

Szczecin, 19.10.2009

To:

Secretary General
European Investment Bank
98-100,boulevard Konrad Adenauer
L-2950 Luxembourg

From:

Anna Roggenbuck
On behalf of
CEE Bankwatch Network
Na Rozcesti 6
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Czech Republic

Address for the purpose of this complaint:

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The complaint on the bank's decision to refuse access to information (documents) about the project D1 Phase I Motorway in Slovakia

Facts of the complaint

On 27 February the complainant requested from the Bank the following documents regarding the Project financed: Public Sector Comparator, Affordability assessment; information on the payment structure; explanation of the four Non-Technical Summaries for one project.

In its response of 24 March, the bank advised complainant to refer to Slovak authorities for the two documents (Public Sector Comparator, Affordability Assessment), because these were not by definition submitted to the Bank .

On 21 July 2009 the complainant sent another request for information to the bank requesting explanation if the documents requested are in possession of EIB; disclosure of the document which contains information on the payment structure; disclosure of concession agreement and other documents provided by Slovak authorities and documents that includes EIB economic and financial assessment of the project; disclosure of the bank Appraisal Report and cost-benefit analysis.

In its response of 23 September EIB refused to disclose information provided by the Slovak authorities including the concession agreement on the basis of the Article 26

of the Public Disclosure Policy. The Bank expressed no objection for the project promoter to make these documents available to complainant. In the same letter the bank refused to disclose Appraisal Report, which includes cost-benefit analysis, on the basis of the 26 and 34 of the bank's Public Disclosure Policy.

Allegations

In the complainant opinion the bank has failed to comply with the Public Disclosure Policy, Regulation 1049/2001/EC regarding Public Access to European Parliament, Council and Commission documents.

1. The bank is obliged to disclose information it holds unless it is subject to the one of the exceptions listed in the Article 4 of the Regulation 1049/2001/EC. Article 4 point 4 says that institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable.

When refusing access to the documents provided by the Slovak authorities (economic documents, concession agreement) the bank did not fulfill its duties to consult the Slovak authorities in case the Bank is not clear that the document shall or shall not be disclosed. The Bank in fact referred complainant to contact Slovak authorities with the same request. Therefore the bank itself was not clear if the documents requested could or could not be disclosed by the Slovak authorities. In its justification of the refusal of disclosure the Bank referred to Art 26 of its Public Disclosure Policy which lists a number of constraints to disclosure. The Bank did not explain which constraint applies in this case. The bank should have indicated which constraint does not allow the bank for disclosure of requested information. In case when the document is a third-party document the justification must also be based by a third-party on the same set of exceptions. The bank made however no objection to the borrower to disclose requested documents what can suggest that the bank itself does not consider them as confidential documents and has not consulted the borrower (Slovak authorities) if the requested documents could be disclosed.

The Bank informed that it was granted access to these documents on confidential basis however did not inform the complainant about the justification for the confidentiality applied to these documents by the Slovak authorities. The justification of the confidentiality should be made available to the bank by the Member State and to the person that requested information from the EU institution.

2. The bank also refused the complainant access to Appraisal Report, which includes cost-benefit analysis on the grounds that the document forms part of the Bank's internal decision-making process and the refusal of disclosure is made on the Articles 26 and 34 of the EIB Public Disclosure Policy. The complainant does not agree with this decision. According to Article 4 point 3 of the Regulation 1049/2001/EC the institution shall refuse access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

When refusing access to a document on the above grounds the banks should have justified that the disclosure would seriously undermine its decision-making process because the decision on whether to approve the loan or not had already been taken by the Board of Directors. The bank did not justify its refusal properly. Moreover, in the

complainant opinion, the bank may not exclude “*a priori*” certain type of documents from disclosure but it should analyse on case by case basis if the document may be disclosed. The justification may not be based on hypothetical situation but must be specific actual to the document requested. The bank should have explain how disclosure of the requested document, which is a case specific, would seriously undermine the bank’s decision-making process in general.

Nevertheless the complainant does not agree that Appraisal Report regarding D1 Phase I PPP Motorway project contains opinions for internal use only as a part of deliberations and preliminary consultations within the bank. The aim of the appraisal process, which comes after pre-appraisal stage (according to the Environmental and Social Practices Handbook), which identifies eligibility for the bank financing) in the bank is to give objective data and information in the project report to the Board of Directors (Appraisal <http://www.eib.org/projects/cycle/appraisal/index.htm?lang=en>). It is worth to emphasis that project report (Appraisal Report) is only put forward to the Board of Directors for approval if the outcome of the appraisal is satisfactory (Information from the EIB webpage http://www.eib.org/projects/faq/loan_applications/index.htm#what-is-the-procedure-for-obtaining-an-eib-loan). Therefore it can be assumed that if project is not satisfactory to the bank or the applicant does not meet the criteria for the bank financing and it was identified during the appraisal, the project report will not be presented to the Board of Directors and the information on the project will not appear on the EIB webpage. Therefore the preliminary consultations and deliberations as indicated in the Regulation 1049/2001/EC take place before the Project Appraisal is prepared. According to the information on the website “Appraisal”: “*project appraisal is carried out by the EIB's teams of engineers, economists and financial analysts, in close cooperation with the promoter.*” The project assessment is based on technical scope of the project, implementation aspect (promoter capability to implement the planned project, information on timing and employment during implementation); operation aspects (promoter's capability to operate and maintain the project, information on production/service, operating and maintenance costs, employment during operational life); procurement aspects; market and demand (analysis of the products/services demand over the project's life, with reference to sectoral studies of the Projects Directorate); investment cost aspect (information on project costs and its detailed components; comparison with cost of similar projects); profitability aspect (information on financial profitability and related indicators (e.g. rate of return, information on economic profitability).

After the project was approved by the Board of Directors, as it was in the case of D1 Phase 1 PPP Motorway, it may be assumed that the positive outcome of the appraisal was confirmed by the Board and that bank is convinced about the eligibility for its financing. The bank may not grant a loan for every projects but must comply with the Article Art. 267 of the EU Treaty which define what the bank should finance:

- a) *Projects for developing less-developed regions*
- b) *Projects for modernising or converting undertakings or for developing fresh activities called for by the progressive establishment of the common markets, 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.*

D1 Phase 1 PPP Motorway is a project located in less-developed region in EU and may be of common interest to several Member States as a part of V Pan-European transport corridor. Therefore the project is of a significant public interest and the way of its realisation, including its environmental but also economic and financial aspects are of significant importance to general public. The report from the bank's positive assessment of the loan to Member State to conduct public project concerning the project's economic and financial aspects should be made public. It is doubtful that disclosure of this document will undermine EIB's decision-making process in the future.

A handwritten signature in black ink, reading "Anna Roggenbuck". The signature is written in a cursive style with a large initial 'A' and a long, sweeping tail.

Anna Roggenbuck