested whether in the specific case the EIB received the Public Sector Comparator calculation and the Affordability assessment for the public budget; in her message she also requested the disclosure of the following documents:

- Documents from which the information on the payment structure was taken
- Concession agreement and other documents provided by Slovak authorities which formed a basis for the EIB's economic due diligence
- Disclosure of the EIB Appraisal Report and cost-benefit analysis.

2.4 On 23 September 2009, the EIB's competent services refused to disclose the Concession agreement as well as other documents provided by the Slovak authorities for the EIB to carry out the economic appraisal of the Project on the basis of §26 of the EIB Public Disclosure Policy (PDP) and informed the complainant that since these documents were provided by the Slovak authorities on a confidential basis, the Bank expressed no objection to the disclosure of the requested documents by the Promoter. In their reply, the EIB's competent services reiterated their advice to direct the request for disclosure of the Public Sector Comparator calculation and the Affordability Assessment for the public budget to the Slovak authorities. Finally, it refused to disclose the Appraisal Report, including the cost-benefit analysis, on the basis of the combined provisions under §§ 26 and 34 of the PDP on the basis of the consideration that the Appraisal Report forms part of the Bank internal decision-making process.



### Box 2 – Overview of Bankwatch CEE’s contacts with the EIB Communication Department

When	Who	What
11/02/09	Barbora Cernusakova, National Coordinator for the Slovak Republic CEE Bankwatch Network	<ul style="list-style-type: none"> <li>• Appraisal Report</li> <li>• Proposal of the Management Committee to the Board of Directors (“Board’s Report”)</li> <li>• Cost-benefit analysis</li> <li>• European Commission’s opinion</li> </ul>
27/02/09	Anna Roggenbuck, EIB Campaign Coordinator CEE Bankwatch Network	<ul style="list-style-type: none"> <li>• Public Sector Comparator calculation</li> <li>• Affordability assessment for the public budget</li> <li>• Information on the payment structure</li> <li>• Explanation of the reasons why four Non-Technical Summaries were available for one project</li> </ul>
21/07/09	Anna Roggenbuck, EIB Campaign Coordinator CEE Bankwatch Network	<ul style="list-style-type: none"> <li>• Information on the availability of Public Sector Comparator calculation and Affordability assessment</li> <li>• Documents from which the information on the payment structure was taken</li> <li>• Concession agreement and other documents provided by Slovak authorities which formed a basis for the EIB’s economic due diligence</li> <li>• Appraisal Report and cost-benefit analysis</li> </ul>

### 3. Applicable Regulatory Framework

3.1 In her letter of 20 October 2009, the complainant refers to the regulatory framework which - in her view - would have applied to the EIB when implementing the contested procedures for the handling of request for documents. In particular, it is to be noted that, besides the EIB PDP, the complainant refers to Regulation 1049/2001 implementing into EC secondary legislation the provision of Article 255 of the treaty establishing the European Community which grants a right of access to European Parliament, Council and Commission documents to any Union citizen and to any natural or legal person residing, or having its registered office, in a Member State.

3.2 From a comparative analysis of the treaty-based provisions together with those stemming from EC secondary legislation, it appears that, at the time of the contested public disclosure procedures as well as of the submission of the present complaint<sup>1</sup>, Regulation 1049 only governed the disclosure of information held by the three institutions mentioned in the Regulation and did not apply as such to the EIB. However, whereas the PDP, governing the general procedures for the disclosure of EIB-held information, is substantially influenced by the spirit and the wording of Regulation 1049/2001 and presents several similarities<sup>2</sup> to it, where possible, the CO interpreted the alleged breaches of the Regulation as alleged breaches of the EIB PDP.

3.3 Furthermore, it is worth emphasising that the EIB procedures for the handling of request for access to information are also subject to the principles of good administration set up by the European Code of Good Administrative Behaviour and the EIB’s Code of Good Administrative Behaviour for the staff of the EIB in its relations with the public.

<sup>1</sup> Following the review of EC primary legislation by the Treaty of Lisbon, the new Article 15 of the Treaty on the Functioning of the European Union replacing Article 255 of the EC Treaty, requires all of the ‘institutions, bodies, offices and agencies’ of the EU to ‘conduct their work as openly as possible’, ‘in order to promote good governance and ensure the participation of civil society’. Therefore, it can be argued that following the entry into force of the Treaty of Lisbon, Reg. 1049/2001 also applies to the EIB.

<sup>2</sup> §15 of the PDP refers to Regulation 1049/2001 as a key reference for the Bank’s disclosure also in the light of the fact that the EU’s three legislative institutions called on the other institutions and bodies of the Union to adopt rules on public access to documents that take into account the principles and limits laid down in the Regulation.



3.4 In this context, §21 of the PDP establishes that «[a]ll information held by the Bank is subject to disclosure upon request, unless there is a compelling reason for non-disclosure. As the EIB operates as a bank, there are certain constraints on information it discloses». §35 of the PDP integrates this principle by emphasising that « [if] only parts of a requested document are covered by any of the constraints above, information from the remaining parts shall be released». It appears appropriate to read these provisions in conjunction with article 13.3 of the Code of good administrative behaviour for the staff of the European Investment Bank in its relations with the public<sup>3</sup> and article 18 of the European Code of Good Administrative Behaviour<sup>4</sup> which impose, respectively on the EIB staff and on all the officials of the EU institutions and bodies, the duty to state the grounds of decisions. As a result, the EIB cannot reject the disclosure of an entire document *per se* unless the competent services adequately state the grounds on which they concluded that *each and any* piece of information contained in the document at stake was confidential.

#### **4. Findings:**

##### *4.1 General observations*

4.1.1 The complaint touches upon the complex and evolving regulatory environment governing the transparency of European institutions as the European Investment Bank. In that regard, it is worth underlining that in 2009 the EIB has managed a public consultation on its Transparency and Public Disclosure Policies and has incorporated the comments expressed by the civil society which engaged in the exercise in its new draft policies approved by the EIB Management Committee in December 2009 and to be published on the EIB website three weeks before the meeting of the EIB Board of Directors in February 2010<sup>5</sup>. In the same spirit of openness and transparency, complaints as the present are a beneficial contribution to the debate on the EIB policies and their implementation with a view to improving the Bank's service to individuals and organisations increasingly focusing their interest on the activities of the EIB.

4.1.2 When carrying out its inquiry on the complaint, the CO noted that between the end of 2008 and the first quarter of 2009, the complainant and the complainant's organisation have established an intense liaison with the competent services of the EIB for the request of access to information pertaining to a number of Projects of interest for the activities of the complainant's organisation. In this context, communications from different members of the complainant's network have sometimes submitted adequately clear applications; in other circumstances, one could not fail to notice that some of the requested documents were not sufficiently identified by the complainant. In particular, from the information gathered during the inter-services consultation, some terms as "affordability assessment for the public budget" or "documents provided by the Slovak authorities" appear to be insufficiently identified. In addition, it is to be noted that the data room of the Project consists of an impressive amount of files (more than 1,000) provided by the Slovak authorities to the EIB.

*4.2 Alleged failure to consult the Slovak authorities with regard to the disclosure of documents provided by the Slovak authorities and used by the EIB to carry out its appraisal of the economic and financial feasibility of the Project.*

4.2.1 Following a review of the correspondence between the complainant and the competent services of the EIB and on the basis of the information provided by the latter within the framework of the inter-service consultation, it appears that the Public Sector Comparator calculation and the Affordability Assessment for the public budget are by definition documents which are not submitted to the EIB and were not held by the Bank at the time of the request. From the above considerations, it results that the Complainant's allegation is ungrounded insofar as the provision requesting the liaison with the authorities concerned in case of third-party documents laid down by §33 of the PDP did not apply to the present case.

3 « All replies to requests and complaints must be reasoned in such way that the person concerned is precisely informed of the grounds and arguments on which they are based »

4 « Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision. The official shall avoid making decisions which are based on brief or vague grounds or which do not contain individual reasoning.»

5 Further information on the public consultation on the relevant EIB policies is available at the following addresses : <http://www.eib.europa.eu/about/news/launch-of-second-round-of-public-consultation1.htm?lang=en>



4.2.2 However, the CO notes that the replies of the EIB's competent services to the request for disclosure of the Public Sector Comparator calculation and the Affordability Assessment for the public budget referred the communicant to the Slovak authorities. In that regard, it is worth underlining that article 12 (1) and (2) of the European Code of Good Administrative Behaviour stipulates that, "*when answering correspondence, telephone calls and e-mails, the official shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked. If the official is not responsible for the matter concerned, he shall direct the citizen to the appropriate official*". Accordingly, in a previous decision on a complaint against the European Investment Bank concerning a transport project in the Slovak Republic<sup>6</sup>, the European Ombudsman had made a further remark encouraging the EIB to consider contacting the national authorities in the future, in order to ascertain the possibility of total or, at least, partial disclosure of finance contracts to which citizens request that it grant them public access. The rationale behind the Ombudsman's further remark was to raise the bar in the Bank's culture of service in order to contribute with a minor but important gesture to mitigating language problems that some citizens may encounter in addressing the corresponding requests for public access to the authorities of the Member State concerned.

#### 4.3 Alleged failure to adequately motivate the refusal to disclose the documents provided by the Slovak authorities

4.3.1 As regards the request to provide access to all documents provided by the Slovak authorities and used by the EIB in its appraisal of the economic and financial feasibility of the project (including the Concession Agreement), the complainant contested that the refusal to disclose such documents was not adequately motivated insofar as the EIB's reply only referred to §26 of the PDP; moreover, the complainant considered that the fact that the EIB expressed its no objection for the Project Promoter to make these documents available to the complainant showed that the EIB itself did not consider such documentation as confidential.

4.3.2 Besides reiterating the considerations made in §4.1.2, it is worth emphasising that §26 of the PDP lists a number of constraints which would justify, in the absence of an overriding public interest, the rejection of an application for access to information. Among those constraints, the PDP includes the risk that the disclosure might undermine commercial interests of a natural or legal person, including intellectual property and explains that such constraint is to be interpreted as covering confidentiality agreements concluded by the Bank with its counterparts. In that regard, it is to be noted that the complainant was informed in the EIB's reply of 23 September 2009 that the latter had received the requested document from the Promoter on a confidential basis and that as such could not disclose as per §26 of the EIB PDP.

4.3.3 As a European body and a bank, whilst enhancing its openness towards stakeholders and practicing transparency as a value, the EIB must also ensure mutual trust with its counterparts, which have the legitimate right to expect that it will act within the established legal framework and will not divulge information protected by the obligation of banking confidentiality<sup>7</sup>. The Community judicature as well as the European Ombudsman have several times referred in their case law to the dual role of the EIB as both a banking institution operating in the financial markets and a Community body. As a result of the banking nature of the EIB, the latter may enter confidentiality agreements with its counterparts as, indeed, it occurred in the case at stake whereby the data room provided by the Slovak authorities was protected by a Confidentiality Agreement of 5 March 2008 covering, *inter alia*, information furnished for the EIB's appraisal of the Project and of the Promoter's financial position with a view to the EIB's decision on the financing of the Project.

4.3.4 On the basis of the above considerations and given that the confidentiality of the requested information was already clear to the Bank's services prior to consulting the Slovak authorities insofar as the latter and the EIB had signed a specific confidentiality agreement, it results that the fact that the EIB informed the Complainant of its non-objection to the disclosure of the requested documents, should the Promoter have waived its confidentiality rights, does not conflict with the lack of consultation with the Slovak authorities insofar as the confidentiality assessment to be performed pursuant to §21 of the PDP had already succeeded in identifying the confidentiality of the requested document and therefore, in accordance with §33 of the PDP, the EIB was not obliged to consult the national authorities for further confirmation. As a result, from the information available, it appears that, although the EIB competent services had correctly rejected the application for access to the concerned

6 Case: 0948/2006/BU, <http://www.ombudsman.europa.eu/decision/en/060948.htm>

7 In this context, see case the EO's decision on case 0948/2006, §1.11 "The Ombudsman considers reasonable to accept that, for the reasons mentioned in the above paragraph, the EIB, acting in its role as a standard banking institution, is obliged to respect banking professional secrecy and that it is its prerogative to decide whether or not a document contains confidential information."

8 Otherwise, the constraint to disclosure should have been motivated on the basis of Regulation 1049/2001 applying to the EIB in case of access to environmental information as stipulated by Regulation 1367/2006.

9 This interpretation is corroborated by the considerations made in §4.3.3 of the present Report.



documents, the relevant constraints to disclosure could and should have been better explained to the complainant by referring to the exact reason (commercial interests) of confidentiality as well as to the signature of confidentiality agreements on the documents requested by the Complainant, in line with the duty to state the grounds of rejection stipulated by §95 of the PDP.

#### 4.4 Alleged failure to disclose the Appraisal Report, including the cost-benefit analysis

4.4.1 From the information gathered during the inquiry into the complaint, it resulted that the complainant was refused access to a full copy of the Appraisal Report and was instead provided with a copy of the Proposal of the Management Committee to the Board of Directors and a summary of updated non-confidential environmental information on the Project contained in the Appraisal Report. From the above reasoning and in light of the EIB's reply to the Complainant of 23 September 2009 justifying the rejection of the complainant's application on the basis of §§26 and 34 of the PDP, it appears that the EIB's competent services considered that, apart from the non-confidential environmental information provided to the Complainant, all remaining parts of the Appraisal Report did contain non-environmental<sup>8</sup> confidential information and as such could not be disclosed to the complainant.

4.4.2 In this context, the Complaints Office thoroughly assessed the contested document with a view to identifying the adequacy of the motivation adopted by the EIB competent services in their reply to the complainant and therefore the grounds of the allegation; on the basis of this review carried out in co-operation with the competent services of the EIB, the CO concluded that:

- the Complainant should have been provided with a formal partial disclosure of the Appraisal Report in line with the obligation stemming from §35 of the EIB PDP.
- the motivation provided by the EIB not to disclose the views/evaluations expressed by EIB's services within the framework of the appraisal process was adequate
- the motivation provided by the EIB not to disclose the financial and economic appraisal – including the cost-benefit analysis was incomplete as it did not refer to another constraint applying to the case, i.e. the commercial interest of the EIB and of its counterparts, §26 of the PDP<sup>9</sup>.
- the motivation provided by the EIB was inadequate to cover the rest of the information which could not be deemed as confidential

4.4.3 As regards the Complainant's view that the disclosure of *any* Appraisal Report could not seriously undermine the internal decision-making process following the EIB Board's approval of the operation, it appears that such "*a priori*" evaluation of the confidentiality/non-confidentiality of an EIB document regardless of an assessment of its very content in line with §§24-36 of the PDP would not be compliant with the EIB policy in the field. On the contrary, in case of applications for access to the Appraisal Report after the EIB Board of Directors has approved an operation proposed by the EIB Management Committee, the requested Appraisal Report might contain, depending on circumstances,:

- information whose disclosure does not undermine the internal decision-making process of the EIB;
- information whose disclosure is superfluous (in case the applicant has already been provided with the Proposal of the Management Committee to the Board, as in the present case); and
- information whose disclosure might *de facto* influence the competent services' future performance of their duty of due diligence insofar as the information at stake refers to opinions/assumptions expressed in a manner which reflects the internal purpose of the Appraisal Report.

4.4.4 Considering the banking nature of the EIB, it is therefore extremely important that the disclosure of internal opinions which might (directly) impact on the commercial interests of the Bank and (indirectly) on its internal decision-making process is carefully assessed. Besides the protection of legitimate commercial interests and preservation of the frank and open internal exchange of views and evaluations, the EIB has also the duty to respect professional secrecy (§24 PDP), in compliance with European laws, in particular Article 287 of the Treaty establishing the European Community which stipulates that "*The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components*".

4.4.5 Finally, it is of crucial importance that the EIB stakeholders are provided with the necessary institutional devices to challenge the EIB's refusal to disclose with a view to cross-checking the adequacy of the EIB's confidentiality assessment. In that regard, it is worth emphasising that, following the *opinion of the Commission and the approval of the Council, on 18 June 2008 the European Parliament adopted modifications to the European Ombudsman's Statute according to which, within the framework of the inquiries carried out by the EO, the latter may consult any document he needs in the course of his inquiry and could lift the secrecy exception for access to a file.*



## **5. Conclusions and Recommendations:**

5.1 *The correct identification of the object of the request for documents has a considerable impact on the quality of the evaluation laid down by §21 of the PDP. Considering the organisational nature of the complainant (NGO), it appears appropriate in the interest of the complainant as well as the other end-users of the service provided by the communicational services of the EIB that info-requests from the complainant's organisation are made in a centralised manner, by a dedicated office of the complainant's organisation. That would increase the network's monitoring capacity whilst facilitating possible misunderstandings or failures to adequately identify the object of the request for disclosure.*

5.2 *As regards the alleged failure to consult the Slovak authorities about the disclosure of the Public Sector Comparator calculation and the Affordability assessment for the public budget, on the basis of the information provided by the competent services of the EIB, it appears that the requested documents were not held by the EIB which, as a result, did not commit any irregularity in referring the communicant to the competent authorities. However, in light of the principles of Good Administration stemming from the European Code of Good Administrative Behaviour and the case law of the European Ombudsman, it is recommended that the EIB services responsible for the handling of application for information liaise with the national counterparts in order to raise the latter's awareness on the EIB's policies in the field and facilitate the handling of info-requests in accordance with the provisions of the European Code of Good Administrative Behaviour and the precedents of the European Ombudsman.*

5.3 *Based on the information gathered during the inquiry on the complaint, it appears that the rejection of the documents provided by the Slovak authorities and used by the EIB in its economic appraisal was grounded on the basis of the appropriate provision of the PDP as the information requested was covered by confidentiality agreements between the EIB and the client. However, it is recommended that in the future the EIB services responsible for the handling of applications for access to documents adequately specify the reasoned opinion behind the rejection of the application, a fortiori when the PDP's paragraph referred to contains several constraints to public disclosure.*

5.4 *On the basis of the inquiry carried out by the CO, the latter considers that the EIB's competent services should have dealt with the request for access to the Appraisal Report according to the instructions given in this Report and recommend to proceed to a formal partial disclosure of the requested document in accordance with §35 of the PDP.*



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