

11.04.2019

A complaint to the European Ombudsman

1. This complaint is based on the Memorandum of Understanding signed by the EIB with the European Ombudsman allowing the complainants who are not satisfied with the outcome of the procedure before the European Investment Bank-Complaints Mechanism (EIB-CM) file a complaint of maladministration against the EIB with the European Ombudsman.

2. On 9 March 2018 CEE Bankwatch Network lodged a complaint to the EIB-CM on non-disclosure by the European Investment Bank (EIB) several documents requested by the complainant in the three subsequent requests for information related to the project in Georgia Nenskra Hydropower Plant.

3. On 6th February 2018 during the meeting with the bank's staff, Bankwatch requested the bank to disclose own cost-benefit analysis for Nenskra power plant project and an additional expertise which the bank commissioned to assess whether the communities impacted should be treated as Indigenous People. This oral request was made in a direct reaction to the bank's staff statement that that bank confirmed that Indigenous People social standard does not apply to this project by consulting with other (than experts hired by the Promotor for Environmental and Social Impact Assessment) expert on this matter. The bank's statement had been done as a response to Bankwatch concerns related to the lack of necessary independency of the ESIA's expert from the project promoter and the Georgian government (in a given political context). This oral request was followed by the two written request.

On 8th February Bankwatch requested *"disclosure of the EIB's economic assessment for Nenskra project as well as an expertise the bank possesses related to the issue of identification of Svans as indigenous people."*

In the following message of 12th February Bankwatch made an additional request for disclosure of *"the Management Proposal to the Board, EIB's environmental appraisal report, ESIA gap analysis done by the EIB, ReM sheet, environmental forms (as required by EIB Environmental Handbook) provided by the borrower"*.

4. This complaint to the European Ombudsman is based on partial dissatisfaction with the outcome of the EIB-CM procedure relating to the assessment of non-disclosure of the requested *"expertise the bank possesses related to the issue of identification of Svans as indigenous people."* Bankwatch is however satisfied with the outcome of the EIB-CM procedure concerning disclosure of the other documents and information requested (specifically in the additional request of 12th February 2018). **This complaint alleges maladministration of the EIB in non-disclosing the requested expertise the bank possesses related to the issue of identification of Svans as indigenous people.**

5. On 23 April 2018 the EIB replied to Bankwatch's request by disclosing of a document *"Summary of EIB's assessment on the applicability of Standard 7 in the context of the Nenskra Project"*, dated April 2018. This document explains that the bank's assessment on the applicability of Indigenous People (IP) requirements under EIB Standard 7 has been conducted in a *"consultation with respected and highly qualified Georgian anthropologists, as well as the Lender's Social Advisors and the Social Expert on the International Panel of Experts"*. The bank also explained that disclosed documents were based on the relevant information produced and obtained during the Bank's appraisal, which has been collated in an ad-hoc manner, and on an exceptional basis, to address Bankwatch information request in a meaningful way.

6. On 30th April, Bankwatch sent its observations to the EIB-CM regarding documents disclosed by the EIB on 23rd April. The complainant raised that the Bank did not disclose requested expertise related to the issue of identification of Svans as indigenous people, instead it disclosed a document containing a summary of Bank's own consideration of the issue. Bankwatch explained that during the meeting on 6th February 2018 the Bank explained that it did not rely on the project promoter's ESIA assessment of the status of Svans as indigenous people but it commissioned an external analysis from the expert which was a subject of the initial request for disclosure: *"an expertise the bank possesses related to the issue of identification of Svans as indigenous people."* Bankwatch also raised that although a document disclosed refers to the *"consultation with respected and highly qualified Georgian anthropologists and the Lender's Social Advisors"*, the name of the expert was not disclosed which is not in line with the standards of the European public institutions to hide the name of the experts advising the institution in relation to the social impacts of a project. We explained that this practice prevents a public verification of the soundness of the bank's due-diligence, in particular if the bank indeed consulted this issue with the appropriate experts independent from the project promoter. **Bankwatch further insisted the bank to disclose all analyses on the issue of indigenous people and information who was the "respected and highly qualified Georgian anthropologists" and "Lender's Social Advisors"**.

7. Bankwatch observations were then forwarded by the EIB-CM to the EIB's services on 3rd July 2018 for handling in line with the provisions of the EIB Group Transparency Policy (EIB-TP). In its reply of 14th August 2018 the bank explained that in terms of a request for the external anthropological study on the issue of the identification of Svans as indigenous people *"the EIB is currently in the process of consulting with the relevant third parties and we will get back to you as soon as possible."*

8. The Bank sent its final reply on 16th November 2018. The Bank explained that it *"has not commissioned and does not hold any standalone document that could be considered as a study carried out by a Georgian anthropologist regarding the identification of Svans as indigenous people. Therefore, the Bank is not in a position to disclose such a document."* It further explained that *"the EIB and the other lenders in this project had requested the promoter to review and reassess the issue of the identification of Svans as indigenous people with the assistance of the promoter's international project consultants and, indeed, a Georgian anthropologist. The outcome of this review process – including the Georgian anthropologist's inputs to the promoter – is the Volume 3 of the project's Social Impact Assessment. This document is publicly available on the EIB website (<http://www.eib.org/en/infocentre/registers/register/80380170>)."*

In the same reply the Bank admits it *“does hold draft working documents related to the promoter’s review process mentioned above, and in line with Article 5.6 of the EIB-TP, the Bank is not in a position to disclose them. These draft documents contain opinions for internal use as part of deliberations and preliminary consultations, and their disclosure would seriously undermine the Bank’s decision-making process. In addition, taking into account the current geopolitical situation in Georgia and the sensitivity within the political debate of the status of the Svan population, disclosing any working drafts or other non-final versions of documents in this matter would undermine the protection of the public interest as regards international relations, as covered by article 5.4.a of the EIB-TP.*

Regarding your request to disclose the name of the Georgian anthropologist, we inform you that, against the described tense geopolitical background, and in line with Article 5.4.b of the EIB-TP, the Bank is not in a position to disclose this information either, as this would seriously undermine the protection of the privacy and integrity of this person.”

9. The EIB-CM replied to Bankwatch complaint on 19th February 2019.

The EIB-CM concluded that there was a material discrepancy in the interpretation of the requested information. It noted that discrepancies in interpretation were clarified with the parties during the course of the compliance investigation.

In the Table 2, the EIB-CM presented the level of disclosure of the requested documents. According to this presentation, the request for an *expertise the Bank possesses related to the issue of identification of Svans as indigenous people* was satisfied by disclosure of a *Summary of the EIB’s assessment on the applicability of Standard 7*, to which exceptions were not applied.

EIB-CM summarised the Bank’s disclosure as reasonable with regard to the Indigenous People’s assessment given the lack of clarity surrounding the requested document.

10. The complainant does not agree with the above assessment of the EIB-CM. The EIB-CM did not thoroughly examine the documents that the bank possesses which may contain information related to the issue of identification of Svans as indigenous people and it did not assess whether these documents which the bank possesses could be disclosed in order to satisfy the request. The EIB-CM has also failed to assess whether the exceptions applied by the EIB in its letter to the complainant dated 16.11.2018 in order to deny access to a requested document and information, were properly applied by the bank.

11. In the complainants view its request was clear and should not cause an interpretation difficulty. The complainant requested an *“expertise the Bank possesses related to the issue of identification of Svans as indigenous people”*.

Moreover the complainant explained the circumstances surrounding its initial request made during the meeting with the EIB’s staff in February 2018. It should not be expected from the person requesting disclosure of information or a document to know and specify the exact title of a document or its character (whether this is an expertise, study or a working document) or the way it was obtained by the institution to which the request is addressed. Additionally, the understanding of *“a document in possession”* should not be limited to a document drawn up by the requested EU institution or to a document to which the EU institution has the material rights.

In the complainants view, the EIB disclosed a different document than the one which was requested. A document disclosed, *Summary of the EIB's assessment on the applicability of Standard 7*, did not even exist at the time the complainant made its request for disclosure. As the bank admitted, this document was based on the relevant information produced and obtained during the Bank's appraisal, which has been collated in an ad-hoc manner, and on an exceptional basis, to address the information request in a meaningful way.

Thus a document requested could not obviously be the one eventually disclosed as it did not exist at the time of the request.

12. The complainant is confident of its understanding of the statement made by the EIB's staff during the meeting on 6th February 2016 that the bank in its assessment on the applicability of the relevant standard related to the status of indigenous people did not solely rely on the Environmental and Social Impact Assessment and requested other expertise on this matter. This would be in fact in line with the EIB's Standard 7 "Rights and Interests of Vulnerable Groups" which explains that "the technical judgement of qualified social scientists should be sought" especially in case when indigenous people are not recognised by their own national context.¹ Svans are not recognised by Georgia as indigenous people and the issue whether they should be treated as indigenous people in the context of the project financed by the EIB is a matter of a dispute between the complainant and the bank.

The complainant also disagree with the explanations of the EIB's services included in the EIB-CM final reply that during the meeting it was explained that the Bank did not solely rely on the project promotor's *initial* environmental and social impact assessment (ESIA) but took into account other relevant information available. At the time of the meeting, 6th February 2018, both initial ESIA and supplementary ESIA were already publicly available and were known to the complainant. The complainant questioned the assessments contained in both ESIA reports.

13. In the letter of 14.08.2018, the bank explained that in regards to the "external anthropological study allegedly commissioned by the EIB on the issue of the identification of Svans as indigenous people", the bank was in the process of consulting with the relevant third parties and would get back as soon as possible. However in the following communication of 16.11.2018, the bank stated it had not commissioned and did not hold any standalone document that could be considered as a study carried out by a Georgian anthropologist regarding the identification of Svans as indigenous people.

The complainant wishes to underline that in its initial request it asked for disclosure of an "*expertise the bank possesses related to the issue of identification of Svans as indigenous people*" and any further expressions, for example contained in the observations of 30th April shared with the EIB-CM should be interpreted in such a way to satisfy this initial request. Thus even though the bank did not commission (meaning contracted a service from someone external) a study itself, it does not mean that the other documents that might have been provided to the bank, were not a subject of a request for disclosure.

14. *The Summary of the EIB's assessment on the applicability of Standard 7* contains information that the EIB's assessment concluded that the Project did not trigger the application of Indigenous People (IP) requirements under EIB Standard 7 in consultation with respected and highly qualified Georgian

¹ EIB's Environmental and Social Handbook, Version 9.0 of 02/12/2013, page 65.

anthropologists, as well as the Lender's Social Advisors and the Social Expert on the International Panel of Experts. Complainant wishes to draw the attention of the European Ombudsman that the bank did not refer to the ESIA a source of information for the EIB's own conclusions in regards to Indigenous People. ESIA was only referred to in regards the applicability of the Standard 7 with respect to the vulnerability of the Nenskra and Nakra Valley communities affected by the project in relation to (i) the exposure to adverse risks and impacts; (ii) the sensitivity to those risks and impacts and (iii) the adaptive capacity of the affected communities for coping with those risks and recovering from the impacts. In observations shared with the EIB-CM on 30.04.2018 the complainant clearly expressed a will of obtaining all analyses on the issue of indigenous people (which formed a basis of the EIB's own conclusions) and information who was the "respected and highly qualified Georgian anthropologists" and "Lender's Social Advisors". The bank failed to disclose these analyses on the issue of indigenous people (which formed a basis of the EIB's own conclusions) as well as the name of the qualified Georgian anthropologists who provided its consultations to the bank.

15. In its final reply to the complainant dated 16.11.2018, the bank explained that *"the EIB and the other lenders in this project had requested the promoter to review and reassess the issue of the identification of Svans as indigenous people with the assistance of the promoter's international project consultants and, indeed, a Georgian anthropologist. The outcome of this review process – including the Georgian anthropologist's inputs to the promoter – is the Volume 3 of the project's Social Impact Assessment. This document is publicly available on the EIB website (<http://www.eib.org/en/infocentre/registers/register/80380170>)."*

The complainant would like to draw the attention of the European Ombudsman to the obvious material discrepancy between the content of the *Summary of the EIB's assessment on the applicability of Standard 7* and the Volume 3 of the project's Social Impact Assessment. For example, in regards the language of Svans population, the ESIA states that: *Svan qualifies as a separate language and is different from Georgian. While studies by linguists indicate that Svan, Megrelian and Laz all belong to the same Kartvelian group of languages, Svan is believed to have differentiated as a separate language in the 2 nd millenium BC.*² The EIB's Summary, to the contrary, states that *"the Svan dialect belongs to a family of Georgian languages and is closely linked to the modern Georgian language."* On the basis of this material discrepancy, the complainant draws the conclusion that this is highly unlikely that one and the same expert could classify Svan language as a "dialect" and as a "separate language" and "different from Georgian" at the same time. As this issue of language is of a great importance for the application of the Standard 7 in regards to indigenous people, such difference in conclusion could not have been based in the same source of information.

16. In the view of this finding, this is justified that the complainant request disclosure of the all *"expertise the bank possesses related to the issue of identification of Svans as indigenous people"*. In the complainant's view, the Bank should make its decisions in a transparent way and should reveal information and its source which led the bank to a conclusion that the Project did not trigger the application of Indigenous People (IP) requirements under EIB Standard 7. The consultation provided by the "respected and highly qualified Georgian anthropologists" had a tangible impact on the EIB's assessment and final conclusion however a refusal of an access to the content of this consultation and its authorship prevent the public scrutiny of the EIB's conduct.

² ESIA, Volume 3, page 26.

17. The complainant wants to draw the European Ombudsman attention to the fact that supplementary ESIA documents make no secret from the fact who was engaged to study if Svans communities meet the criteria for indigenous peoples. The ESIA report to which the link was given by the EIB indicates that *“in addition to various social experts who have worked on the Supplementary E&S Studies, an anthropologist from the Institute of History and Ethnology of Iv. Javakhishvili State University of Tbilisi was engaged by the Project to study the Svan’s ethnic identity, language, history, customs, traditions, way of living, and livelihoods. The study also reviewed the set of criteria used by the potential Lenders’ policies.”*³ This information was further detailed in the Consultation Report: *„Information used in the E&S documentation for the Project regarding the history of the Svans was collated by Professor Liana Bitadze, Doctor of Sciences in History, Head of Anthropological Researches’ Laboratory, Iv. Javakhishvili Institute of History and Ethnology and Iv. Javakhishvili State University of Tbilisi”*.⁴

18. Information on the author of is publicly available in the ESIA documentation. In the view of this fact, the application of the exception contained in the Article 5.4.b of the EIB-Transparency Policy, for the refusal of information about the identity of Georgian anthropologists who was consulted by the EIB was not justified. The refusal was also justified against the tense geopolitical background however the bank has failed to meaningfully explain this background and how this political situation would undermine the protection of the privacy and integrity of the person consulted on the issue of indigenous people. The complainant aims to establish whether in its decision making process, the Bank sought a consultation from an independent (from the project promotor) source and indeed different from the source of opinion presented in the ESIA.

19. Finally, the bank admitted it does hold draft working documents related to the promoter’s review process, and in line with Article 5.6 of the EIB-TP, the Bank was not in a position to disclose them.

According to the bank, these draft documents contain opinions for internal use as part of deliberations and preliminary consultations, and their disclosure would seriously undermine the Bank’s decision-making process.

Further the bank added that *“taking into account the current geopolitical situation in Georgia and the sensitivity within the political debate of the status of the Svan population, disclosing any working drafts or other non-final versions of documents in this matter would undermine the protection of the public interest as regards international relations, as covered by article 5.4.a of the EIB-TP. “*

20. In the complainants view these working documents are the documents that were requested - *“expertise the bank possesses related to the issue of identification of Svans as indigenous people.”* The EIB does hold these documents and information contained there had a tangible impact on the decision of the bank that provisions of the Standard 7 related to the indigenous people apply in the context of Nenskra project. The bank refused disclosure of these documents as this would in its view seriously undermine its decision-making process however it had failed to explain which decisions and how would in fact be undermined by disclosure of these documents. The EIB-CM has not assessed whether the EIB correctly applied this exception.

³ ESIA, Volume 3, <http://www.eib.org/en/infocentre/registers/register/80380170>, page 24, in connection to ESIA, Public Consultation Report, October 2017, page 14 http://nenskra.ge/inc/uploads/2017/04/ES-Nenskra_PCR_-27-October-2017.pdf

⁴ http://nenskra.ge/inc/uploads/2017/04/ES-Nenskra_PCR_-27-October-2017.pdf

The complainant disagrees with the EIB's justification. The bank shall conduct its environmental and social appraisal of projects in a transparent manner. In the course of this due diligence it has requested the promoter to provide additional information (for the bank to be able to undertake a decision in regard indigenous people issue) which type of content may be similar to the content of the ESIA documentation. Thus the content of these documents do not justify application of the exception from the Article 5.6 of the EIB-TP. Moreover, the decision to grant a loan for the Nenskra Hydropower project has already been made by the Board of the Directors on 6th February 2018. Also the decision of the bank not to apply provisions of the Standard 7 related to the indigenous people has also been undertaken. At this point the complainant wish to inform the European Ombudsman that it has, together with a group of directly impacted persons, lodged a complaint to the EIB-CM challenging the EIB's decision related to indigenous people. The EIB-CM process is currently ongoing.

21. The bank has also refused to disclose the requested documents justifying it against the *“current geopolitical situation in Georgia and the sensitivity within the political debate of the status of the Svan population”*, which *“would undermine the protection of the public interest as regards international relations, as covered by article 5.4.a of the EIB-TP.”* Again, the bank has not described or explained this geopolitical situation that would justify non-disclosure and it failed to provide any explanation on the kind of international relations that would be undermined if the requested documents were disclosed.

22. In the complainants view there is an overriding public interest in disclosure of the requested information which prevails over the other interests. The complainant wishes to undermine the role of the EIB in determining which of its policies apply in the context of a specific project. It is the EIB sole competence to review whether its policies were properly applied and eventually decide which policies apply in the context of Nenskra project. The role of the financiers, such as the EIB, was also explained in the ESIA Consultation Report: *“the determination for who are to be considered Indigenous Peoples for the purposes of this Project is to be determined by the Potential lenders on the basis of the policies of the ADB and EBRD.”*⁵ The EIB's Standard also explains that such determination, to consider people impacted by the project as indigenous people, is not entirely dependent on the national law as indigenous people may sometimes not be recognised by their own national context. This is exactly the case for Nenskra project located in Georgia, the country which does not recognize Svans as indigenous people. Not only does Georgia not recognize Svans as indigenous people, but also it does not guarantee any protection of cultural rights such as protection of the Svan language which is consider as endangered. Svan language is not recognized as a separate, regional language on the political grounds as a threat to integrity of the state and nation⁶. Georgia is a partner of a consortium created for the construction of the Nenskra power plant and thus is also a project promoter. As this is not the EIB's role to solve the political problem in Georgia around the issue of indigenous people, however its role is to determine, in objective and transparent way which policies apply to the project. The magnitude of the EIB's decision on triggering the indigenous people standards is not negligible. If the relevant provisions related to indigenous people apply for Nenskra project, it would have a tremendous impact on the implementation of the project, protection of the impacted cultural heritage and the livelihood of impacted persons. It would be in line with the EU

⁵ ESIA Consultation Report, page 14, http://nenskra.ge/inc/uploads/2017/04/ES-Nenskra_PCR_-27-October-2017.pdf

⁶ Jonthan Weathley, Georgia and the European Charter for Regional or Minority Languages, European Centre for Minority Issues, Page 16

Charter of Fundamental Rights if the EIB handled the issue of indigenous people transparently, impartially, fairly and independently in line with the policies adopted by its governing bodies. By denying disclosure of the requested documents and information which had a tangible impact on the EIB's conclusion not to apply indigenous people relevant standards, the Bank has failed to act in accordance with the Charter. Disclosure of the requested documents is necessary for the complainant to establish whether the bank's decision was undertaken lawfully and objectively.

23. The complainant asks the European Ombudsman to:

- Examined the documents that the bank possesses which may contain information related to the issue of identification of Svans as indigenous people and assess whether these documents and information which the bank possesses could be disclosed in order to satisfy the request for documents;
- Assess whether the bank properly justified non-disclosure of requested documents by making a reference to the exceptions provisions of its Transparency Policy.

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Annexes

1. *“Summary of EIB’s assessment on the applicability of Standard 7 in the context of the Nenskra Project „ April 2018*
2. Correspondence with the EIB in chronological order
3. The EIB-CM final reply

