



European Investment Bank

Complaints Office

CONCLUSIONS REPORT

Complaint SG/G/2010/01

Steel product and processing R&D Facility Project

11 October 2010

External Distribution

Complainants:
on behalf of ClientEarth

on behalf of CEE Bankwatch Network,
on behalf of Global Action on ArcelorMittal

Internal Distribution

Vice Presidents
Secretary General, Inspector General
EIB services concerned

CONCLUSIONS REPORT

Steel product and processing R&D Facility

1. Complaint

Complainant: [redacted] on behalf of CEE Bankwatch Network

Date received: 3 March 2010

1.1 On 3 March 2010, [redacted] behalf of CEE Bankwatch Network, [redacted] on behalf of ClientEarth and [redacted] on behalf of Global Action on ArcelorMittal (hereinafter the complainants) lodged a complaint with the EIB by email to the complaints inbox concerning the EIB's decision to grant a loan for the "Steel product and processing R&D Facility" (the Project) to ArcelorMittal.

1.2 In their message, the complainants refer to their previous correspondence on the Project with the Communication Department of the EIB (see §2.2). In essence, the complainants allege that the EIB would have failed to reply to their expression of concerns before the EIB Board of Directors approved the loan on 21 October 2009.

1.3 In addition to that, the complainants consider that ArcelorMittal would be able to finance the project out of its own resources or would be anyway able to access credit from commercial banks and that therefore the EIB's provision of a low-interest public loan would provide no added value and would not be justified. Under these circumstances, the complainants allege that the EIB failed to carry out proper assessment of the alternative sources of the funding pursuant to the provisions determining the granting of a loan and breached Article 16 of Bank's Statute as well as Article 309 of the TFEU. A detailed assessment of this allegation is provided in §3 of this report.

1.4 On 17 March 2010, the EIB acknowledged receipt of the complaint. The complainants were informed of the fact that the EIB Complaints Office (CO) was carrying out a review of their case as well as the date by which they may expect a formal reply from the EIB. Following a preliminary analysis on the admissibility of the complaint, the CO deemed appropriate to carry out further inquiries with a view to gathering additional information on the complaint. In this context, the CO reviewed the project's documentation as well as the submissions by the competent services of the EIB and conducted an inter-services consultation on the issue raised by the complainants. In this context, on 19 May 2010, the CO sent a letter to the complainants informing of the necessity to extend the timeframe for the handling of the complaint pursuant to article 10.2 of the EIB Complaints Mechanism.

1.5 On 25 May 2010 the complainants sent an email whereby they criticised the extension of the timeframe as the complainants deemed it was not justified by the complexity of the inquiry. In this message, the complainants took the opportunity to reiterate their request for information on the following issues:

- What assessment of alternative sources of funding has been carried out in relation to the above-mentioned loan?
- Did the EIB Management Committee comply with the statutory provisions relating to the granting of loans
- Why is the investigation into this complaint sufficiently complex to justify the 100 day time extension

Finally the complainants requested a written confirmation that the loan will not be signed before the receipt of a full response from the EIB to her complaint.

1.6 In its reply of 3 June 2010 to the complainants, the CO informed the complainants that their concerns would have been taken into account with a view to appropriately addressing them in its Conclusions Report; it also took opportunity to ensure that the complainants are aware that the EIB is making all efforts to provide them with the final reply before the completion of the additional timeframe.

1.7 On 8 September 2010, [redacted] on behalf of CEE Bankwatch Network lodged a new complaint concerning the decision of the EIB Management Committee to sign the finance contract for the Project whilst the CO was carrying out the inquiry on the present complaint; in her message, the complainant claimed that the EIB CO should have dealt with the new allegations within the timeframe for the handling of the present complaint. On 22 September 2010, the CO acknowledged receipt of the new complaint and informed the complainant that – insofar as her message raised concerns which had not been identified in her previous complaint – the timeframe established by article 10.2 of the EIB Complaints Mechanism would apply to the procedure for the handling of her new complaint. As a result, the new allegations will be dealt with by in a separate Conclusions Report of the CO.

2. Background information

2.1 Information on the Project

2.1.1 The contested operation consists of research, engineering and technological innovation related to process improvements (aimed at energy reductions, emission reductions, removal of chromium, recovery and recycling of steel, and steel ingredients like Zinc and Nickel and by-products), and new steel products and markets (for automotive, packaging, stainless steels, construction steels). These activities will be carried out in the ArcelorMittal's research and technology centers in Gent and Liège (Belgium), Esch-sur-Alzette (Luxembourg), Isbergues, Montataire, Gandrange, Maizières-les-Metz, and Le Creusot (France), and Avilès (Spain). The project further includes preparatory investments related to the relining of the two blast-furnaces selected for the European Steel Technology Platform's ULCOS-project (ultra low CO₂ steelmaking), for *in situ* research on CO₂ sequestration, recycling and storage on industrial scale, which will take place in Eisenhüttenstadt (Germany) and Florange (France).

2.1.2 Following the approval of the operation by the EIB Board of Directors on 21 October 2009, on 15 July 2010 the EIB signed a Finance Contract with the Promoter.

2.2 Previous expressions of concerns

2.2.1 On 19 October 2009, Global Action on ArcelorMittal wrote to the Bank asking not to approve the loan insofar as the Borrower would have an extremely poor environmental, social and transparency record and considering that - given the size of the company - it would be able either to fund the Project out of its own resources or to access commercial loans. On 27 October 2009, the EIB replied by stating that it had taken note of the concerns raised and that the loan was intrinsically linked to the Borrower's plans to improve the environmental standards of the operations of its Group and the reduction of CO₂ emission by 8% by 2020. The EIB further stated that it did not claim that the Borrower could not raise funds elsewhere and justified its decision to provide the loan on the basis of the fact that the Project is "*part of that funding programme recognised as a priority by ... [EIB's] stakeholders*" and that contains innovative research and development elements.

2.2.2 On 27 November 2009, CEE Bankwatch wrote to the Bank requesting details of the EIB's assessment of the eligibility of the Project for financial support. In particular, it asked whether the Project was conceived for the modernisation of an undertaking or was a project of common interest

and therefore whether it fell under article 267 (b) or (c) of the EC Treaty¹ and asked for details of the assessment that led the EIB to conclude that the Project could not be financed by means available in the Member States where it is to be carried out in accordance with article 267 and how the Bank had concluded that funds would not be available from other sources "on reasonable terms" in accordance with article 16 (ex article 18) of the EIB Statute.

2.2.3 In its response of 22 December 2009, the Bank clarified that the Project was of common interest pursuant to article 267 (c) of the EC Treaty and that it fell in the scope of the EU policy orientations regarding the establishment of a knowledge-based economy, the protection of the environment and tackling climate change. The EIB also explained that the Bank carries out its due diligence in order to evaluate the Bank's contribution to the project and that such process includes the assessment of the value added by the EIB's involvement and takes into consideration the availability, terms and conditions of other sources of funding. In its letter, the EIB also identifies the three pillars for measuring the value added of its lending activities and namely:

- Consistency between each operation and the priority objectives of the EU;
- Quality and soundness of the project (focusing on the economic-environmental sustainability of the operation); and
- Contribution made by the EIB, both financial and non-financial.

3. The complainant's main allegation

3.1 In their letter, the complainants argue that pursuant to articles 1 (i.e. the obligation to act in accordance with the provisions of the EIB Statute and of the Treaties) and 2 (the limitation of Bank's activities to the categories identified in article 309 of the TFEU) of the EIB Statute, the Bank should not provide finance to projects for modernising undertakings or projects of common interest which could be funded from sources within the Member States in which the project is to be carried out.

3.2 Moreover, the complainants refer to article 16 of the EIB Statute stipulating additional conditions on the eligibility of loans to be provided under article 309 TFEU. The complainants take the view that the requirement under article 16 that funds must not be available from "*other sources on reasonable terms*" for a project to be eligible for EIB funding is not limited to intra-EU sources and that therefore the Bank should also consider whether funding could be available from international sources on reasonable terms before agreeing to provide finance.

3.3 The complainants elaborate on the EIB's internal procedures by arguing that pursuant to article 19(4) of the EIB Statute, the Management Committee is required to examine the eligibility of the proposed operation in line with the provisions of articles 16 and 18 of the Statute. The complainants emphasise that the reference to article 16 of the Statute has been introduced by the Treaty of Lisbon and express their view that such reference serves to consolidate an important component of the pre-existing requirement for the EIB Management Committee to ensure compliance of EIB operations with all provisions of the EIB Statute. According to the complainants, it would stem from articles 9 and 19(4) of the EIB Statute that on all projects the Management Committee is required to examine the availability of alternative sources and to report its findings to the Board of Directors which would be required to take the Management Committee's Report into account.

3.4 On the basis of these assumptions and given the previous correspondence with the Bank and in particular the latter's reply of 27 October 2009, the complainants argue that the EIB's financing was granted regardless of the fact that alternative funding was available. According to the complainants, the text of the EIB's reply would imply "a fundamental failure" to grasp that if funding is available from other sources the EIB is not authorised under the TFEU to provide funding.

¹ now article 309 of the Treaty on the Functioning of the European Union – TFEU

3.5 Based on the previous correspondence with the EIB, the complainants raise their concern about the compliance of EIB's operations with the existing statutory procedures for examining and reporting on the eligibility of projects for Bank funding. In particular, they consider that in its reply of 27 November 2009 the EIB has not clarified how the assessment on the compliance of the operation with article 309 TFEU and article 16 of the Statute is carried out. In this context, the complainants take the view that all proposals prepared by the Management Committee should contain a statement that the proposed operation complies with the EIB Statute and that the EIB Board of Directors should not approve proposed operations for which such statement has not been made. Finally the complainants consider that such assessment should be carried out during the pre-appraisal stage of the project cycle with a view to minimising the waste of staff resources in full appraisal of non-eligible projects.

3.6 The complainants finally raise the issue of the segregation of the legal assessment on the eligibility under the Statute and the qualitative assessment of the Bank's contribution (i.e. the Value Added). The complainants argue that from the EIB's letter of 22 December 2009, the two processes seem to be conflated, insofar as the three pillars outlining the Bank's objectives are not relevant to the assessment of the Project's compliance with article 309 TFEU and article 16 of the Bank's statute.

3.7 The complainants also asked the EIB Secretary General to initiate an internal investigation whether the statutory provisions relating to the assessment of project's compliance with the EIB Statute and eligibility for EIB financing is complied with and whether the current statutory provisions are adequate or should be revised. Finally, the complainants ask that the investigation addresses also the timeframe of the eligibility assessment and in particular whether the latter should be held during the pre-appraisal phase and if the Management Committee is the appropriate body to carry out such an assessment given the possible delegation of authority from the EIB Board of Directors.

BOX 1 Allegations and Claims

Allegations:

Failure to reply to the complainants' expression of concerns before the approval of the lending operation by the EIB Board of Directors;

Failure to adequately explain what assessment of alternative sources of funding has been carried out in relation to the contested operation;

Breach of article 309 TFEU and article 16 of the EIB Statute. The complainants interpret the correspondence of the EIB as admitting that other sources of funding may have been available and they take a view that the operation had been approved in breach of the above-mentioned provisions;

Breach of article 19 of the EIB Statute. The complainants argue that the EIB Management Committee did not comply with its statutory duty to examine whether the proposed loan comply with all provisions of the EIB Statute before submitting its report to the EIB Boards of Directors.

Claims:

New assessment of the loan with particular reference to article 309 TFEU and article 16 of the Statute;

Stop to contract signature and disbursements until the above-mentioned assessment is completed.

4. Applicable regulatory framework

4.1 *The scope of the EIB Complaints Mechanism*

4.1.1 Article 4.1 of the EIB Complaints Mechanism stipulates that the Mechanism covers all complaints of alleged maladministration lodged against the EIB Group and that decisions concerning the investment mandate of the EIB, its credit policy guidelines or the EIB's participation in financing operations fall outside its scope.

4.1.2 In its assessment of admissibility, the Complaints Office deemed appropriate to launch a full inquiry into the matter, insofar as the concerns raised by the complainants as regards the eligibility of the lending operation refers to alleged non-compliance of the EIB and its governing bodies to the provisions laid down by the EIB Statute and the Treaties.

4.2 *Public Disclosure Policy*

4.2.1 The policy applicable to the info-request at stake is the 2007 Public Disclosure Policy². With regard to the timeframe for the handling of such procedure, §88 stipulates that "*requests are normally processed ... and ... replied to without delay and in any event no later than 15 working days following receipt*".

4.3 *The statutory framework*

4.3.1 Given the type of allegations made by the complainants, it appears necessary to further elaborate on the statutory framework applicable to the EIB in the performance of its functions. The EIB Statute whose status as protocol to the Treaties is stipulated by article 308 TFEU (ex Article 266 TEC) constitutes the primary source of internal regulation of the EIB in its efforts to attain the mission laid down by article 309 TFEU (ex Article 267 TEC) i.e. "*to contribute, by having recourse to the capital market and utilising its own resources, to the balanced and steady development of the internal market in the interest of the Union. For this purpose the Bank shall, operating on a non-profit-making basis, grant loans and give guarantees which facilitate the financing of the following projects in all sectors of the economy:*

(a) projects for developing less-developed regions;

(b) projects for modernising or converting undertakings or for developing fresh activities called for by the establishment or functioning of the internal market, where these projects are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States;

(c) projects of common interest to several Member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States."

4.3.2 Article 1 of the EIB Statute stipulates that the Bank shall perform its functions and carry on its activities in accordance with the provisions of the Treaties and of the Statute. Article 9 (ex Article 11) of the Statute places the responsibility to ensure that the Bank is managed in accordance with the obligation under article 1 as well as with the general directives laid down by the Board of Governors on the EIB Board of Directors which may delegate some of its functions to the Management Committee. Furthermore it must be noted that article 12 (ex Article 14) of the Statute attributes to the Audit Committee the function to "*verify that the activities of the Bank conform to best banking practice*" and that "*the Bank's operations have been carried out in compliance with the formalities and procedures laid down by this Statute and the Rules of Procedure*". In this context, on the basis of the provision under article 11 (ex Article 13) of the Statute, the Management Committee prepares the decisions of the Board of Directors, in particular decisions

² http://www.eib.org/attachments/strategies/public_disclosure_policy_en.pdf

on the raising of loans and the granting of finance, in particular in the form of loans and guarantees. This provision should be read in conjunction with article 19 (ex article 21) §4 of the Statute stipulating that the Management Committee shall examine whether financing operations submitted to it comply with the provisions of the Statute, in particular with articles 16 and 18 and then report to the Board of Directors on the proposed operation.

4.3.3 Article 16 (ex Article 18) of the Statute establishes that, within the framework of the task identified by Article 309 TFEU, the Bank shall grant finance, in particular in the form of loans and guarantees, to its members or to private or public undertakings for investments to be carried out in the territories of Member States, to the extent that funds are not available from other sources on reasonable terms. The second paragraph complements the above provision by stipulating that, as far as possible, loans shall be granted only on condition that other sources of finance are also used. In addition to that, it is worth recalling that article 18 (ex Article 20) of the Statute lays down the clause of the rational employment of funds as principle which should drive the EIB in the performance of financing operations.

4.4 The submission of the legal services of the EIB

4.4.1 During the inquiry carried out into the complaint, the CO consulted the legal services of the EIB with regard to the interpretation of the Treaties and the EIB Statute and in particular article 309 TFEU and article 16 of the EIB's Statute.

4.4.2 In their opinion, the legal services of the EIB rejected the strict and literal interpretation of the above-mentioned provisions proposed by the complainants insofar as it would run counter to and be incompatible with the normal rules of sound financial management and best banking practice that the EIB must respect as a financing body of the EU and in accordance with article 12 of its Statute. Furthermore, the legal services recalled that in accordance with article 18.1 of the Statute, the Bank has a statutory obligation to ensure that its funds are used rationally and that operations benefiting from its loans are financially and economically profitable. This clearly implies that, when carrying out its lending activities, the EIB must apply normal banking principles as any other bank, including the requirement to ensure a long-term sustainability and quality of the projects it finances.

4.4.3 The opinion addresses the definition of the concept of 'reasonable terms', mentioned in article 16.1 of the Statute, by considering that it should not focus on a single variable, notably the interest rate that the borrower could potentially obtain elsewhere, but it should be based on an overall assessment of the financial situation of the project, its long-term viability and perspectives of execution and, ultimately, the general economic context in which it will be carried out. The Borrower could for instance consider that, besides the pure funding advantage provided by the EIB, the latter's presence in the project would have a catalytic effect attracting other investors and consequently be of value in its own right. The appreciation of EIB financing should thus not be reduced to a simple comparison of its funding conditions with those of other potential lenders but it should take into account all the different components of the financial value added that the EIB's intervention will bring to the operation.

4.5 EIB appraisal

4.5.1 Within the framework of the inquiry, the Complaints Office carried out a review of the internal appraisal procedure as well as the external consultation to be carried out prior to the approval of the project by the Board of Directors.

4.5.2 As regards the internal appraisal process, it is to be noted that the Appraisal Report of 23 September 2009 already identifies in §3.1 the consistency of the projects with EU priority objectives. The Report explains that in 2004 the European Commission and EUROFER had launched ESTEP, the European Steel Technology Platform to boost research and innovation in order to meet global competitiveness and environmental challenges. In March 2009 ESTEP announced the second phase of this initiative by sponsoring a cooperative research and

development initiative to enable drastic reduction in CO2 emissions from steel production. The consortium consisting of all major EU steel companies, of energy and engineering partners, research institutes and universities and supported by the European Commission selected ArcelorMittal sites to trial the technology on a small and then on an industrial scale. One of the projects (in Florange, France) included in the lending operation figures on the list of Carbon Capture and Storage projects put forward by the Commission as part of the European Economic Recovery Plan.

4.5.3 The operational services of the EIB conclude that the project is in line with the research priorities in the European Steel Technology Platform's Strategic Research Agenda and will drive the productivity, competitiveness and environmental sustainability of European steel industry consistent with the recommendations of the Lisbon Council. The investments to align the furnaces for R&D activities can be considered as the creation "R&D-capacity" through a research infrastructure for the advancement of knowledge and technology on low CO2 steel-making. EIB financing of these investments is in line with the Community objectives specified in Article 163 of the EC Treaty, to "(strengthen) the scientific and technological bases of the Community industry" and under the Common Interest criterion retained for EIB-lending under Article 267 point (c): Knowledge Economy, Research and Development and Innovation as well as under Protection of Environment, Improving Environment and Health, Reduction of industrial pollution and Tackling Climate Change, through mitigation and adaptation of industrial activities. Finally, it is worth noting that the Report underlines the positive impact of the project on employment as it will lead to the stabilisation of at least some 1100 high skilled jobs in R&D requiring some 4500 persons/years during its implementation.

4.5.4 Furthermore, §4 "*Value-added identification*" of the Proposal from the Management Committee to the Board of Directors of 21 October 2009 clearly states that "*the project...will contribute to preserve the R&D and innovation investment capability of ArcelorMittal securing its long-term competitiveness and profitability*". As regards the EIB contribution to the project, the Management Committee considers it will contribute to make the financing of research and development more cost-efficient for the Borrower and it will improve the terms and conditions at which the Borrower can fund itself; in particular, the Management Committee considers that "*EIB involvement would provide financing advantage and competitive diversification to the Borrower's funding at times when sources of this kind are both necessary and scarce*".

4.5.5 Together with the internal appraisal process, the project at stake has been also subject to the procedure pursuant to article 19 of the EIB Statute. In that regard, it is worth noting that on 25 September 2009 the European Commission issued its favourable opinion to the contested operation.

5. Findings and Conclusions

5.1 The concerns raised in the present complaint feature a high degree of complexity due to the fact that they pertain to the interpretation of EU treaties and of the EIB Statute and in particular of the obligations to assess the eligibility of lending operations before the latter are approved by the EIB Board of Directors. Aside from the inconvenience of the annual holidays period during the summer break and the current workload of the Complaints Office, the type of compliance review to be performed and the variety of internal actors involved in the procedures challenged by the complainants justified the extension of the timeframe for the handling of the complaint whose main purposes have been to enable the EIB services and management to contribute to the internal debate on the matter as well as to provide adequate time for the Complaints Office to assess the information gathered and elaborate its independent opinion on the matter.

5.2 From the information provided by the complainants and by the competent services of the EIB and in accordance with the PDP provision referred to in §4.2 of this Report, the CO concludes that the competent services of the EIB acted in compliance with the applicable policy of the Bank and therefore files the allegation as ungrounded.

5.3 As regards the failure to adequately explain the assessment of alternative sources carried out in relation to the contested operation, it is to be noted that the inquiry of the Complaints Office has identified information in the Appraisal Report of the operation at stake as well as in the Proposal of the Management Committee to the Board of Directors which indicates an assessment of the availability of alternative sources of funding. The Complaints Office considers that the complainants should have been provided with the information on the EIB appraisal contained in §4.5 of this Report..

5.4 As regards the complainants' main allegation and namely the breach of article 309 TFEU and 16 of the EIB Statute, the Complaints Office shares the opinion of the legal services of the EIB that a strict interpretation of the above-mentioned provisions, if contrary to other, equally important, principles of the EU regulatory framework, shall be rejected. The Complaints Office agrees with the doctrine of the legal services of the EIB according to which the refusal to adopt a strict market-oriented interpretation of the unavailability of alternative financial resources supports the EIB in its efforts to employ its fund rationally.

5.5 However, the Complaints Office equally deems that such interpretation shall not lead the administrative behaviour of the EIB services towards the *de facto* abrogation of the statutory obligation under article 16 of the EIB Statute. In this view and with the objective to better document the work performed by the EIB in the appraisal of the project, the existing assessment should be clearly identified as one of the steps of the appraisal in the operating manuals of the concerned operational services; documentary evidence of the assessment should be kept and a dedicated paragraph should be conceived in the Appraisal documents.

5.6 As regards the alleged breach of article 19 of the EIB Statute, from the information gathered during the inquiry of the Complaints Office and in view of the considerations made in §4.5.4 of this Report, it appears that the Management Committee complied with its statutory duty as it informed the Board of Directors of the scarcity of financial sources for this type of investment and therefore of the necessity of the investment proposed for approval. In light of the considerations made in §5.5, the Management Committee could consider the possibility to include a dedicate paragraph of the proposal to the Board of Directors to the assessment carried out during the appraisal exercise as information necessary for the Board of Directors to exercise its functions under article 9 of the Statute.

6. Recommendations

6.1 The operational services of the EIB involved in the appraisal of the project should keep documentary evidence of the assessment performed with a view to fulfilling statutory requirements and should report in a paragraph of the Appraisal Report the outcome of the assessment carried out.

6.2 Such information should then be systematically included in the documentation provided to the Boards of Directors when requesting the approval for a proposed operation as instrumental for the exercise of the Board's functions under article 9 of the Statute.

Complaints Mechanism
11/10/2010

Complaints Officer
11/10/2010