

## Civil Society update

### Recent cases of complaints at the European Ombudsman and EIB Complaints Mechanism

#### Lessons learnt & challenges

The recent European Investment Bank (EIB) Complaints Mechanism (CM) policy, as adopted by the EIB in November 2018, foresees an increased role for the EIB Board of Directors to oversee the functioning of the CM. In particular, the policy states that the Board should be informed twice a year on the status and outcomes of CM complaints.

Board oversight is crucial for bolstering the independence and legitimacy of the CM. Communities affected by EIB activities will be disillusioned with the CM process if its findings are not being earnestly considered by the Bank's governing body. Board oversight is also key to effectuating the CM's role as a source for continuous institutional learning. Only by engaging thoroughly with the CM's findings and advisory output will the Board be able to capture the valuable lessons they illuminate, incorporate them into EIB processes and prevent future harm.

In this context, as Civil Society Organisations committed to enhancing the accountability and transparency of public financial institutions, we take this opportunity to share this brief paper presenting our perspective on:

- conclusions of cases that escalated to the European Ombudsman;
- recent cases closed at the CM; and
- key cases the CM is currently dealing with.

The EIB Complaints Mechanism is a key accountability tool for citizens, NGOs and communities affected by the operations of the EIB. The mechanism is often the only way that the EIB hears the voices of the people whom the EIB is intended to benefit.

- **Conclusion of the Ambatovy case by the European Ombudsman**

In an unprecedented [ruling](#), the European Ombudsman concluded that the EIB mishandled complaints about a major mining project it financed in Madagascar. The Ombudsman **ruled maladministration** for the EIB's massive delays in handling the case and highlighted the poor monitoring on the implementation of the project on the ground.

According to the Ombudsman, *"there are other cases where the EIB-CM has exceeded the timelines set out in its rules on handling complaints and the Ombudsman has received a number of complaints. As such, delays in the EIB's complaint-handling process appear to be systemic."* On this issue, the Ombudsman noted that the revised CM policy should enable such delays not to happen in the future.

Then the Ombudsman noted that the Bank did not provide convincing reasons to prove the complainant's conflict of interest concerns wrong. Indeed, the project's assessment was performed by a consulting company whose fees and expenses were paid by the very mining company in charge of the project, which was perceived to compromise its independence. The Ombudsman states, *"As the EU's bank financing projects within and outside the Union, the EIB's activities have an impact on the EU's reputation. Given its*

*monitoring activities are based, in part, on reports prepared by private companies, it is important that these companies are perceived to be acting independently from the promoters whose activities they monitor. If their fees and expenses are paid by those promoters from the project's budget, appropriate safeguards need to be in place to deal with any risks arising from this situation. This is essential for the EIB to maintain public trust."*

Key Takeaways and Next Steps:

- EIB Directors should request updates on how the Action Plan developed by the EIB to address outstanding environmental, health and safety issues related to the Ambatovy project is being implemented.
- EIB Directors should monitor how the Bank is implementing the recommendation of the Ombudsman in order to strengthen its practices when dealing with external evaluators at project level. We see it crucial for the EIB to reinforce its supervision to allow for stronger emphasis on their independence and avoid conflicts of interests.

- **Conclusion of the Volkswagen case by the European Ombudsman**

On 24 March 2019, the European Ombudsman issued strong [recommendations](#) on a complaint it received on access to information about the EIB's EUR 400 million loan to Volkswagen – on which the European Anti-Fraud Office (OLAF) had previously concluded an instance of fraud by the company. The Bank refused public access to the OLAF report and the administrative recommendation issued by OLAF regarding the loan.

The European Ombudsman expressed no doubt that *"there was a very strong public interest in disclosure in this case. The case concerned serious misuse of EUR 400 million of public funds and misrepresentations by a leading European company as to their purpose. **The public interest therefore in knowing the details of how such money was acquired and used was both obvious and significant.** (...)The Ombudsman found that disclosure would enhance the public's capacity to make an informed view of the accountability of Volkswagen and of any follow-up action undertaken.*

The Ombudsman issued two recommendations:

**The EIB should grant public access to the OLAF report and recommendations concerning the EIB loan to Volkswagen**, with appropriate redactions of personal data; and

**The EIB should also grant public access to their internal notes of 5 October 2017 and 9 October 2017**, with appropriate redactions of personal data.

Key Takeaways and Next Steps:

- The EIB Directors should ensure that the Ombudsman recommendations are implemented and information requested is disclosed.

- **Cases concluded by the EIB Complaints Mechanism**

- The Castor case in Spain:

In March 2018, the CM published its [conclusion report](#) flagging important lessons to be learnt by the Bank. Among interesting recommendations featured the following:

*“The Bank should establish an appropriate guidance to be used when carrying out the assessment of the meaningfulness of the public consultation process. This guidance should be based on the implementation and best practices including those of the relevant Aarhus Convention bodies”.*

*“The Bank’s services should verify that the concerns and risks flagged as part of the Stakeholder Engagement process are adequately assessed and addressed, as relevant, by the promoter. The Bank’s services should also adequately document the outcome of their analysis and the appropriate action that needs to be taken for an informed decision making process”*

Key Takeaways and Next Steps:

- The EIB is currently developing a guidance note for promoters on Stakeholder Engagement. We welcome this process, but think the EIB Directors should ask for a similar guidance note to be produced for the EIB staff itself. Indeed, the guidance note for promoters is likely to remain non-binding, and the CM conclusions call for further action from the EIB itself.

- Public consultation processes need to be more than a tick-the-box exercise for the EIB. The Bank needs to make this a priority area of its appraisal and monitoring processes.

- ETAP project in Tunisia

In December 2015 CEE Bankwatch Network lodged a complaint concerning the EIB’s decision to refuse full disclosure of the Results Measurement Framework (“ReM”) of the ETAP South Tunisian Gas project (the “Project”).

ReM is a tool used by the EIB to fulfil the obligation under the External Lending Mandate to carry out an ex-ante assessment of the environmental and social impacts of investment projects to ensure their sustainability, their contribution to the fulfilment of the EU's external policy as well as monitoring and reporting on the actual results achieved.

Redacted information which had not been disclosed concerned information on environment and on revenues from extractive project, such as information on the forecasted designed throughput of the gas pipeline; the forecasted quantity of gas reserves and liquids which the project would enable to be produced; the rate of LPG production and the cumulative production of condensate over the project's lifetime and the estimated amount of taxes to be received by the Tunisian government from the project.

The EIB-CM found that the Bank’s refusal to disclose information on the technical capacity of the gas transmission pipeline cannot find support in the protection of commercial interests in the present case and that the Project’s Environmental Impact Assessment had already conveyed the same environmental information to the public. The CM also concluded that although the EIB eventually complied with its Transparency Policy, it had erred in declaring that all environmental information contained in the ReM was disclosed in full.

As a result of this complaint, the Bank agreed to disclose the available information on fiscal revenues. The Bank also indicated the possibility to disclose information on annual fiscal payments upon a request submitted by the Complainant, when this information is available and in line with the EIB Transparency Policy.

- Nam Thun 2 in Lao

In April 2016 CEE Bankwatch Network submitted a complaint alleging that the EIB has overlooked significant environmental and social non-compliance and failed to report honestly to the European Commission and Parliament on the negative environmental and social impacts and risks of the project and it failed to properly monitor project compliance with both the EIB's environmental and social standards and the borrower's contractual commitments.

The Bank approved a loan to a 1070 MW hydropower plant in Laos in 2005, joining a group of International Financial Institutions (IFIs) supporting the project. In 2014, the World Bank-financed Panel of Experts warned that the Government of Laos had failed to comply with the project's Concession Agreement by not providing necessary support to the livelihood programs for affected villagers. At the same time also Lenders Technical Advisor hired by IFIs found serious non-compliance of the project with conditions related to the five livelihood restoration pillars causing a serious reputational risk to the Bank. Despite these concerns, the Bank's reports, namely 2011 Completion Report, 2013 Report on results of EIB operations outside the EU and 2015 Nam Thun 2 Project Update, expressed satisfaction with the project fulfilling a number of policy objectives including the environmental and social objectives.

In November 2018, the CM concluded that EIB was not required to report to the European Commission on the project on either the environmental and social issues, or as a project deserving to be highlighted during monitoring – for reasons of public interest, or EU “reputational” / accountability risk to EU policies. Generally, the CM found the EIB to comply with the required ELM legal framework and own policies and standards; however, giving access to a document one year after the submission of the disclosure request could not be justified.

- **Important cases currently in the hands of the CM and the European Ombudsman**

- **Regional Mombasa Port Access Road in Kenya**

In Kenya, the EIB is funding the expansion of a 41.7 km section of the road from Mombasa towards Nairobi. The borrower of the loan is the Republic of Kenya and the beneficiary and promoter is the Kenya National Highways Authority (KeNHA). Here is a short [infographic](#) summarizing key features of the human rights impacts of the project.

In 2015, more than 100 families were forcibly evicted from their homes on the roadside to make way for the construction works. Only later did the lenders and KENHA halt the works and agree to develop a Corrective Action Plan to remedy the harm done and revise the Resettlement Action Plan for the whole project. However, the compensation process was not satisfactory and in 2017, the CM received several complaints related to the compensatory measures. In the course of the CM assessment, it turned out that there were more impacted individuals and it was agreed to extend the mediation process to all complaints received by the grievance mechanisms of the project and the lenders. Ultimately the number of individual complaints reached the amount of about 350. The mediation results were finally presented in 2019 to the communities affected. **A key conclusion of the CM was the need to improve the project grievance mechanism in order to make it functional, independent from the project promoter and adopt clear procedures.**

Even though the project has already caused serious human rights violations, in 2017 community leaders were intimidated and threatened by the head of the project grievance mechanism (namely, the local authority) because the EIB disclosed to the promoter the confidential complaint it received from the people affected by the project.

Also, the revised Resettlement Action Plan approved by the Bank completely ignores the project's negative impact on housing structures and families with children – as specific impacted group. This results in a lack of proper mitigation measures, such as new relocation sites or education schemes. In addition, a Livelihood Restoration Plan describing measures to mitigate and compensate for the material losses of affected persons has still not been finalised.

The project circumstances prompted even more project affected persons to complain to the CM which is currently investigating the new complaints related to the Resettlement Action Plan.

#### - Transmission lines in Nepal

Community members in Lamjung district of Nepal, who are affected by the EIB funded 220 kV Marsyangdi Corridor high voltage power transmission line, have organized together as the FPIC & Rights Forum, and filed a complaint with the EIB's CM in October 2018. In their complaint, the Lamjung communities are requesting the CM to help resolve their issues amicably by conducting a mediation between the communities on one hand, and EIB management and services, the Nepal Electricity Authority and Nepali authorities, on the other.

The communities conducted a survey to better understand who among them was affected, how they were affected and what their concerns were. The communities have produced the attached [infographic](#) summarizing key findings of their survey. The community-led survey finds that the project authorities and government have not done enough to disclose information about the project or consult locally affected people about its impacts. The communities have many concerns about the potential economic, environmental and social impacts of the project, which will run through their lands, villages and forests. They are looking for these concerns to be resolved before construction starts in their area, and it becomes too costly to make any required changes to the project's design.

CM staff visited the Lamjung district of Nepal from March 15 to 18, 2019. Their Initial Assessment Report is expected soon, suggesting a way forward with the communities' complaint. The communities are asking the EIB Board of Directors to encourage management and services to participate in a mediation process with the communities. The communities also want the EIB to encourage the Nepali government, the project implementer, and other key stakeholders to similarly participate in the mediation process in good faith with a view to finding solutions for the communities' problems.

#### - The Nenskra dam in Georgia

On 9 March 2018 CEE Bankwatch Network lodged a complaint to the CM related to the non-disclosure by the EIB of several documents related to Nenskra Hydropower Plant in Georgia. One of these documents relates to an expertise the Bank possesses on the identification of local communities – the Svans - as indigenous people. In its reply of February 2019 the CM concluded that there was a material discrepancy in the interpretation of the requested information and noted that these discrepancies in interpretation were clarified with the parties during the course of the compliance investigation. The CM also concluded that *“in order to ensure fullest possible disclosure of requested information/documents in a manner consistent with the principles for disclosure, **the Bank should develop specific guidance on the application of the EIB-TP exceptions for use by EIB staff**”*.

The Bank however still refused to disclose the requested documents *“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. “*

This highly unsatisfactory reply, putting an undefined political interest over the interest of indigenous people, prompted Bankwatch to lodge a complaint to the European Ombudsman who found it admissible and opened its investigation into the EIB's transparency practices.

In addition to the complaint on access to information, Bankwatch - together with a group of community members impacted by the project - lodged in May 2018 a complaint to the CM alleging the Bank's failure to comply with its Standard 7 by not respecting the status of Svans as indigenous peoples. The complaint also alleges that the Bank failed to comply with its environmental and social standards by ignoring the significant impacts of the project on Svans as indigenous people, on culture, health and general well-being of the impacted community, by ignoring the lack of proper public consultations and mitigation measures as well as by approving the project without considering meaningful alternatives. In February 2019, both the CM and the EBRD Project Complaint Mechanism conducted a mission to the project site and met with the complainants to discuss their allegations.

#### - Southern Gas Corridor

In February 2019, CEE Bankwatch Network, Counter Balance, Friends of the Earth and Re:Common lodged a complaint to the CM about the failure of the EIB to ensure proper climate impact assessment for the Trans Adriatic Pipeline (TAP) and Trans Anatolian Natural Gas Pipeline (TANAP) projects.

The complainants allege that the EIB failed to require the project promoters to provide a proper climate impact assessment for TAP and TANAP within their entire area of influence; Environmental and Social Impact Assessments (ESIAs) failed to include fugitive emissions of greenhouse gases and thus significant greenhouse gas emissions were not assessed, and that the project's significant impact on Albania's greenhouse gas inventory was not mitigated. The complainants also found that **the amount of greenhouse gasses calculated in ESIAs for TAP is 3.5 times higher, and for TANAP 2.5 higher than calculations made under the EIB's carbon footprint assessment.**

As a conclusion, we would like to recall how crucial it is for the Board of Directors to support the operations of the CM and to ensure its operational independence, legitimacy, transparency, accessibility and effectiveness. We count on your engagement and oversight to steer the CM in this direction, and to ensure that the EIB learns lessons and implements recommendations from important cases in order to enhance its transparency, accountability and overall how it puts in practice its standards.

Yours sincerely

**Accountability Counsel**

**CEE Bankwatch Network**

**Counter Balance**

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