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Complaint about maladministration against the European Investment Bank

The complaint regards the refusal of the European Investment Bank (EIB) to disclose the Framework Agreement concluded between the EIB and Tajikistan signed on 11 February 2009.

I. Facts of the complaint

On February 11, 2009, the EIB and the President of the Republic of Tajikistan, Mr. Emomali Rahmon, signed a Framework Agreement providing the basis for governing EIB's future lending in Tajikistan. This event was announced the same day on the EIB web page and accompanied by the press note. The EIB informed that *"The Framework Agreement between the Republic of Tajikistan and the EIB opens the way for EIB financing of projects in Tajikistan. The focus will be on the financing of major energy projects of common interest both to Tajikistan and the European Union."*

The EIB is entitled to finance investment projects in Tajikistan on the basis of the Council of European Union Decision (mention the reference of the Decision) of December 2006 granting a Community guarantee to the EIB against losses under loans and loan guarantees for projects outside the European Community. According to the decision, in Central Asia, the EIB should focus on major energy supply and energy transport projects with cross-border implications. Moreover, EIB financing should be consistent with and support EU external policies including specific regional objectives and should take place in countries complying with appropriate conditionality consistent with EU high level agreements on political and macro-

economic aspects. According to Article 2, point 3 of the Council decision, the Community guarantee shall only cover EIB financing operations carried out in countries having concluded a framework agreement with the EIB establishing the legal conditions under which such EIB Financing Operations are to be carried out.

On 27th February 2009, CEE Bankwatch Network requested to have access to the Framework Agreement concluded between the EIB and Tajikistan. In the response of 24 March 2009, the bank refused to disclose the Agreement on the basis of Article 33 of the Public Disclosure Policy (PDP) of the Bank. The Bank informed that the Tajikistan Authorities had not given their consent for disclosure.

On 25 March 2009, CEE Bankwatch Network lodged a complaint to the EIB Complaints Office against the decision of the Bank not to disclose the Framework Agreement. The Framework Agreement should not have been classified as a third party document as it was signed by both parties, the EIB and the Republic of Tajikistan.

On 4th May 2009, the Secretary General of the EIB adopted its final reply accompanied by a Conclusions Report. The Secretary General admitted that the reasoning of the Bank's decision supporting the refusal was not totally correct, however, the Secretary-General decided that the Framework Agreement could not be disclosed as it was still undergoing the process of ratification by the competent authorities of Tajikistan. Furthermore, the Conclusions Report concluded that the Bank did not commit an instance of maladministration in the refusal to disclose the document since the Framework Agreement did not enter into force and the request could not have been satisfied as the document was not yet valid for any of its signatories. The Conclusions Report states that the complainant shall be informed that the EIB will liaise with the national authorities of Tajikistan in order to verify whether their objection to disclose the requested document can be waved after its ratification. The Conclusions Report also suggests that the EIB should in the future assess the request for disclosure of Framework Agreements taking into account that some of the information therewith contained might be confidential in line with the Articles 24-36 of the Public Disclosure Policy.

By refusing to disclose the Framework Agreement concluded with Tajikistan, the EIB has infringed Article 21 of the Public Disclosure Policy. The Complaints Office of the EIB has failed to properly consider Bankwatch's complaint regarding the refusal of disclosure and grounded its decision on reasoning that is not based on any relevant provisions of the EIB's Public Disclosure Policy or Regulation 1049/2001/EC on Public Access to European Parliament, Council and Commission documents.

II. Legal background

In the Conclusions Report, the Complaint Office concluded that Bankwatch's request could not be satisfied due to the fact that: (i) the requested document did not yet undergo the ratification procedure and was therefore not valid yet to any signatories (point 3.3 of the Conclusions Report) and (ii) the authorities of Tajikistan objected to disclosure of the document (point 4.3 of the Conclusions Report). It follows that the

Complaints Office did not properly justify its refusal to disclose the requested document.

The EIB as an EC body is subject to Regulation 1049/2001/EC. Indeed, indent 12 of Regulation 1367/2006's preamble provides that "Regulation (EC) No 1049/2001 applies to the European Parliament, the Council and the Commission, as well as to agencies and similar bodies set up by a Community legal act. It is necessary to extend the application of regulation (EC) No 1049/2001 to all other Community institutions and bodies." The EIB is therefore subject to Regulation 1049/2001/EC.

In addition, the EIB's PDP applies a presumption of disclosure in line with EU legislation, those of the EU Member States, and internationally accepted principles (Art 21 of the PDP).

Yet the EIB Complaint Office's decision does not comply either with Regulation 1049/2001 or with the Bank's PDP.

1. Compliance of the Complaints Office's decision with Regulation 1049/2001/EC

Article 2(1) of Regulation 1049/2001/EC lays down a principle of public access to documents held by EC institutions and bodies. Article 4 of the regulation also lays down exceptions under which EC institutions and bodies may refuse access to documents. However, the EIB's Complaints Office did not refer to any of the provisions of the regulation to refuse Bankwatch access to the requested document. It first stated that the Framework Agreement had not been ratified and was therefore not valid.

However, the "validity" or the "invalidity" of a document cannot justify the refusal of an EC body to disclose a document. Regulation 1049/2001/EC does not refer to the "validity of a document" as the determinant of disclosure. Moreover, the requested Framework Agreement had been entered into by both parties, the EIB and the Republic of Tajikistan. The agreement was therefore valid from a legal point of view. The information note provided to the public on the EIB website confirmed the official character of this agreement and did not mention in any way that the validity of the agreement was subject to ratification process. And even if the agreement had to be ratified to enter into force in the Tajikistan legal order, this could not affect the EU citizens' right to have access to the existing public documents drawn up, entered into and held by an EU body as the EIB.

The Bank also argued that the Framework Agreement could not be disclosed because of the refusal of the Tajikistan authorities to make the document public.

However, the Framework Agreement cannot be considered as a "third-party document" in the meaning of article 4(4) of Regulation 1049/2001/EC as the agreement had been entered into by the EIB itself.

Article 4(4) of Regulation 1049/2001/EC provides that "*as regards third-party documents, the institution shall consult the third party with a view to assessing*

whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed”.

Because the EIB was a party to the requested agreement, it did not have to consult the republic of Tajikistan to decide whether to provide Bankwatch with access to the agreement or not.

As stated in the EIB’s Conclusions Report, the Framework Agreement is a contractual document between the EIB and Tajikistan: *“Indeed since Framework Agreements are contractual documents between the EIB and a counterpart, they cannot be defined as EIB internal documents nor as third-party documents”*. The Agreement has its base in the European Council’s Decision of 19 December 2006 (2006/1016/EC) and constitutes a necessary condition for the EIB to operate in Tajikistan. When operating outside the EU, the EIB is obliged to be consistent with EU external policies as well as with policies and legislation concerning the European Institutions’ administrative practices which are in this case Regulation 1049/2001/EC and the EIB’s Public Disclosure Policy. The Republic of Tajikistan cannot ignore the fact that the EIB, as an EC body, is subject to specific pieces of legislation regarding transparency and access to documents.

For the same reasons, the agreement was neither a document for internal use of the Bank in the meaning of article 4(3) of Regulation 1049/2001/EC.

2. Compliance of the Complaints Office’s decision with the EIB’s Public Disclosure Policy

The Complaints Office’s decision does not comply either with the Bank’s PDP.

Article 21 of the PDP provides that *“... All 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 (...)”*

Yet, the Bank does not refer to any compelling reasons for non disclosure except the lack of ratification of the agreement and the refusal of the Tajikistan authorities to disclose the agreement. However, none of these reasons constitute constraints on disclosure provided by the Bank’s PDP.

Similarly to Regulation 1049/2001/EC, the PDP provides that:

“As regards third-party documents, the Bank shall consult with the third party to assess whether information in the document is confidential, unless it is clear that the document shall or shall not be disclosed” (article 33).

However, as argued above, the Framework Agreement cannot be qualified as a third-party document as it is not a document only originating from the Republic of Tajikistan. The agreement was entered into by the EIB as well and thus also constitutes an EIB document. The Bank did not therefore have to consult with the

Republic of Tajikistan to assess whether the information in the agreement was confidential or not but should have decided to disclose it upon request.

Even if the framework agreement was considered as a third-party document in the meaning of article 33 of the PDP, the EIB's decision could not be considered as complying with the Regulation 1049/2001/EC and the PDP. Furthermore, the European Court of Justice in case C-64/05¹ made clear that the State from which the document originates and the EC institution that holds it cannot object to the disclosure of such a document without any constraints. The ECJ decided that "*Article 4(5) of Regulation No 1049/2001 cannot be interpreted as conferring on the Member State a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution, with the effect that access to such documents would cease to be governed by the provisions of that regulation and would depend only on the provisions of national law*"². (). , The ECJ further stated that "*a Member State which, at the conclusion of the dialogue with a Community institution concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, objects to disclosure of the document in question is obliged to state reasons for that objection with reference to those exceptions*"³."

Although the Republic of Tajikistan is not a Member State, this fact may not place this state in a more privileged position than others EIB's counterparts which are the Member States. All the documents that EIB holds should be subject to the same provisions for disclosure irrespectively from where they were provided to the Bank or who (a Member state or not) the party is to the framework agreement with the Bank.

Neither the EIB nor the Tajikistan Republic could object to the disclosure of the Framework Agreement on the grounds that the document was not valid and needed to undergo a ratification procedure.

Conclusions

The requested document is a public document which should have been disclosed by the Bank. The Bank did not refer to any circumstances or any "compelling reason" that would make the information contained in this document confidential. However, there is a public interest in the disclosure of the Framework Agreement which was concluded by the EIB on behalf of the Community in order to supports EU external policies and objectives and operates in countries that comply with appropriate conditionality consistent with EU high level agreements. The requested document establishes the legal conditions under which the EIB projects are to be carried out in Tajikistan.

Taking into account the fact that the bank disclosed in the past Framework Agreements concluded with other counterparts (for example Framework Agreement signed with Albania in 1998), it seems that EIB's decision on whether to disclose a framework agreement or not is only based on the consent of the counterpart to the agreement. However, this practice infringes Regulation 1049/2001/EC as an

¹ Case C-64/05 *Sweden v Commission*, [2007] REC I-11389.

² Case C-64/05, *ibid*, paragraph

³ Case C-64/05, *ibid*, paragraph

agreement by the EIB is not a third-party document in the meaning of article 4(5) of the regulation or in the meaning of article 33 of the EIB PDP.

Furthermore the Bank did not state any reasons to justify keeping the agreement confidential until its ratification by the Tajikistan authorities. It did not refer to any provisions of Regulation 1049/2001/EC or of its PDP to justify its refusal. Nor did it refer to an overriding public interest in making the agreement confidential until its ratification by the Tajikistan authorities.

It follows that the EIB's refusal to give Bankwatch access to the Framework Agreement entered into by the EIB and the Republic of Tajikistan violates article 2(1) and 4(4) of Regulation 1049/2001/EC and the EIB's PDP.

Taking above into account CEE Bankwatch Network requests disclosure of the requested Framework Agreement signed with Tajikistan in 2009.

21 August 2009

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The list of appendixes:

1. Secretary General final reply to the CEE Bankwatch Network complaint for unfair refusal to disclose the Framework Agreement between the EIB and the Republic of Tajikistan, Luxembourg, 4 May 2009
2. Conclusions report form the Complaints Office investigation