

Las Palmas Bus Rapid Transit

Spain

Complaint SG/F/2017/02

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

8 March 2018

Prepared by

Alfredo ABAD

Deputy Head of Division

Marta JUHASZ

Case Officer

Sonja DERKUM

Head of Division

Complaints Mechanism

External Distribution

Complainant: The Civil Association “el sol sale para todos”

Promoter: Municipality of Las Palmas

Borrower: Guaguas Municipales, S.A.

Internal Distribution

Management Committee

Secretary General

Inspector General

EIB services concerned

The EIB Complaints Mechanism

The EIB Complaints Mechanism is designed to provide the public with a tool enabling alternative and pre-emptive resolution of disputes in cases in which members of the public feel that the EIB Group has done something wrong, i.e. if they consider that the EIB has committed an act of maladministration. When exercising the right to lodge a complaint against the EIB, any member of the public has access to a two-tier procedure, one internal – the Complaints Mechanism Division (EIB-CM) – and one external – the European Ombudsman (EO).

Complainants that are not satisfied with the EIB-CM's reply have the opportunity to submit a confirmatory complaint within 15 days of receipt of that reply. In addition, complainants who are not satisfied with the outcome of the procedure before the EIB-CM and who do not wish to make a confirmatory complaint have the right to lodge a complaint of maladministration against the EIB with the European Ombudsman.

The EO was “created” by the Maastricht Treaty of 1992 as an EU institution to which any EU citizen or entity may appeal to investigate any EU institution or body on the grounds of maladministration. Maladministration means poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Some examples, as set out by the European Ombudsman, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal to provide information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group's activities and to project cycle-related policies and other applicable policies of the EIB.

The EIB Complaints Mechanism is designed not only to address non-compliance by the EIB with its policies and procedures but also to endeavour to solve the problem(s) raised by complainants such as those regarding the implementation of projects.

For further and more detailed information regarding the EIB Complaints Mechanism please visit our website:

<http://www.eib.org/about/accountability/complaints/index.htm>

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CONCLUSIONS REPORT

Las Palmas Bus Rapid Transit

Complainant: The Civil Association “el sol sale para todos”

Date received: 8 May 2017

Confidentiality: Not confidential

Project Status: *Signed/Partially disbursed/Under monitoring*

Board Report: *December 2016*

Contract amount: *EUR 50m, including an EFSI guarantee*

1. THE COMPLAINT

- 1.1. On 8 May 2017 The Civil Association “el sol sale para todos”, a Spanish NGO, (“the Complainant”) submitted a complaint by email to the EIB-CM in relation to the Las Palmas Bus Rapid Transit project (“the project”).
- 1.2. The Complainant alleges that the project lacks transparency given that the promoter has refused to disclose documents that are of public interest in the view of the Complainant, namely the basic study (“estudio básico”) and the preliminary draft (“memoria de anteproyecto”) of the project. The Complainant underlines that the Commissioner of Transparency and Access to Public Information of the Canary Islands declared the disclosure request well-founded in a resolution issued on 4 November 2016, and that the promoter has not yet complied with this decision.
- 1.3. The Complainant’s email states *“[t]he present complaint is based on the fact that, despite our efforts and actions, the lack of transparency, obscurantism and, ultimately, the lack of information to the citizens violates the guiding principles of the European Institutions. At the same time, the European Investment Bank’s economic financing for invisible projects promotes poor governance and corruption and, worse still, contradicts the principles underlying the construction of a Europe for its citizens.”*
- 1.4. The Complainant also expresses concerns about the economic and financial viability of the project. The Complainant refers to the Municipal Plenary Agreement of 8 February 2017, which reads as follows: *“[t]hird: Given that the City does not currently have the necessary resources to carry out the Project, and given that the impact of neither the investment nor the increase of passenger subsidies to the company has been assessed, Guaguas Municipales will not be able to make the first payment of the EIB credit until the City Council has the resources to finance the operation and analyse the future impact, in order to comply with the requirements of the principles of budgetary stability and financial sustainability [..].”*

2. ALLEGATION

Alleged failure of the Bank to monitor the project's compliance with EIB requirements on access to information at project-level.

3. CLAIM

The Complainant asks the Bank to facilitate access to information held by the promoter so as to be able to formulate an informed opinion about the efficient spending of public financial resources.

4. THE PROJECT AND THE BANK'S FINANCING

- 4.1 The project consists of the construction of a segregated Bus Rapid Transit system and the acquisition of the associated bus fleet in the city of Las Palmas, the capital of the island of Gran Canaria, in Spain. In addition to the construction works for the segregated 11.2-km double lanes, the project includes three stations, 17 at-grade stops, the acquisition of 17 low-floor articulated hybrid or electrical buses, the implementation of a Traffic Management and Control System at the junctions, and the regeneration of the nearby urban area with measures such as the widening and revamping of the sidewalks and the creation of new bicycle lanes.
- 4.2 The project is included in the Cleaner Transport Facility, an umbrella initiative of the EIB and the European Commission to promote the deployment of transport vehicles with lower greenhouse gas emissions – or enhanced environmental performance – compared to conventionally-fuelled transport vehicles.
- 4.3 The project is being implemented by the Municipality of Las Palmas (“the promoter” or “Municipality”) and the city bus company Guaguas Municipales, S.A. The latter entity also acts as the borrower under the finance contract. The Board of the EIB approved a loan of EUR 50m to finance the project in December 2016, and the finance contract was signed in February 2017. The project benefits from a guarantee under the European Fund for Strategic Investments (EFSI). The Bank disbursed the first tranche of the loan in October 2017.
- 4.4 Implementation of the project works has been commissioned to GEUR, S.A., the public works agency responsible for the procurement, management and supervision of the works promoted by the Municipality. The Bank's project documentation notes that implementation works would start in mid-2017 and that the project is expected to become operational during the third quarter of 2021.

5. APPLICABLE REGULATORY FRAMEWORK

The scope of the EIB-CM

- 5.1 The EIB-CM enables any person or group that alleges that there may be a case of maladministration in the EIB's actions and/or omissions to lodge a complaint with the EIB Secretary General. Article 4, Part II of the EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (“CMPTR”) describes the scope of the Mechanism as covering all complaints of maladministration lodged against the EIB Group. Maladministration occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights.

- 5.2 Pursuant to Article 2.3, Part IV of the CMPTR the EIB Complaints Mechanism Division is not competent to investigate complaints concerning international organisations, Community institutions and bodies, national, regional or local authorities (e.g. government departments, state agencies and local councils).

EIB Transparency Policy

- 5.3 Project promoters and/or borrowers are made aware of the principles of the EIB Group Transparency Policy at an early stage in discussions. The Bank encourages the project promoters and/or borrowers to follow the transparency principles detailed in the Policy in the context of the financed projects.¹
- 5.4 The EIB Transparency Policy makes reference to EIB Standard 10 of the Bank's Environmental and Social standards regarding stakeholder engagement in projects financed by the Bank.²

The finance contract

- 5.5 The preamble of the finance contract recalls that the borrower has accepted the current version of the EIB Group Transparency Policy.
- 5.6 The borrower and the promoter of the project have undertaken contractual obligations to implement the project in line with national law and promptly inform the Bank about any genuine claim, protest or complaint received by them relevant to the project. The borrower have committed to annually report to the Bank about, among others, any ongoing judicial proceedings related to the project.

National law

- 5.7 According to Article 105(b) of the Spanish Constitution, national law provides for the right to access information held in the registers and archives, except for information relating to national security and defence, criminal investigations and private life.
- 5.8 State Act 19/2013 ("Ley 19/2013") concerning transparency, access to information and good governance applies to, amongst others, the public administration of the autonomous communities and the undertakings where the direct or indirect participation of public authorities exceeds 50%.³ The Council on Transparency and Good Governance ("Consejo de Transparencia y Buen Gobierno") oversees the correct application of the law in the autonomous communities that signed an agreement with the Council thereto. In other cases, the competent entity of the autonomous community exercises the functions of the Council under this Act.⁴ Complaints against any decisions that concern, expressly or presumably, access to information under this Act can be lodged with the Council (administrative review), and competent national courts (judicial review).⁵

¹ EIB Transparency Policy, paragraph 7.5 and 8.3, available at: <http://www.eib.org/infocentre/publications/all/eib-group-transparency-policy.htm>

² See: EIB Environmental and Social Handbook (2013), available at: <http://www.eib.org/infocentre/publications/all/environmental-and-social-practices-handbook.htm>

³ Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno, Art. 2.

⁴ Ibid, preámbulo, III.

⁵ Ibid, Art. 23-24.

- 5.9 Canary Islands Act 12/2014 (“Ley Canaria 12/2014”) on transparency and access to public information regulates the transparency of public activity and the exercise of the right of access to public information within the Autonomous Community of the Canary Islands. The entities subject to this act include, *inter alia*, the public administration of the Autonomous Community of the Canary Islands, business entities established under public law, public foundations, commercial companies and consortiums that are integrated into the public sector of the Autonomous Community.⁶ The Commissioner of Transparency and Access to Public Information of the Canary Islands carries out the administrative review of the decisions issued under this Act, prior to the judicial review by competent courts.⁷

6. WORK CARRIED OUT BY THE EIB-CM

- 6.1 On 16 May 2017 the Bank’s services were notified of the registration of the complaint.
- 6.2 On 22 May 2017 the EIB-CM acknowledged receipt of the complaint and indicated that the Complainant could expect to receive a response from the EIB-CM no later than 21 July 2017.
- 6.3 On 21 July 2017 the EIB-CM informed the Complainant that it was not able to provide a reply by the expected date. The EIB-CM apologised for the delay and assured the Complainant that it would do its best to provide the formal reply within the shortest time frame.
- 6.4 On 13 and 16 October 2017 the EIB-CM liaised with the Complainant to request clarifications and additional information regarding the complaint. In this context, the EIB-CM was provided with a copy of the following documentation: (i) a letter signed by Guaguas Municipales S.A. of 13 December 2016; (ii) the reply of the Municipality to the disclosure request, dated 26 April 2017; (iii) several official documents relating to the ongoing litigation before the Administrative Court of Las Palmas concerning access to the contested project documents; and (iv) a written reply from the Municipality, dated 25 September 2017, concerning the costs of the media campaign of the project.
- 6.5 On 14 November 2017 the Complainant contacted the EIB-CM to provide updates about the ongoing court case.
- 6.6 The EIB-CM has reviewed the project documents held by the EIB, the documents submitted by the Complainant and the applicable regulatory framework. The information gathered during the investigation enabled the EIB-CM to reach findings and conclusions on the allegation summarised below.

7. FINDINGS

- 7.1 On 20 May 2016 the Complainant filed an application with the promoter to access the basic study and the preliminary draft of the project. In the absence of a response from the promoter, a complaints procedure was lodged with the Commissioner of Transparency and Access to Public Information of the Canary Islands on 22 July 2016. In a decision dated 4 November 2016, the Commissioner observed that the promoter “*had contextualised the project in the framework of the city’s overarching mobility strategy, and based on the Sustainable Urban Mobility Plan. This work resulted in a detailed preliminary draft of the project, which had been announced on the project website*”.⁸ The Commissioner declared that the PowerPoint presentation available on the project website did not correspond to the information requested by the Complainant. The Commissioner noted that the promoter had not published the basic study and the preliminary draft, and the promoter refused to share the contested documents with the Commissioner

⁶ Ley Canaria 12/2014 de 26 de diciembre, de transparencia y de acceso a la información pública, Art. 1-2.

⁷ Ibid. Art. 51. et seqq.

⁸ R46/2016 (04-11-2016) resolución del comisionado de transparencia y acceso a la información pública sobre reclamación por desestimación presunta por silencio administrativo de petición de información formulada por d^a. NOMBRE ante el ayuntamiento de las palmas de gran canaria, available at: <https://www.transparenciacanarias.org/node/133>

during the enquiry. The Commissioner upheld the claim of the Complainant and urged the promoter to comply with national law on access to information and disclose the contested documents within ten days.

- 7.2 In a letter dated 13 December 2016, and sent to the Complainant, the Director General of Guaguas Municipales S.A. claimed that the requested documents did not exist.
- 7.3 On 10 January 2017 the Complainant repeated its application with the Municipality to access the contested documents. In the absence of a reply, on 30 January 2017 the Complainant requested the Commissioner to impose sanctions on the promoter under national law. The Commissioner had not issued a decision by the time of the preparation of this report.
- 7.4 In a letter dated 26 April 2017, the promoter provided the Complainant with a brief description of the project, also available on the project's website.
- 7.5 On 5 May 2017 the Complainant asked the Administrative Court of Las Palmas ("Juzgado de lo Contencioso Administrativo") to authorize access to the complete administrative file of the project, including all the compulsory legal documents, technical and economic analysis produced or held by the Municipality, GEURSA and Guaguas Municipales S.A. The court case is ongoing at the time of writing of this report. It appears that the borrower and the promoter have not notified the Bank about the pending litigation concerning access to information about the project.
- 7.6 The promoter has maintained a website for the project since 2016.⁹ At the time of writing of this report, several documents are available on the website that carry the name "anteproyecto 2015" and that were not referenced in the resolution of the Commissioner of Transparency and Access to Public Information of the Canary Islands.¹⁰ The Complainant explained to the EIB-CM that the documents had been recently published. The Complainant is currently assessing whether the published files correspond to his disclosure request.
- 7.7 On 25 September 2017 a representative of the Municipality responded to a written question¹¹ at the plenary session of the local council, where the question enquired about the amount of public money spent on the media campaign of the project. The written reply by the Municipality explained that *"[o]riginally no specific budget was allocated, however on the advice of the EIB and considering, as we were told, the magnitude of the project and the impact it will have on citizens during the construction works, we are required to state an explicit amount, based on projects of similar impact. Hence we earmarked EUR 3.5m for the campaign. This amount is backed-up by EIB financing, since one of the conditions for obtaining the loan was the communication of the project to citizens and promoting awareness of sustainable transport modes."*
- 7.8 The Bank appraised the project between July and December 2016, and prepared its own economic and financial analysis based on the data supplied by the promoter.¹² The Bank's project appraisal documents noted amongst others that *"[a]s part of the approvals process, it is likely that project will be submitted to a formal Public Enquiry procedure in line with national requirements."*¹³ The technical description appended to the finance contract lists a "communication campaign" as a project component to be implemented under the finance contract.

⁹ <https://www.guaguas.com/lineas/metroguagua>

¹⁰ These documents are: "Sistema de Transporte público rápido, Bus Rapid Transit, Las Palmas de Gran Canaria. Fase 1. Anteproyecto 2015"; "BRT-LPGC Anteproyecto Marzo 2015"; "BRT-LPGC Anteproyecto Marzo 2015. Anexos" and "Sistema de Transporte público rápido, Bus Rapid Transit, Las Palmas de Gran Canaria. Fase 1. Anteproyecto 2015".

¹¹ ID de pregunta: R.E.S. Gral Número 1437, presentada en sesión 28/07/2017.

¹² The Bank assesses the economic and financial viability of urban mobility projects in accordance with the EIB Transport Lending Policy (<http://www.eib.org/infocentre/publications/all/eib-transport-lending-policy.htm>) and the EIB's Economic Appraisal of Investment Projects (<http://www.eib.org/infocentre/publications/all/economic-appraisal-of-investment-projects.htm>)

¹³ See: the environmental and social datasheet of the project: <http://www.eib.org/infocentre/registers/register/69891754>

- 7.9 Parallel to lodging a complaint with the EIB-CM about the project's transparency, on 8 May 2017 the Complainant also contacted the Bank by email to request access to project-related information held by the Bank. The Bank's response, of 31 May 2017, referred the Complainant to the information publicly available on the EIB's website. The Complainant was informed about the possibility of obtaining further information from the EIB about this project in accordance with the provisions of the EIB Transparency Policy. The Bank asked the Complainant to specify the type of information or documents subject to a future disclosure request. The Complainant has not submitted a new application to the Bank as at the time of this report.
- 7.10 On 14 November 2017 the Complainant informed the EIB-CM that the Administrative Court made available several project documents, including the EIA screening decision of the competent authority, whereby the project was screened out pursuant to Spanish law on environmental impact assessment. The Complainant expressed concerns about the compliance of the EIA screening decision of the competent authority with Spanish law. It is noted that at the time of project appraisal the Bank assessed that "[...]the project falls under Annex II of the EIA Directive 2011/92/EC amended by Directive 2014/52/EU. The project is likely to be screened out in accordance to the conclusions of the preliminary environmental and social impact assessment but a formal decision has not been taken yet by the Competent Authority".¹⁴ The EIA screening decision was submitted to the Bank after the approval of the project by the Bank's Board of Directors and it forms part of the Bank's project monitoring. It is noted that the Bank has appraised and is monitoring the project with the assumption that Spain has duly implemented the EU legislation (including Directive 2011/92/EC as amended).¹⁵

8. CONCLUSIONS

- 8.1 The complaint concerns the Bank's monitoring of the project's compliance with EIB requirements on access to information at project-level.
- 8.2 The Complainant has utilised two local remedies available in the Spanish legal system to validate the right of access to information held by public authorities. Whereas the proceedings before the Administrative Court of Las Palmas are still ongoing, the Commissioner already concluded in November 2016 that project-related information had not been disclosed in compliance with national law. The recently published documents on the project's website (entitled "anteproyecto 2015") may indicate that the non-compliance has been remedied, although the ongoing court procedure does not support this contention.
- 8.3 Whereas the borrower and the promoter did not inform the Bank about the ongoing court procedure, the Bank has been made aware via the complaint lodged with EIB-CM. As part of its standard monitoring activity, the Bank will follow up on the outcome of the court case.
- 8.4 It is relevant to highlight that the project represents a pioneering endeavour in climate action and sustainable transportation at European level, as attested by its inclusion in the EU's Cleaner Transport Facility. The high visibility of the project, and the intention to showcase cleaner transport investments in the European Union, would provide reasons for heightened stakeholder engagement. Although the media campaign serves to engage citizens, it cannot replace the timely disclosure of project-related information in compliance with national law.

¹⁴ The environmental and social datasheet is available at the following link: <http://www.eib.org/infocentre/registers/register/69891754>

¹⁵ Within the EU, the EIB assumes that EU environmental and social law has been correctly transposed into national law and that national law is being enforced by the responsible authorities. EIB due diligence focuses particularly on countries and/or specific laws where there is evidence to suggest these assumptions may be false. See: EIB Statement of Environmental and Social Principles and Standards (2009), page 8, paragraph 20.

- 8.5 The EIB-CM's investigation confirmed that the Bank is monitoring the project in line with the Bank's applicable standards and policies. The Bank expects to be informed about the outcome of the ongoing litigation before the Administrative Court of Las Palmas pursuant to the reporting and monitoring framework of the project.
- 8.6 While considering that this complaint does not concern access to information held by the Bank, the EIB-CM has noted that the Bank responded to the Complainant's enquiry and indicated the possibility of disclosing further information in accordance with the EIB Transparency Policy.

S. Derkum
Head of Division
Complaints Mechanism
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A. Abad
Deputy Head of Division
Complaints Mechanism
08.03.2018