European Investment Bank

Complaints Mechanism

CONCLUSIONS REPORT

Complaint SG/A/2011/01

South Poland CHP
Bielsko Biala, Poland

29 September 2011

External Distribution
Complainants: - on behalf of CEE Bankwatch Network

Internal Distribution
Vice Presidents: S. Brooks, Ph. De Fontaine Vive, A. Rop
Secretary General, Inspector General
EIB services concerned

CONCLUSIONS REPORT

South Poland CHP, Bielsko-Biala, Poland

1. Complaint

Complainant: - on behalf of CEE Bankwatch Network

Date received: 29 March 2011

Subject of complaint: Unfair denial of access to information concerning the contested project

1.1 On 29 March 2011, on behalf of CEE Bankwatch Network (hereinafter, the Complainant) lodged a complaint by e-mail to the EIB complaints inbox. In the letter attached to the e-mail, he alleged the refusal of access to information, in particular that the EIB refused to provide information on the carbon intensity of the energy produced in the new unit and on the exact dates of the phasing-out of existing units.

1.2 Furthermore, the complainant stated that the refusal was justified by the EIB by arguing that: (i) this information is covered by the confidentiality agreement signed with the promoter; (ii) it would form part of the EIB's confidential relationship with its business partners; (iii) and therefore fall under the exceptions for disclosure described in §§ 5.2.3 and 5.2.8, Part A of the EIB's Transparency Policy.

1.3 The complainant further stated that he lodged the complaint because at the time of writing he still had not received an answer from the EIB regarding his confirmatory application of 8 February 2011, despite the communication from the EIB of 9 March 2011 informing that the confirmatory application was being processed and that a response would be provided as soon as possible.

1.4 On 12 April 2011, the EIB Complaints Mechanism Division (CM) acknowledged the receipt of the complaint. The complainant was informed of the fact that the EIB CM was carrying out a review of his complaint as well as of the date by which he may expect an official reply from the EIB.

2. Background information

2.1 The South Poland CHP Project

2.1.1 The project concerns the construction and commissioning of a state-of-the-art high efficiency hard coal-fired cogeneration (CHP) unit and associated infrastructure. The capacity of the plant is 50 MWe and 106 MWt. It will replace an inefficient hard coal-fired CHP unit of higher capacity (which will be dismantled) and will be located within the boundaries of the existing Bielsko-Biala power plant, in Southern Poland.

2.1.2 The project falls under Annex I of Directive 97/11/EC and thus an Environmental Impact Assessment (EIA) was undertaken by the Promoter and no significant negative residual impacts were identified. The plant received its development, environmental and building permits.

2.1.3 The main environmental impacts are noise, dust and traffic during the construction of the plant, and noise and airborne pollutants during its operation. Concerns were highlighted by adjacent property owners

in relation to noise pollution and lack of information. Additional acoustic assessments were undertaken, and greater level of information was included in the EIA which allayed their concerns.

2.1.4 The project is replacing an existing inefficient CHP unit and as a result the emissions of CO2 will be significantly reduced compared to prior levels. The project will have a significantly higher energy efficiency, 89.9% compared to 60% for the old unit. The primary energy savings (PES) of the new unit have been estimated, based on the anticipated operating mode of the plant and the requirements of the CHP Directive (2004/8/EC), at approximately 25%.

2.1.5 The new plant will be located within the boundaries of the existing facility which itself is located adjacent to urban residential dwellings. The plant does not appear to impact on any site of nature conservation. The nearest Natura 2000 designated site is located approximately 10km distance from the project site.

2.2 *Request for information*

2.2.1 On 21 December 2010 the complainant together with also from CEE Bankwatch Network, wrote to the EIB Director of the Transport and Energy Department referring to previous correspondence on the topic, in particular a letter of 8 December 2010, to further inquire about compliance of the CHP project.

2.2.2 According to the complainant the information asked for was not contained in the environmental impact assessment (EIA) and this information was required in order to understand how the EIB applied its screening criteria for coal power plants stemming from its policy document "*Clean Energy for Europe: A Reinforced EIB Contribution*" (page 3 and 4). Therefore, he lodged an access for information request with the EIB on 21 December 2010.

2.2.3 Part of the request was to provide the document that supports the statement, in the previous correspondence, that the project "would comply with the Bank's screening criteria for new coal power stations (…). This understanding will be verified by the EIB's appraisal work (…)." and which demonstrates that the project is planned and ready for the implementation of the CCS technology.

2.2.4 In particular, the complainant requested the EIB to disclose a document which contains the calculations referring to 20% decrease in the carbon intensity of the South Poland CHP.

2.2.5 Furthermore he requested information concerning the particular dates on which the existing generation units would be phased-out.

2.2.6 Apart from the inquiry regarding the evidence of compliance with the EIB criteria for coal lending, the complainant informed that the EIA report does not contain the elements required by the EIA Directive. These are: assessment of alternative scenarios of heat and electricity generation for the planned CHP from other resources than coal - gas, petrol, biomass etc. - other than "zero alternative" as well as the climate impact assessment of the project. As a result he requested disclosure of document(s) other than the EIA study in which the project promoter describes analysed alternatives of the proposed CHP project.

2.2.7 The complainant continues to state, that according to the EIB website, one of the objectives of the project is: "The use of coal from national reserves should contribute to diversification of fuel and electricity supply and hence increasing security of supply". Consequently he asked the EIB to specify how the use of coal will contribute to the diversification of fuel and electricity supply in Poland.

2.2.8 Furthermore, the complainant requested disclosure of the EIA study or non-technical summary of the EIA study in the working language of the Bank. If this is not available, he asked the EIB to explain how it

proceeded with the appraisal of this project. Moreover, the complainant requested disclosure of the other documents provided by the project promoter or produced by EIB, which contain environmental information and constitute the basis for the environmental appraisal of this project by the Bank.

2.2.9 On 26 January 2011 the EIB competent service provided the complainant with documents provided by the promoter: the environmental permit; the construction permit and a non-certified translation in English of the project's EIA.

2.2.10 At the same time the EIB competent service refused to release documentary information on the carbon intensity of the energy produced in the new unit and exact dates for the phasing out of existing units, as this information was covered by the confidentiality agreement signed with the promoter and part of the EIB's confidential relationship with its business partners. As such it fell under the exceptions for disclosure as described in §§ 5.2.3 and 5.2.8, Part A of the EIB's Transparency policy.

2.2.11 However, having stated such the EIB competent service, as a result of having consulted with the project promoter, did provide some information pertaining to the Bank's calculations of the project's estimated carbon intensity reductions by informing the complainant that (i) the overall efficiency of the project would be around 90% replacing a much less efficient coal fired CHP plant (ii) with an overall energy efficiency of approximately 60% (iii) resulting in the comparative carbon intensity in the order of 25% reduction compared to the current situation.

2.2.12 Furthermore and regarding the timeline for the existing unit's operation, the EIB competent service informed that the unit EC1 of the plant would be decommissioned and retired from service. The promoter had indicated to the Bank that the large Combustion plant Directive (LCPD) applies to the operations of the unit EC1 (i.e. the maximum operating capacity from 1 January 2008 to 31 December 2015 cannot exceed 20.000h, implying that the 31 December 2015 would be the latest possible date of operation of the plant).

2.2.13 As a result of the refusal above (2.2.10) the complainant lodged a confirmatory application on 8 February 2011, asking the EIB to reconsider its position in terms of disclosure of environmental information claiming the existence of an overriding public interest in disclosure under the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, as his request relates in particular to carbon dioxide emissions.

2.2.14 In his confirmatory application the complainant specifically requested disclosure of (i) documents provided by the project promoter or produced by the EIB referring to the carbon intensity of the installation (emissions of carbon dioxide) and (ii) a document stating whether the carbon footprint of the project is above or below 100kt of Co2-e in accordance to the EIB's pre-appraisal climate change evaluation.

2.2.15 Furthermore, the complainant requested information (not included in the original request of 21 December 2010) regarding which of the existing generation units will be phased-out and the date thereof.

2.2.16 He also asked for information about the number of hours the unit EC1 has been in operation in the period 1st January 2008 – 31 December 2010.

2.3 EIB reply to confirmatory application

2.3.1 On 14 April 2011 the EIB competent service replied to the confirmatory application of the complainant, apologising for the delay of their response due to administrative constraints.

2.3.2 In their reply reference is made to the special meeting held with colleagues of the complainant from CEE Bankwatch (and co-complainants), 17 March 2011. The EIB services believe that in this meeting all of the complainant's general concerns regarding the EIB's financing of coal/lignite power stations were extensively discussed and clarified.

2.3.3 In this communication, as well as in the previous response of 26 January 2011, the EIB competent service reiterated that the EIB did not receive any specific document from the promoter referring to the carbon intensity of the installation and did not finalized any document on this issue at the time of the previous response.

2.3.4 Furthermore and also already provided in the first reply, the complainant was informed that the EIB's services carried out its own carbon intensity calculations based on information obtained during the appraisal mission. These calculations indicated a reduction in carbon intensity of around 25%. Following finalisation of the EIB appraisal and application of the EIB's GHG footprint assessment methodology,it turned out that this figure is closer to 35%.

2.3.5 The EIB competent service provided the complainant in its reply and following the approval of the project by the EIB's Board of Directors on 10 March 2011, with a copy of the project's "Proposal from the Management Committee to the Board of Directors", as well as its Environmental and Social Data Sheet, which provide further information regarding this aspect[1].

2.3.6 Regarding the GHG Footprint Assessment the complainant was provided with information on the EIB's internal calculation of the annual absolute emissions of the project as well as information on the relative emissions reduction. This footprint assessment methodology is to be considered essentially as an internal EIB tool, which is currently still under development and does not necessarily reflect the promoter's views. Furthermore this falls within the pilot exercise that the EIB launched to assess the carbon footprint induced by the direct single investment schemes it finances. The Southern Poland CHP project was part of the pilot exercise.

2.3.7 The complainant was further informed that a short technical summary of the methodology used by the EIB for the pilot exercise is currently under preparation and will be made publically available on the web. Moreover, the EIB competent service offered availability and willingness to provide any clarifications regarding the methodology used if needed.

2.3.8 In regards of the phasing-out, the complainant was informed that, as also indicated in their first reply, the existing unit that is to be phased out is Unit EC1 and that the promoter has informed the EIB that according to the Large Combustion Plant Directive, the latest possible date of operation of the plant is 31st December 2015. Notwithstanding this, the EIB has requested that the existing plant should be decommissioned and withdrawn from service once the new plant enters commercial operation.

2.3.9 In response to the complainant's specific question, and according to the project promoter, Unit EC1 has been in operation for 17 355 hours in the period 1st January 2008 - 31st December 2010 (this covers the period when at least one of generating units was working).

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[1] *In line with the provisions of § 4.3 (Part B) of the Bank's Transparency Policy (http://www.eib.org/about/publications/eib-transparency-policy.htm) regarding private sector projects, information in the Proposal from the Management Committee to the Board of Directors designated by the Bank's private sector counterpart as confidential has been replaced by the symbol " [...] ".*

3. Applicable regulatory framework

3.1 EIB policies and procedures concerning the disclosure of information

3.1.1 The EIB 2010 Transparency Policy (TP) applies to the information request in December 2010, which was allegedly unfairly rejected. This policy establishes a general presumption of disclosure of EIB-held information or documents unless there is a compelling reason for non-disclosure. Such principle stems from EC Regulation 1049/2001 which constitutes a key reference for the EIB TP; moreover, following the entry into force of the Lisbon Treaty, article 15 of the Treaty on the Functioning of the European Union extends the application of EC Regulation 1049/2001 to the EIB.

3.1.2 In view of the content of the info-request submitted, it is also worth noting that in line with its TP, when handling requests for environmental information, the EIB is also bound by the provisions of Regulation 1367/2006 and of the Aarhus Convention.

3.1.3 When informing the complainant of the reasons for the rejection of his application, the EIB competent services referred to the constraints to disclosure enumerated in §§ 5.2.3 and 5.2.8 of the EIB TP.

3.1.4 §5.2.3 of the EIB Transparency Policy stipulates:

> Unless there is an overriding public interest, access to information shall also be refused where disclosure would undermine the protection of:
> • commercial interests of a natural or legal person[2];
> • intellectual property;
> • court proceedings and legal advice;
> • the purpose of inspections, investigations and audits.
> As regards the first, second and fourth bullet points, with the exception of investigations, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.

3.1.5 §5.2.8 of the EIB Transparency Policy stipulates:

> Exceptions cover information typically forming part of the Bank's confidential relationship with its business partners. The Bank does not object to project promoters, borrowers, or other competent parties making information available on their relationship and arrangements with the EIB.

3.1.6 Article 5.2.11 of the TP stipulates that *"All requests for disclosure of specific information shall be handled promptly by the Bank, which will either grant full or partial access to the document requested (if only parts of a requested document are covered by any of the constraints above, information from the remaining parts shall be released) and/or the grounds for the total or partial refusal shall be stated"*. Finally, article 4.2 of the TP lays down that *"The EIB is committed to high standards of "Good administration" regarding its governing bodies, management and staff members' relations with the public, thus promoting values such as …fairness – acting in a fair and reasonable manner [and] … Courtesy – acting in a conscientious, correct, courteous and approachable manner."*

[2] *The term "commercial interest" covers confidentiality agreements concluded by the Bank.*

4. Findings and Conclusions

4.1 The requests for access to information

4.1.1 The reply to the request for access to information of 21 December 2010 was a follow-up message to the Director General of the EIB Projects Directorate referring to previous correspondence on the topic between the complainants and the EIB, in particular letters of 8 December 2010, 31 March 2010 and 5 October 2009.

4.1.2 The communication of 21 December 2010 was acknowledged the same day by the EIB's Communication Department who replied on 26 January 2011 to the information request.

4.1.3 The complainant was provided with most of the information requested in the EIB reply of 26 January 2011 and the EIB reply to the confirmatory request of 14 April 2011 covered not only the remainder but also the response to the additional requested information and on a voluntary basis, after the approval of the project by the Bank's Board of Directors on 10 March 2011, a copy of the project's "Proposal from the Management Committee to the Board of Directors" as well as the Environmental and Social Data Sheet.

4.1.4 When informing the complainant of the reasons of the rejection of his application, the EIB competent services referred to the constraints to disclosure enumerated in §§ 5.2.3 and 5.2.8 of the EIB TP.

4.2 EIB compliance

4.2.1 From the assessment carried out by the CM it can be concluded that although the EIB services were late in replying to the confirmatory application due to internal and administrative constraints, ultimately the totality of the information requested was disclosed.

4.2.2 Furthermore, the CM notes that the EIB services held a meeting with representatives and co-complainants of the complainants' NGO, CEE Bankwatch Network, on 17 March 2011 in order to discuss their general concerns regarding the Bank's financing of coal/lignite power stations.

4.2.3 The CM takes note of the fact that the EIB's reply dated 14 April 2011 complies with the general principles of the EIB Transparency Policy, with Regulation 1049/2001 as well as with the provisions of Regulation 1367/2006 and of the Aarhus Convention when handling request for environmental information.

4.2.4 The CM concludes that there was no maladministration committed by the EIB in respect of the allegations made by the complainant. Indeed, the procedures in place – confirmatory request and lodging of a complaint – have proven effective in addressing the requester/complainant concerns.

4.2.5 Finally, the complainant should be provided with additional information on the EIB Complaints Mechanism through the relevant webpage of the EIB's web site.

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29/09/2011

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