

## **Complaint regarding the decision by the EIB to grant "Steel product and processing R&D Facility" loan**

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### **1. Factual background**

On 3 March 2010, CEE Bankwatch, ClientEarth and Global Action on ArcelorMittal Coalition ("the complainants") lodged a complaint with the Bank's Complaint office against the decision of the European Investment Bank (the Bank) to grant a "Steel product and processing R&D Facility" loan to ArcelorMittal (the Loan).

Under Article 10.2 of the EIB Complaints Mechanisms Policy (the "CMP"), the Complaints Office had 40 days to respond to the complaint, which would have been 28 April 2010.

On 19 May 2010, the Complaints Office argued that due to the complexity of the inquiry they needed a time extension in line with Article 10.2 of the EIB CMP.

By a letter dated 25 May 2010, the complainants expressed their concern regarding the request of the Complaints Office arguing that postponing the decision of the Complaints Office would imply the risk that the loan could be signed before the Complaints Office would have the opportunity to give a reply to their complaint and requested the Bank not to sign the loan before providing a reply to their complaint.

This concern was also caused by the fact that the Bank in its reply by e-mail of 23 December 2009 to the complainants' first request did not provide a satisfactory explanation on the way the assessment of the compliance of a project financed by the Bank with Article 309 TFEU or Article 16 of the Bank's statute was carried out. The Bank's failure to provide full details on the assessment procedure raised concerns on the decision-making process according to which the loan was being envisaged and of its compliance with the relevant provisions of the Bank's statute and TFEU. That is the reason why Bankwatch, ClientEarth and Global Action on ArcelorMittal Coalition decided to lodge the complaint with the Complaints Office in the first place.

However, despite the complainants' complaint and request that the Bank did not sign the loan before replying to their complaint, the loan was signed on 15 July 2010.

### **2. Legal background**

Against this background, the complainants hereby submit to the Complaints Office a further complaint concerning the decision of the Management Committee to sign the loan before the Complaints Office provided a reply to the complainants' complaint. The complainants propose that the Complaints Office deals with this further complaint together with the original complaint.

This complaint demonstrates that by signing the loan to ArcelorMittal before the complaint had been resolved, the Management Committee committed maladministration and breached the Bank's CMP

thereby undermining the role of the Complaints Office as a compliance focused mechanism and its efficacy in preventing maladministration.

The details of the complaint for maladministration are set out below.

## **2.1 Maladministration**

According to Article 1.2 of the Definitions section of the CMP, "*the EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedures apply to complaints regarding 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 of failure to respect the principles of good administration, as set by the European Ombudsman, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of 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 decision of the Management Committee to sign a loan which forms the subject of a complaint lodged with the Complaints Office before the Complaints Office resolves the complaint is a maladministration for the purposes of Article 1.2 of the CMP on the following grounds:

- i. failure to act in accordance with established policies, standards and procedures of the Bank, namely the CMP;
- ii. failure to respect the principles of good administration;
- iii. an abuse of power; and
- iv. a failure to reply by not giving the Complaints Office the chance to carry out its function.

## **2.2 Guiding Principles**

Article 2.4 of the Guiding principles section of the CMP provides that « *the EIB Complaints Mechanism shall be part of the institutional context of the European Union* ».

By signing the loan before the Complaints Office completed its investigation, the Management Committee did not allow the EIB Complaints Mechanism to be part of the institutional context of the EU for the purposes of Article 2.4 of the CMP. The Management Committee prevented the Complaints Mechanism from being used in an efficient way as it prevented the Complaints Office from participating in the decision making process of the EIB and from contributing to improvements to the implementation of the EIB Group's activities in the meaning of Article 1.2 of the introduction of the CMP.

## **2.3 Purpose**

Article 3 of the section on the Purpose of the CMP provides that « *the EIB Complaints Mechanism serves the following functions:*

- *Assess occurrence(s) of maladministration;*
- *Evaluate and report for each admissible complaint the compliance with the EIB Group's policy framework;*
- *Attempt to, whilst acting as a problem solving or pre-emptive dispute resolution function resolve concerns raised by the complainant through a consensual process;*
- *Provide advice and recommendations to the EIB Management; and*
- *Follow-up and report on efforts to take corrective actions whenever applicable.*

*3.2 Therefore, in order to ensure proper corporate responsibility and accountability of EIB Group towards all its stakeholders, EIB Complaints Mechanism is predominantly compliance focussed. Over and above such compliance review and whenever applicable the EIB Complaints Office also has a remit for problem solving and/or mediation ».*

In signing the loan before giving the opportunity to the Complaints Office to give a reply to the complainants, the Management Committee breached Article 3.1 of the Bank's CMP. It did not allow the Complaints Office to assess the occurrence of maladministration or evaluate and report the compliance of the decision of the Bank to grant a loan to ArcelorMittal with Article 309 TFEU and Article 16 of the Bank's statute. It did not allow the Complaints Office to resolve concerns raised by the complainants through a consensual process either, let alone to act as « *a problem solving or pre-emptive dispute resolution function* ».

Article 1.2 of the CMP introduction also provides that « *the EIB Complaints Mechanism provides the public with a tool enabling alternative and pre-emptive resolution of disputes between the latter and the EIB* ».

The sentence « *pre-emptive resolution of disputes* » necessarily implies that the Complaint office should provide replies to the complaints lodged with it before any decisions of the Management Committee is taken.

The concerned decision also prevented the Complaints Office from fulfilling its function to « *provide advice and recommendations to the EIB Management* ».

As a result, the Complaints Office was not able to ensure « *proper corporate responsibility and accountability of EIB Group towards all its stakeholders* ».

The Management Committee thus prevented the Complaints Office from fulfilling its very purpose.

## **2.4 Terms of reference**

According to Article 3.1 of the Terms of reference of the CMP « *the EIB Group's staff has the duty to co-operate with the EIB Complaints Office promptly, fully and efficiently following the EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure, especially with a view to respecting the deadlines as well as to adhering to the standards and policies of the EIB Group* ».

The relevant Staff has clearly not complied with this requirement as it did not co-operate with the Complaints Office in a way to enable it to provide a reply to the complainants before adopting its decision on the litigious matter.

## 2.5 Article 9 paragraphs 3 and 4 of the Aarhus Convention: Access to justice

The very aim of the loan granted to ArcelorMittal is to improve the R&D programme of the Company to make its production methods more respectful of the environment. We refer to the letter addressed to Bankwatch and Global action on ArcelorMittal Coalition on 27 October 2009 by the Bank. This purpose of the loan makes the decision of the Management Committee subject to the Aarhus Convention on Access to Information, Public Participation in decision-making and Access to Justice in environmental matters.

The EU is a party to the Convention which makes the EIB bound by the provisions of the Convention.

Article 9 paragraph 3 of the Aarhus Convention provides that:

*"...each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment".*

As a party, the EU shall ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by the Bank (as a public authority for the purposes of the Convention) when the Bank contravenes provisions of EU law relating to the environment.

The Complaints Mechanism of the Bank may be considered as constituting an administrative procedure which allows the public to challenge acts and omissions of the Bank for the purposes of Article 9(3) of the Convention.

Article 9 paragraph 4 of the Convention further provides that:

*"In addition ... the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be **fair, equitable, timely** and not prohibitively expensive."*

The situation discussed in this complaint demonstrates that the Bank's Complaints Mechanism does not provide such remedies to the public against the decisions and omissions of the Bank. Indeed, signing a loan which forms the subject of a complaint lodged before the Bank's Complaints Office before the complaint has been resolved prevents the Complaints Office from providing adequate, effective, fair and timely remedies for the purposes of Article 9(4) of the Convention.

It follows that by signing the loan before the Complaints Office had replied to the complaint, the Bank infringed Article 9 paragraphs 3 and 4 of the Aarhus Convention.

## Conclusion

The Bank, through the Management Committee, by signing the loan before the Complaints Office had resolved the complaint lodged by CEE Bankwatch, ClientEarth and Global Action on ArcelorMittal Coalition, breached Article 1.2 of the introduction of the CMP; Article 2.4 of the Guiding Principles of the CMP; Article 3 of the Purpose section of the CMP; Article 3.1 of the Terms of reference of the CMP. It also breached Article 9(3) and (4) of the Aarhus Convention.

This calls into question the credibility of the EIB and its Complaints Mechanism. The decision of the Management Committee to sign the loan without giving the Complaints Office the opportunity to carry out its task demonstrates its unwillingness to comply with the basic principles of the rules of law and with the Bank's very own policy, namely the CMP.

We consider this decision as a very worrying step in the functioning of the Bank as a transparent and accountable EU body.

We therefore respectfully request the Complaints Office to follow the steps outlined in Articles 7.13 and 7.14 of its Rules of Procedure and to:

- Prepare a reasoned opinion that includes the allegations, findings, conclusions and recommendations, and send it to the Management Committee for opinion and comments.
- Prepare a final Conclusions Report that takes into account the opinion/comments from the Management Committee and formulate recommendations and proposed corrective actions.

A corrective action would be to reassess the loan to ArcelorMittal in the light of Article 309 TFEU and Article 16 of the Bank's Statute and to provide the complainants with access to the evidence of the compliance of this assessment with the relevant provisions mentioned above.

Bankwatch

ClientEarth