

# Sulina Canal Bank Protection

## Romania

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

Complaint SG/F/2013/01

## CONCLUSIONS REPORT

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**EIB Complaints Mechanism**

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### **The EIB Complaints Mechanism**

The EIB Complaints Mechanism intends to provide the public with a tool enabling alternative and pre-emptive resolution of disputes in cases whereby the public feels that the EIB Group did something wrong, i.e. if they consider that the EIB 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 the 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 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 activities and to project cycle related policies and other applicable policies of the EIB.

The EIB Complaints Mechanism intends to not only address non-compliance by the EIB to its policies and procedures but 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/cr/governance/complaints/index.htm>

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## 1. THE COMPLAINT

1.1 On 27 April 2013, the [redacted] or "the complainant") lodged a complaint with the EIB Complaints Mechanism ("EIB-CM") concerning the project Sulina Canal Bank Protection ("the Project") financed by the EIB.

1.2 On 16 May 2013, the EIB-CM acknowledged receipt of the complaint and informed the complainant that it was carrying out a review of the case as well as about the date by which it might expect a formal reply from the Bank. On 15 July 2013, the EIB-CM informed the complainant that due to the complexity of the inquiry and the workload of the EIB-CM, it appeared appropriate to extend the time frame for handling the complaint.

1.3 By letter of 30 July 2013, the complainant waived its right to the confidentiality of the procedure.

## 2. ALLEGATION AND CLAIM

2.1. Following a bidding process in 2004, [redacted], the beneficiary of the loan ('[redacted]' or "the promoter") awarded a contract to the complainant for the execution of works related to the Project, namely the removal of the wreck of the Rostok from the Sulina channel, the clearing of the navigable waterway and the restoration of Bank Protection.

2.2 The complainant alleged that, almost eight years after the removal of the wreck, it still has not been paid for the additional costs, despite a final and binding award in arbitration proceedings before the ICC International Court of Arbitration in Paris. The complainant stressed that EIB's presence in the Project would normally guarantee respect of each party's obligations and would ensure the advancement of the Project without problems and without a default event.

2.3 The complainant requested the intervention of the Bank so that the promoter complies with the arbitration award and pays the complainant the due amounts.

## 3. THE PROJECT

3.1 The Project aimed at repairing the banks along critical sections of the Sulina Canal in the Danube Delta and improving the navigation safety on the whole Romanian section of the Danube. On 25 September 2001, the Board of Directors approved the loan to Romania amounting to EUR 38 million. The Finance Contract was signed between the Bank, Romania, represented by the Ministry of Finance ("the borrower") and the promoter on 8 March 2002. Out of the EUR 38 million approved initially, EUR 18, 1 million were cancelled and EUR 19, 9 million were fully disbursed. EUR 6,1 million are already reimbursed.

## 4. APPLICABLE REGULATORY FRAMEWORK

### 4.1 The scope of the EIB-CM

4.1.1 The EIB Complaints Mechanism enables any person or group, who alleges that there may be a case of maladministration of the EIB in its actions and/or omissions, to lodge a complaint with the EIB Secretary General. Article 4, Part II of the EIB-CM Principles, Terms of Reference and Rules of



Procedure (EIB-CM CMPTR) describes the scope of the mechanism as comprehending all complaints of maladministration lodged against the EIB Group.

4.1.2 According to Article 3, Part II of the EIB-CM CMPTR, among its other functions, the EIB-CM attempts to resolve concerns raised by the complainant through a consensual process whilst acting as a problem solving or pre-emptive dispute resolution function. The EIB-CM is predominantly *compliance focussed*. Over and above such compliance review and whenever applicable the EIB Complaints Mechanism also has a remit for *problem solving and/or mediation*.

#### 4.2 The EIB Guide to Procurement (EIB-GtP)

4.2.1 Section 1.3 of the EIB-GtP defines the role of the Bank and that of the promoter as follows: *"Promoters are fully responsible for implementing projects financed by the Bank, in particular for all aspects of the procurement process, from drafting tender documents and awarding contracts through to implementing contracts. The involvement of the Bank is confined solely to verifying whether or not the conditions attached to its financing are met.*

*The Bank may advise or assist promoters in the procurement process, but is not a party to the resulting contracts. The Bank has the right and obligation to ensure that, in the case of projects inside the Union, EU provisions in this field or, in the case of projects outside the Union, the relevant criteria with regard to the proper management of its financing are respected, and that the procurement process is fair and transparent and the tender selected is economically the most advantageous. The rights and obligations of the promoter vis-à-vis the tenderers for works, goods or services to be furnished for a project are governed by the local legislation and tender documents published by the promoter, and not by this Guide."*

### 5. METHODOLOGY OF THE INQUIRY

In the course of its enquiry, the EIB-CM reviewed the complaint together with the rest of the correspondence sent by the complainant, the Project documents and the relevant regulatory framework. After having reviewed the complaint received and all the elements provided by the complainant, the EIB-CM held internal consultation meetings with the EIB services and had numerous contacts with the representatives of the complainant, the national authorities and several other stakeholders.

### 6. FINDINGS

#### 6.1 The arbitration proceedings

6.1.1 In June 2006, [redacted] initiated the arbitration proceedings before the ICC International Court of Arbitration in order to claim the payment of additional costs of the works performed. The arbitration took place in Zurich, Switzerland. The arbitral award was issued on 11 June 2012. The Arbitral Tribunal awarded partially [redacted] claims and ruled that a total amount of EUR [redacted] had to be paid by [redacted] to [redacted], as well as an amount of USD [redacted] as compensation for the arbitration costs. The award was not challenged by [redacted] before the Swiss courts and the award became therefore final. In March 2013, [redacted] obtained an exequatur of the arbitral award in Luxembourg. The EIB understands that [redacted] has not applied for an exequatur in Romania.

## 6.2 Contacts between the EIB, [REDACTED] and the national authorities

6.2.1 On 26 November 2012, before the initiation of the EIB-CM procedure, [REDACTED] sent a letter to the EIB informing that despite the completion of works in the Project, it had not been paid. The Arbitration proceedings had concluded but the promoter and the Ministry of Transport were allegedly not complying with the Final Award. [REDACTED] requested EIB's assistance and intervention.

6.2.2 By letter of 10 January 2013, the operational services of the Bank replied that *"because the EIB is not a party to the contract entered into between [REDACTED] and [REDACTED], we are limited in terms of the extent to which we can discuss with either party in relation thereto. Yet, we hope for a positive resolution of the current dispute between [REDACTED] and [REDACTED] and would kindly ask you to continue keeping us informed of any development relating to this matter."*

6.2.3 Concerned about the difficulties arising in the Project, the services sent on the same day a letter to the Romanian Ministry of Finance stating that [REDACTED] claimed that [REDACTED] had so far not complied with the ICC Decision (by settling the related award) and, therefore that [REDACTED] intended to take legal action for its enforcement (including outside Romania). Whilst not expressing a view on the merits and/or possible outcome of the intended by [REDACTED] legal action, the services noted their concerns over the potential adverse effects of the same on the position of Romania and [REDACTED] under the Finance Contract.

6.2.4 On 21 January 2013, the Ministry of Public Finance informed the EIB that the Romanian legal framework required that any decision of foreign court could not be directly executed, but needed to be enforced through a legal action in a national (Romanian) court. If all the legal requirements were met, the court would pronounce the foreign decision as binding and enforceable. Until that moment, [REDACTED] had not initiated any such court action in order to enforce the arbitral decision and the latter was not yet enforceable and binding towards [REDACTED] i.

6.2.5 In a letter of 26 November 2013 addressed to the Ministry of Finance, the EIB pointed out that they were informed about the exequatur of the Arbitral Award obtained in Luxembourg by the complainant and asked to be further informed of the developments. A reply was expected by no later than 9 December 2013.

6.2.6 Given the lack of response by the Ministry, a reminder was sent on 28 January 2014.

6.2.7 On 20 February 2014, the Ministry of Finance underlined that the litigation aroused from a commercial contract concluded between two companies, and neither the Ministry of Finance, nor EIB are parties to this commercial contract. The Ministry appeared confident that, once the Romanian legal requirements were met in order to render the Arbitral Tribunal decision binding and thus enforceable in Romania, all necessary measures would be taken in order to ensure the payment.

## 6.3 Request to serve a garnishee order/attach assets held by the Bank

6.3.1 On 16 October 2013, the complainant informed the EIB that in order to recover the debt of the promoter, it was planning to present a garnishee order to attach property in the hand of the EIB. The EIB was requested to take position on the question as to whether it intended to use its privileges and immunities under Protocol (No 7) on the Privileges and Immunities of the European Union in case of a possible future garnishee procedure. The request was subsequently put on hold by the complainant's representatives.

6.3.2 On 13 February 2014, the request was raised again. By letter of 3 March 2014, the Legal Services of the Bank replied that, in the absence of a request made by a competent judicial authority, it could



not take position on a hypothetical question. It was also reminded that in similar cases in the past and with reference to the case law of the Court of Justice of the European Union, the EIB had not waived its privileges and immunities under Protocol No 7.

#### 6.4 Submissions of legal experts

6.4.1 In May 2014, the complainant's representative submitted to the EIB-CM the opinion of a legal expert concerning the legal framework regulating the enforcement of the arbitration award in Romania. The conclusions of the legal expert as summarised in his opinion are the following: *"An arbitration agreement is binding for both contractual parties. The binding effects of arbitration agreements are widely recognised by law and jurisprudence. The ICC Court arbitral awards are final and binding according to the ICC Arbitration Rules. Parties should comply with the arbitral awards promptly and voluntarily". Romanian law and courts also acknowledge the final, binding and enforceable nature of arbitration awards, whether international or domestic. They also state the principle that the arbitral awards should be voluntarily implemented by parties, no further formalities being required in such case. In different law systems, the right of refusal to comply with the arbitral awards may be exerted through an action of annulment before the competent court within a limited period of time. In the Romanian law, this period is one month since the communication of the arbitral award. The enforcement procedure is not mandatory. However, if necessary, under the regulations in force arbitral awards have an enforceable nature and the enforcement procedures may be conducted by Romanian courts and judicial executors."*

6.4.2 The EIB-CM asked for the contribution of an independent legal expert in order to form a reasoned opinion. According to the submission of the independent legal expert, as a matter of principle, arbitral awards, like judgments, must be fulfilled voluntarily. The principle of voluntary fulfilment applies also to public institutions. Romanian public institutions are subject to special regulation only in what concerns the judicial enforcement, without this aspect eliminating the general rule of voluntary compliance. Voluntary fulfilment of arbitral awards, whether foreign or national, represents the rule, and is not dependant on the judicial recognition of the foreign award. In case the award is not voluntarily complied with, the claimant may request the recognition and subsequently the enforcement of the award, in which case a procedure will be carried out through a judicial enforcer which will ensure the recovery of the amounts due through the enforcement measures allowed under the New Civil Procedure Code.

### 7. CONCLUSIONS

7.1 It appears that to this date, the promoter has not proceeded with the payment of the amount due as ordered by the ICC. In this regard, the Borrower argued that the complainant should apply to the national courts in order to render the arbitral award binding and enforceable. The Borrower affirmed that payment will be made upon fulfilment of the legal requirements. The complainant asserted that the award is binding and voluntary compliance is possible. The legal opinion requested by the EIB-CM confirms the complainant's position while pointing to the existence of specific rules applicable to public institutions with respect to actual payment of money and judicial enforcement. Based on that opinion, it seems reasonable to conclude that the arbitral award is binding and voluntary implementation is possible. However, recognition and enforcement procedure is necessary in case that voluntary compliance is refused. In this context, it is very unfortunate that more than two years and a half after the final arbitral award, the latter is still not complied with and that, to the knowledge of the EIB, no recognition and enforcement procedure has been initiated so far by the complainant before the competent authority in Romania.

7.2 As an international financial institution, the EIB attaches great importance to the respect of court decisions and arbitral awards. Non-compliance with arbitral awards can undermine the reliability of

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alternative dispute resolution mechanisms, including arbitration, and enforceability of contracts, which could seriously disrupt investment projects. For these reasons, since becoming aware of the issue (even before the official complaint), the EIB services have been interested and involved in solution seeking. After the submission of the complaint, the EIB-CM engaged in contacts with all the involved parties in order to gather information on the issue and explore the different aspects of the case.

7.3 Nevertheless, the EIB-CM highlights that the EIB is not a party to the contract or the dispute between the complainant and the promoter. Its responsibility as well as its margin of action is therefore very limited. It is also important to note that it cannot be expected from the EIB to replace national courts in the protection of the contractors' interests. In case the complainant wishes to enforce the arbitral award, it should consider addressing a request for recognition and enforcement of the arbitral award to the competent domestic court. On the basis of paragraphs 7.2 and 7.3 above, the EIB-CM fails to see maladministration on the side of the EIB in relation to this matter.

7.4 The EIB-CM recommends to the Bank to follow the developments of the issue under discussion by continuing its contacts on high political and institutional level. Additionally, it is recommended to be kept informed about the procedure of obtaining an exequatur in Romania, if such procedure is initiated in the future.

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