



Европейска инвестиционна банка
Evropská investiční banka
Den Europæiske Investeringssbank
Europäische Investitionsbank
Euroopa Investeeringuspank
Ευρωπαϊκή Τράπεζα Επενδύσεων
European Investment Bank
Banco Europeo de Inversiones
Banque européenne d'investissement
An Banc Eorpach Infheistíochta
Europska investicijska banka
Banca europea per gli investimenti
Eiropas Investīciju banka
Europos investicijų bankas
Európai Beruházási Bank
Bank Ewropew tal-Investment
Europese Investeringssbank
Europejski Bank Inwestycyjny
Banco Europeu de Investimento
Banca Europeană de Investiții
Európska investičná banka
Evropska investicijska banka
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Luxembourg, 17 April 2018

SG/CR/CS/2018-516

EIB – Corporate use

Subject: Your confirmatory application of 2 March 2018

Dear Mr Teffer,

I refer to your confirmatory application of 2 March 2018, sent via the "AsktheEU.org" platform, requesting the European Investment Bank (EIB) to reconsider its decision not to disclose the documents requested in your message of 18 January 2018 (hereafter, the "initial application") related to the OLAF report on the possible misuse of EU funds and EIB loans by the Volkswagen Group. I further refer to the Bank's acknowledgement of receipt of 5 March 2018. Your request has been handled in line with the [EIB Group Transparency Policy \(EIB-TP\)](#).

I would first like to thank you for this confirmatory application, which gives the EIB the opportunity to review and clarify its original reply to your initial application.

Background

With your initial application of 18 January 2018, you have asked the EIB for the documents containing the following information:

1. The OLAF report about the EUR 400 million loan to Volkswagen (Volkswagen Antrieb RDI)
2. The administrative recommendations received from OLAF regarding the loan to Volkswagen
3. EIB internal documents, including but not limited [to] memo's, papers, e-mails, and letters, discussing the above-mentioned report and/or recommendation from OLAF regarding the loan to Volkswagen.

In its initial reply of 2 March 2018, the EIB responded with the following information:

1. With regard to the OLAF report, the Bank indicated that *the EIB has consulted with OLAF, who is the author and the owner of the requested report, and assessed whether the information in the document is confidential according to the EIB-TP*. The Bank replied that, on the basis of this assessment, *the EIB is not in a position to disclose this report, as its disclosure would seriously undermine the protection of i) the privacy and the integrity of individuals, ii) ongoing court proceedings, and iii) the purpose of investigations*.
2. The EIB also replied that *the same exceptions of the EIB-TP apply to your request for the disclosure of the administrative recommendation received from OLAF (which are part of the OLAF report)*. The EIB has also taken note of the response provided by OLAF to your request for public access to this information.



3. The Bank further replied that the EIB has not produced any specific internal document related to the above-mentioned report and/or recommendations from OLAF. Internal e-mails and exchanges related to this matter cannot be disclosed based on the above-mentioned exceptions of the EIB TP, as well as to protect the Bank's decision-making process.
4. In addition, the Bank complemented its response by indicating that, on the basis of OLAF's findings, the Bank now knows that the EIB was misled by Volkswagen, that the OLAF report recommends that the EIB applies all relevant measures vis-à-vis Volkswagen AG as provided for under the Bank's Anti-Fraud Policy, and that the EIB continues to keep the evolution of other ongoing judicial inquiries under review. The Bank further added that the EIB is currently not considering any new loans to Volkswagen and will continue reviewing its business relationships with Volkswagen in light of the OLAF recommendations and of the outcome of the ongoing judicial inquiries. Finally, the EIB indicated that the Bank is considering other potential actions on this matter, but that these actions can only be taken in light of the above-mentioned reviews, and are yet to be decided.

In your confirmatory application of 2 March 2018, you request a review of the EIB decision not to disclose the documents on the following basis:

1. **Ownership of the OLAF report:** You argue that the EIB decision, not to disclose the report and the administrative recommendation received from OLAF, is based on the assertion that OLAF is "the owner of the requested report", but that "since OLAF has sent a copy of the report to the EIB, the EIB has become owner of the report, or at the very least co-owner".
2. **Overriding public interest in relation to the OLAF report and OLAF recommendations:** On the basis of the above, you argue that articles 5.5, 5.6, and 5.7 of the EIB's transparency policy apply, and that those articles state that exceptions shall apply "unless there is an overriding public interest in disclosure". You also argue that you believe there is such an overriding public interest, "because the documents will give insight as to how a company was able to mislead the EIB and acquire a loan based on incorrect information. That, as well the recommendation, will likely contain information needed to assess whether the EIB has learned from the experience". You further add that, since your request was sent to the EIB, "the overriding public interest has been expressed very clearly by the European Parliament", and you refer to the European Parliament resolution of 8 February 2018 on the Annual Report on the Financial Activities of the European Investment Bank¹.
3. **Overriding public interest in relation to internal documents of the EIB:** You argue that "even if the argument that the report and recommendation are fully owned by OLAF holds up in the internal review - the 'internal e-mails and exchanges related to this matter' are not owned by OLAF. It therefore follows that articles 5.5, 5.6, and 5.7 of the EIB's transparency policy apply, and that those documents should be released if there is "an overriding public interest in disclosure". You argue that "this overriding public interest exists, because the internal response of the bank is essential to evaluate whether lessons have been learned from the case".
4. **Partial access to the requested documents:** You also argue that "without prejudice to the above, it also seems that the bank has not considered partial publication of the report; the administrative recommendation; and/or the internal e-mails and exchanges related to the report".
5. **Application of the Aarhus convention:** You also argue that, regardless of the above, your request "could be seen in the context of the Aarhus convention". You indicate that "the decision to grant a loan to VW – which reportedly has been at least partially used to develop an engine with an illegal defeat device, emitting NOx beyond EU limits – could be seen as "administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making" (article 2b of the convention). You further indicate that "while the Aarhus convention also allows refusal of documents under certain exceptions, it also stresses that "the public interest served by disclosure and ... whether the information requested relates to emissions into the environment" should be taken into account.

¹ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0039&format=XML&language=EN>



EIB's assessment of your confirmatory application

In light of the information submitted in your confirmatory application and pursuant to Articles 5.31 and 5.32 of the EIB TP, a fresh review of the EIB's initial reply has been carried out, resulting in the following decision/position:

1. Ownership of the OLAF report

The EIB would first like to point out that the EIB-TP applies to all documents held by the Bank. In line with the principle of presumption of disclosure described in Article 5.1, point a) of the EIB-TP, *"all information and documents held by the Bank are subject to disclosure upon request, unless there is a compelling reason for non-disclosure"*. These reasons are further described in the exceptions section of the EIB-TP (Articles 5.3 to 5.15).

Therefore, requests for access to documents held by the Bank should be handled and assessed by the Bank in accordance with the provisions of the EIB-TP, irrespective of who the authors or owners of the documents requested are. The EIB hereby confirms that your request made on 18 January was processed in line with Article 5.1 point a) of the EIB TP, with all requested documents being considered as documents **held** by the Bank.

Article 5.1 point a) of the EIB TP should be read in conjunction with Article 5.9. The latter states that, *"as regards third-party documents (including EU Member States and EU institutions and bodies), the Bank shall **consult with the third party** whether the information in the document is confidential **according to this Policy** unless it is clear that the document shall or shall not be disclosed"* (emphasis added).

Given that the OLAF report² was produced by OLAF and not by the EIB, the Bank qualified this document as a third-party document, and therefore, in line with Article 5.9 of the EIB-TP, the EIB consulted with OLAF with regard to its disclosure. The final decision of the Bank, however, was taken based on all the relevant provisions of the EIB-TP. In this regard, the EIB notes that its initial decision was specifically based on: i) Article 5.4 b) regarding the protection of the privacy and the integrity of individuals, ii) the third bullet of Article 5.5 regarding the protection of court proceedings, and iii) the fourth bullet of Article 5.5 regarding the protection of the purpose of investigations.

It is clear therefore that the Bank did not base its refusal on the assertion that OLAF is the owner of the requested report, but correctly assessed your request on the basis of the provisions of the EIB-TP after having consulted with OLAF.

2. Overriding public interest in relation to the OLAF report and OLAF recommendations

In your confirmatory application, you further argue that Articles 5.5, 5.6, and 5.7 of the EIB-TP should apply to your request, and that *those articles state that exceptions shall apply "unless there is an overriding public interest in disclosure"*.

As part of this review, the EIB notes that the Bank indeed invoked the exception under Article 5.5, third and fourth bullets, in dealing with your initial request, as indicated in its initial response.

Regarding the application of Article 5.6³, the Bank notes that the OLAF report is indeed a document received by the Bank pertaining to a matter where a decision has not yet been taken. In this regard, the Bank notes that the OLAF report contains opinions for internal use, which are the subject of ongoing deliberations and preliminary consultations within the Bank and with other stakeholders. Therefore, its

² For the purposes of this review, references to the OLAF report also include its recommendations, which are an integral part of the report.

³ Which states that *Access to information/documents, drawn up by the Bank for internal use or received by the Bank, which relates to a matter where the decision has not been taken by the relevant organ of the Bank, shall be refused if disclosure of the document/information would seriously undermine the Bank's decision-making process, and that Access to information/documents containing opinions for internal use as part of deliberations and preliminary consultations within the Bank or with Member States/other stakeholders shall be refused even after the decision has been taken if disclosure of the information/document would seriously undermine the Bank's decision-making process*



disclosure would seriously undermine the Bank's decision-making process. Moreover, as indicated in the Bank's initial response, the Bank is considering other potential actions on this matter, and disclosure of the OLAF report at this time is likely to concretely jeopardize the Bank's decisions on future actions. In consideration of the foregoing, and as a result of this review, the Bank agrees that Article 5.6 of the EIB-TP can also be invoked to substantiate its refusal to disclose the OLAF report.

Regarding the application of Article 5.7⁴, which specifies the need to take into account the presence of an overriding public interest in disclosure when applying the exceptions under 5.5 and 5.6, you argue:

- that such an overriding public interest exists because the documents will give insight as to how a company was able to mislead the EIB and acquire a loan based on incorrect information;
- that the recommendation will likely contain information needed to assess whether the EIB has learned from the experience;
- that the overriding public interest has been expressed by the European Parliament Resolution of 8 February 2018.

As a first general preliminary point, the Bank notes the importance of preserving not only its (and indeed OLAF's) right to conduct investigations but also its right to follow up on the results of internal investigations and any recommendations issued to the Bank by OLAF. Indeed, as set out in the EIB's Anti-Fraud Policy, these rights are essential with a view to preventing and deterring corruption, fraud, collusion, coercion, obstruction, money laundering and terrorist financing. It is for this reason, together with the very premise of these aims of the Bank in terms of the future prevention of fraud, which in and of itself contributes to the protection of the public interest, that the Bank must protect investigative and follow up processes, even when the relevant investigation has been brought to a close and the relevant act has become definitive. The protection of investigative and follow up processes becomes all the more pertinent in the context of cases where the Bank investigates alleged instances of fraud that are of a similar nature, for instance, or that pertain to the same sector.

By way of a second preliminary point, the Bank notes the importance of protecting its investigative and follow up rights in view of its autonomy in implementing the sanctions and remedies available to it by virtue of its Anti-Fraud Policy.

By way of a final preliminary point, the Bank notes that your reasons for disclosure of the requested documents, as required by the established case-law of the European Court of the European Union, are not sufficiently specific to establish an overriding public interest that would prevail over the protection afforded by the EIB-TP's exceptions invoked by the Bank in this case.

Moreover, in making its assessment of whether the public interest outweighs the interests protected by the exceptions invoked, the Bank, firstly, with regard to the protection of on-going court proceedings and ongoing investigations at national level, is of the opinion that disclosure of the report would distort the principle of the sound administration of justice. Secondly, and as already noted, the Bank's internal discussions and consultations on the issue of the OLAF report are ongoing. Disclosure would therefore seriously undermine any final outcome on the Bank's consideration of this file. Thirdly and finally, the Bank notes that OLAF is the responsible EU body charged with investigating instances of alleged fraud. It necessarily collects and generates documents during its investigations, which, in accordance with Article 5.5 bullet 4 of the EIB-TP, are protected from disclosure even after the relevant investigation has been closed and follow-up action has been taken. The Bank therefore submits that the public interest in disclosure with regard to documents relating to OLAF investigations, and any follow-up actions to be taken by the Bank on the basis of such an investigation, must be based on overriding, concrete arguments, which, as noted above, have not been provided in this case.

More generally, and with regard to the points you forward, firstly, it is already publicly known that the scope of the EIB loan included the development of technologies targeting the improved environmental performance of passenger cars, and that the EIB loan coincided in time with the design and use of the

⁴ Which states that *the exceptions under 5.5 and 5.6 shall apply unless there is an overriding public interest in disclosure. As regards the first, second and fourth bullet points of Article 5.5 with the exception of investigations, an overriding public interest in disclosure shall be deemed to exist where the information/document requested relates to emissions into the environment.*



defeat software by Volkswagen. However, the Bank only learned about the existence of the defeat software when the issue became public, and after the loan in question was repaid in line with the relevant contractual provisions.

Secondly, with regard to lessons learned, the Bank notes that the OLAF investigation did not identify any failure in the EIB processes linked to the appraisal, approval, and monitoring of the EIB loan. The Bank is continuously improving its appraisal and monitoring procedures, and ensuring that they adhere to best industry practices. In line with the EIB Anti-Fraud Policy, and the Bank's zero tolerance policy on prohibited practices, the Bank works to prevent and deter Prohibited Conduct from occurring and, where it does occur, to address it in a timely and expeditious manner. Furthermore, the Bank also regularly reviews its loans to various sectors, including in the automotive sector. However, when lending to the automotive industry, the EIB will continue to rely on the work carried out by the competent authorities and agencies at national and EU level who are responsible to ensure and monitor the environmental performance in the sector.

Thirdly and finally, with regard to the European Parliament Resolution, the EIB has taken note of the Parliament's call regarding this issue, and has responded to the interested Members in line with the initial response that was provided to you.

On the basis of the foregoing consideration of your arguments, the Bank:

- continues to maintain that disclosure of the OLAF report would specifically and actually undermine the interests protected by Article 5.5, bullets 3 and 4 of the EIB-TP;
- agrees that Article 5.6 of the EIB-TP is applicable and submits that disclosure would seriously undermine the Bank's decision making process;
- opines that the potential public interest as invoked by you does not outweigh the specific and concrete harm that the disclosure of such information would cause.

For the sake of completeness, the Bank notes that invoking Article 5.4 b) does not oblige the Bank to take into account the existence of an overriding public interest.

3. Overriding public interest in relation to internal documents of the EIB

With regard to the internal e-mails and exchanges related to the investigation of OLAF into the EIB loans to Volkswagen, the Bank notes that, given that these documents are also held by the Bank and are inherently related to the OLAF report and recommendation, the foregoing analysis of your arguments equally extends to this aspect of the disclosure request. Therefore, as part of this review, the EIB is of the opinion that these documents cannot be disclosed as their disclosure would seriously undermine the protection of i) the privacy and the integrity of individuals, ii) ongoing court proceedings, iii) the purpose of investigations, and iv) the Bank's decision making process. With regard to ii), iii) and iv) the Bank maintains that any claims pertaining to the overriding public interest of disclosure of these documents are outweighed by specific harm that the disclosure of such information could cause.

4. Partial access to the requested documents

With regard to the allegation that the Bank has not considered a partial disclosure of the requested documents, the EIB would like to inform you that the Bank assessed this possibility in line with Article 5.15 of the EIB-TP. However, given that the information contained in the documents is protected from disclosure on the basis of the exceptions invoked above and in our initial response, the Bank concluded that partial disclosure was not possible in this case.

5. The application of the Aarhus Convention

Regarding the allegation that your request could be seen in the context of the Aarhus Convention, and that the decision to grant a loan to Volkswagen could be seen as falling under Article 2b of the Convention,

the Bank would like to point out that, as an EU body, the EIB is subject to the relevant provisions of Regulation (EC) No 1367/2006⁵.

The Bank implements Article 6(1) of the said regulation in Article 5.7 of the EIB-TP. Article 5.7 of the EIB-TP provides that an overriding public interest is deemed to exist where the information requested relates to emissions into the environment. However, the same article also clearly states that this does not apply to investigations which are at stake in the present application.

In addition, with regard Article 5.5, bullets 3 and 4, and Article 5.6, it should be noted that the requested information does not relate to emissions into the environment. Rather, the OLAF Report, its recommendation and internal documents, concern exclusively OLAF's investigation on the EIB loans and therefore the information contained therein cannot be qualified as environmental information. Article 6(1) of the said Regulation, implemented by way of Article 5.7 of the EIB-TP, is therefore not applicable to the case at hand.

Conclusions


On the basis of the above considerations, and having carefully considered your confirmatory application under the provisions of the EIB TP, the EIB regrets to inform you that it cannot provide you with access to the documents that you have requested for the reasons set out above.

However, once the various legal and non-legal actions and the ongoing investigations pursued both by the EIB and third parties are concluded, the EIB will consider, to the extent possible and in accordance with the provisions of the EIB-TP, to further communicate on the state of play as to its actions and the recommendations made by OLAF.

In line with Article 5.33 of the EIB-TP please be informed that, should you consider this response unsatisfactory, you have the right to appeal in line with the provisions of Chapter 6 of the EIB-TP.

Yours sincerely,

EUROPEAN INVESTMENT BANK



Marjut Santoni
Secretary General

⁵ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies