

The European Ombudsman

COMPLAINT ABOUT MALADMINISTRATION

1. From (name): Pavel Pribyl

On behalf of:

CEE Bankwatch Network and Hnuti Duha - Friends of the Earth Czech Republic

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2. Against which European Union institution or body do you wish to complain?

European Investment Bank

**3. What is the decision or matter about which you complain?
When did it come to your attention?**

We would like to make a complaint on a decision of the European Investment Bank concerning the disclosure of information regarding the D8 Motorway project in the Czech Republic.

The relevant facts are as follow:

January 31, 2003: Magda Stoczkiewicz, acting on behalf of two environmental non-governmental organisations - CEE Bankwatch Network and Friends of the Earth International and at the request of their member group Hnuti Duha - sent a request for information to Ms. Yvonne Berghorst, Senior Information Officer at the EIB. Among other things, the request consisted of the question: "Is the project (D8) going to be presented for Board approval at the meeting on February 25?" (Appendix no.1, Ms. Stoczkiewicz request).

February 14, 2003: In the EIB response, Ms. Stoczkiewicz was informed that Ms. Berghorst was, "not in a position to comment on the timetable for financing the D8 motorway"; and further, "before its commitment to a project (based on loan signature) the EIB publishes a range of factual data on a project in a summary linked to the project pipeline list on its website." (Appendix no. 2, Ms. Berghorst response). After consulting with the EIB website, Ms. Stoczkiewicz found that the project in question was not mentioned in the project pipeline.

February 24, 2003: Magda Stoczkiewicz got back to Ms. Berghorst, noting that she had not found the project on the website, and with further questions on the matter, specifically asking: "According to the EIB information policy that would mean that the project promoter has asked the bank not to put it [the project] on the list for commercial confidentiality reasons. I would like to know if that is the case. If not, what is the reason for not putting the D8 project on the web?" (Appendix no. 3, Ms. Stoczkiewicz clarification letter) (Appendix no. 4, the EIB transparent information policy)

March 10, 2003: In response, Ms. Stoczkiewicz received a letter from Mr. Marty-Gauquié Director of Communications, which revealed that the information could not be provided due to the fact that the "Czech Government has asked the bank not to publicize public sector projects until the Parliament has approved them. The reason being that the Parliament has the sole authority for committing the Czech Republic" (Appendix no. 5, Mr. Marty-Gauquié response).

After looking into Czech law, we could not find any legislation that would be relevant in supporting Mr. Marty-Gauquié's explanation. We asked for information on such a request to the Ministry of Environment which referred us to the Government office, which in turn referred us to the Ministry of Finance.

During this process we learned that the EIB Board approved the D8 motorway loan during its session in April 2003. We note that information about the loan was not available on the EIB website until September 2004 when the project was officially signed.

July 25, 2003: Ms. Stoczkiewicz submitted an official complaint concerning access to information on the D8 Motorway project to the Secretary General of the Bank (Appendix no. 7).

August 5, 2003: In response to a request from Friends of the Earth Czech Republic (Hnutí Duha) concerning the conditions for information disclosure about loans that are provided to the Czech Republic by the EIB, in a letter of 5 August 2003 the Czech Ministry of Finance affirmed that "no request exists on the part of Czech Government in any form, where the government would ask the EIB not to provide information to the public regarding approved loans/projects that were still to be approved by the Czech Parliament." (Appendix no. 6, translation of the Czech Ministry of Finance statement and copy of the Czech original)

September 22, 2003: In the response to Ms. Stoczkiewicz's complaint, Mr. Uhlmann concluded that: EIB "staff have fully complied with current policy and rules, provided information to the extent possible and given you the correct reasons why further information was not available".

The arguments:

3.1 Grounds for a promoter to remove a project from the Project Pipeline List

According to the EIB's Transparent Information Policy:

- "all projects (in principle) appear on the list except those where the promoter specifically requests confidentiality to protect commercial interests" (Appendix no. 3).
- 'all projects' means also these which EIB: "considers for financing, before a decision by the Board of Directors, and at the same time as the European Commission and the Member States are asked for their opinions."

In light of the aforementioned policy statements, the Czech Government would have to request the EIB not to include the D8 Motorway project in the pipeline list in order *to protect commercial interests*. However, the conclusion which can be drawn from Mr. Marty-Gauquié's response is that the Czech Government's request relates not to *commercial* but to political interests. According to the EIB's policies the grounds for not putting a project on the Project Pipeline List are only commercial ones; the policy does not mention any political grounds for withholding information. Therefore, we believe that in the case of the D8 project if there was a request from the Czech Government, the EIB should be obliged to assess whether or not the request was adequate in terms of relating to commercial interests.

3.2 No request exists

Looking at Czech law, we could not find any legislation that would be relevant for supporting Mr. Marty-Gauquié's explanation that the Czech authorities' request for project confidentiality (until the Parliament approval) is "deriving from a constitutional structure of sovereign State" (Appendix no. 5). From the response we received from the Czech authorities we understand there was no request from the Czech side to the EIB to withhold the information. Therefore, we want to point out that there are no legal rules mandating secrecy or limiting the disclosure of information on projects before the final approval by the Czech Parliament. There is also no evidence that the Czech government asked for the withholding of information on any other grounds. Therefore it can be concluded that the decision not to release information was made solely on the EIB side and against the Bank's own rules on access to information.

3.3 The black hole situation

Our correspondence between the EIB and the Czech Ministry of Finance leads us to a kind of black hole phenomenon. The EIB claims that the Czech authorities' "general and official position" is to not "publicize public sector projects until the Parliament has approved them", and the Czech Government ensured us that it has never "asked the Bank to not publicize public sector project until the Parliament has approved them." We believe that, as a minimum, the EIB should be required to provide us with clear evidence of the Czech Government request. Unfortunately, that was not the case. Therefore, the way in which the EIB's staff subsequently handled our request for information can, in our opinion, be recognised as maladministration.

**4. What result do you hope to achieve with your complaint?
What are your claims?**

The result of the complaint should prevent maladministration practices from the EIB in handling information requests, which in our opinion can be seen in the case of the information disclosure regarding the D8 Motorway project.

Therefore, within the D8 Motorway case we would like the European Ombudsman to:

- 4.1 examine the EIB's methods of handling the request for information concerning the D8 Motorway project in the Czech Republic in light of possible maladministration;
- 4.2 make a clear ruling that, in the D8 case and generally where the EIB is relying on the promoter's request for secrecy, the Bank should either provide the document containing that request or at least provide relevant details (who requested secrecy, when, what reasons were given) to justify any refusal of information disclosure;
- 4.3 examine the definition of commercial confidentiality which the EIB applies to projects;
- 4.4 examine if the EIB's current information policy, as well as its applied practice, compromises citizens' rights to information.

5. Have you already contacted the Union institution or body concerned in order to obtain redress?

Yes, we have contacted the Secretary General of the EIB with the complaint, as per the "Code of good administrative behaviour for the staff of the European Investment Bank in its relations with the Public".

6. If the complaint concerns work relationships with the Union in situations and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff regulations? If so, have the time limits for replies by the institutions already expired?

Yes, in accordance with article 18 of the Code of Good Administrative Behavior of EIB staff, Ms Stoczkiewicz on 25 July 2003 submitted an official complaint concerning access to information on the D8 Motorway project to the Secretary General of the Bank (Appendix no. 7). In the response of 22 September 2003, Mr. Uhlmann concluded that: EIB "staff have fully complied with current policy and rules, provided information to the extent possible and given you the correct reasons why further information was not available".

We found the response insufficient and unsatisfactory. With the above-mentioned requests and complaint, CEE Bankwatch and Hnuti Duha - Friends of the Earth Czech Republic have used all existing possibilities for internal administrative requests and complaints provided within the EIB regulations.

7. Has the object of your complaint already been settled by a court or is it pending before a court?

No.

8. Please select one of the following two options:

Please treat my complaint publicly

9. Do you agree that your complaint may be passed on to another authority (European or national), if the European Ombudsman decides that he is not entitled to deal with it?

Yes.

Date and signature: 29.11.2004

Pavel Pribyl

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