

THE EUROPEAN OMBUDSMAN



JACOB SÖDERMAN

29 JAN. 2001

Strasbourg, 24 -01- 2001

**Mr John Hontelez**  
**Secretary General**  
**European Environmental Bureau**  
**Boulevard de Waterloo 34**  
**B -1000 Brussels**

**Decision on complaint 1338/98/ME against the European Investment Bank**

Dear Mr Hontelez,

On 15 December 1998, you made a complaint to the European Ombudsman on behalf of the European Environmental Bureau concerning the European Investment Bank's financing of the construction of the northern part of the MO orbital motorway (MO-M2 Motorway) in Hungary.

On 27 January 1999, I forwarded the complaint to the President of the Bank. The Bank sent its opinion on 26 February 1999. I forwarded it to you with an invitation to make observations, which you sent on 29 April 1999. On 29 July 1999, I asked the Bank for further information and the Bank replied on 23 September 1999. On 16 November 1999, I repeated my request for further information and the Bank replied on 13 December 1999. I forwarded the reply to you with an invitation to make observations, which you sent on 28 February 2000. On 29 May 2000, I again asked the Bank for further information. The Bank sent its opinion on 22 June 2000 and I forwarded it to you with an invitation to make observations, if you so wished. No observations appear to have been received from you. On 11 December 2000, I asked the Bank to inspect documents relevant to the complaint. Following that request, the Bank sent me documents on 14 December 2000.

I am writing now to let you know the results of the inquiries that have been made,

**THE COMPLAINT**

In December 1998, the Secretary General of the European Environmental Bureau lodged a complaint with the European Ombudsman on behalf of the Bureau. The complaint concerned the European Investment Bank and its financing of the construction of the northern part of the MO orbital motorway (MO-M2 Motorway) around Budapest in Hungary. The complainant

claimed that the planning and construction of the motorway violated both the Hungarian Constitution and other Hungarian laws, as well as Council Directive 85/337/EEC,

The complainant stated that the northern section of the MO orbital motorway was supposed to connect the M3 motorway with the main road N° 11. The MO would pass through an almost uninhabited area near the M3, then connect with the new M2, also financed by the Bank. From there, the road would go through a 16 meter-high and 270 meter-long viaduct which passes within 250-300 meters of a housing estate called Káposztásmegyer II. This housing estate has 500 inhabitants. Junction 2, connecting the new MO to an arterial road in the direction of downtown Budapest, was planned within 150 meters of a nursery school and within 400 meters of the apartment buildings. Projected traffic backing up on two-lane roads leading to the arterial road was planned only 15 meters from the apartment buildings, and runs between the local school, the nursery and the apartments. Junction 3 and the ring road, connecting the MO to the M2, would pass through a nature protection area inhabited by *Hippophae rhamnoides*, a protected bush. Fencing, to protect it during construction had not occurred around that area.

The complainant put forward that health risks had been pointed out by experts. For example the increased traffic will generate the Nitrogen Oxides and particulates to a level 25-30% above Hungarian ambient air and noise standards and the noise levels are expected to exceed the limits and reach 70- 76dB in the day and 63-68 dB at night where the accepted limit values are 65 dB in the day and 55 dB at night. The increases in traffic will also affect the air quality and moreover the northern sector of the MO ring road is the wind corridor from which clean air blows into Budapest.

According to the complainant, the public should have been informed of the project at a hearing but, as the hearing had not been correctly announced and not published in a major newspaper, no affected citizens or environmental groups were notified. Instead, the Ministry of Transport, Communication and Water Management signed a contract with UTIBER Ltd. in December 1997 to begin the work. The residents were only informed of the construction in early spring 1998, when they realised that the construction work had begun 250 meters away from their homes.

The complainant stated that the construction was financed by the Bank with a loan of 46 million ECU. In summary, the complainant thus alleged that the Bank's financing of the northern part of the MO orbital motorway around Budapest violated both the Hungarian Constitution and other Hungarian laws, as well as Council Directive 85/337/EEC. The complainant claimed that it had written to the Bank asking it to withhold its loan.

Council Directive 85/337 /EEC of 27 June 1985 on the assessment of the effects of certain public and private projects, on the environment, OJ 1985 L 175/40.

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## THE INQUIRY

### The European Investment Bank's opinion

In its opinion, the Bank explained that the loan referred to by the complainant was a € 72 million credit granted to the Republic of Hungary at the end of 1993 to part-finance a road project comprising of the construction of a ca. 35 km section of road E77 north of Budapest, and the rehabilitation of approximately 350 km of existing roads. The complaint concerned a 270 meter-long stretch of a 4.3 km section of the by-pass - known as phase III (b) - where the road flies over a railway line and an existing local road. Upon completion, phase III (b) will relieve local roads in the north-eastern quadrant of Budapest from heavy congestion and it will be a direct link between E77 and motorway M3. The phase III (b) section will eventually be part of the planned and partially built Ma ring road of Budapest.

The European Council and the Pan-European Transport Conferences in Crete and Helsinki have defined ten corridors which must be urgently upgraded and developed in central and eastern Europe during the pre-accession years. The MO ring road of Budapest is an integral part of the "Crete Corridor V". In 1993, Hungary requested a loan from the Bank to part-finance the road project which is the subject of the complaint.

The Bank stated that its lending activities are governed by its Statute, a Protocol attached to the EC Treaty, and further guided by Community policies as well as the priorities of the countries where it operates.

In accordance with the Bank's policies, the environmental impact of the project was analysed when the loan request was appraised in 1993, prior to the submission of the loan proposal to the Bank's Board of Directors. The documents submitted by the executing agency for the project, the Ministry of Transport, Communication and Water Management in Hungary, demonstrated to the satisfaction of the Bank that although Hungary did not have an environmental legislation comparable to Directive 85/337, the impact of the by-pass construction and operation on land, water, air, landscape, built-up areas and fauna had been fully investigated and, further that appropriate environmental impact reductions and mitigation measures (landscaping, game protection fences, noise barriers. etc.) had been included in the design of the project.

The Bank pointed out that there are limits to its responsibilities in this field and referred to Article 16 of the Bank's Environmental Policy Statement. It is for the promoter of the project to make sure that the project comply with legal obligations and standards relating to the environment. The Bank had also already pointed out to the complainant that it is not for the Bank to comment on national legal procedures for granting project permits and other permissions. Should a project be subject to legal testing in the courts this will be discussed with the promoter.

Furthermore, the Bank stated that it is fully committed to an active information policy although its role as a financial institution together with the nature of its commercial activities impose a

certain degree of reserve as regards specific operations.

#### The complainant's observations

In its observations, the complainant pointed out that the MO ring road was according to the Bank part of the Helsinki corridors (referred to as "Crete Corridor V" by the Bank). The complainant however stated that the particular section of the MO ring road that is the subject of the complaint, was not part of the Helsinki corridors.

As regards the environmental aspect, the complainant stated that according to independent experts, results of the studies done so far are based on incorrect calculations. In particular, a satisfactory investigation and analysis of the adverse impacts on air quality and residential areas resulting from the construction of the motorway segment in question, were missing,

The complainant also commented on the Bank's information duties in general regarding projects that it is financing.

#### Further inquiries

After careful consideration of the Bank's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore asked the Bank to specify in more detail how in this specific case it examined the present and likely future environmental legislation and the environmental impact assessments performed by the promoter. The Ombudsman also asked the Bank to supply the documents submitted by the executing agency for the project (the Ministry of Transport, Communication and Water Management) which appeared to be the main documents taken into account when deciding to grant the loan, as regards the environmental aspects of the project.

#### The European Investment Bank's second opinion

In its second opinion, the Bank stated that the decision to finance the project in question was taken by the Bank's Board of Directors following the favourable opinion of the European Commission, pursuant to Article 21 of the Bank's Statute. Such decision by the Board of Directors entail an exercise of the wide discretionary power which has been conferred on the Board through the Bank's Statute. This is reflected in the fact that the decision by the Bank's Board of Directors are not, according to Article 237 (c) of the EC Treaty, subject to judicial review with the limited exceptions of matters relating to the application of Article 21 of the Bank's Statute, as has been confirmed by the Court of First Instance<sup>1</sup>.

Moreover, the Bank was of the opinion that the complaint lodged and the request to investigate, did not fall within the scope of investigation into maladministration in the sense that it had been defined by the European Ombudsman's Annual Report for 1997 (Section 2.2.1). The Bank did

*T-460/93, Tete and others v. EIB. ECR [1993] II-1257,*

therefore not find it appropriate to make any further comments in this particular matter .

Finally, the Bank assured the Ombudsman that it will co-operate in accordance with the Ombudsman's institutional duties.

Following the Bank's second opinion, which the Ombudsman understood to be a refusal to co- operate further in the inquiry into the complaint, the Ombudsman wrote again to the Bank repeating the request for further information. In doing so the Ombudsman pointed out that his activities are not governed by Article 237 of the EC Treaty, but by Article 195. Further that, what the Ombudsman is examining is a possible instance of maladministration in the administrative procedure which led up to the Bank's decision to finance the project.

#### The European Investment Bank's third opinion

In its third opinion, the Bank contested that it refused to co-operate in the inquiry. However, the Bank did not accept that the complaint related to an instance of maladministration in the meaning of Article 195 of the EC Treaty and referred to the definition in the Ombudsman's Annual Report for 1997. According to the Bank, the Ombudsman's remit does not extend to an assessment of the Bank's lending policies, nor of the exercise of discretion that their applications entail, whether at the level of the decisions of the Boards of Directors, or at the level of the appraisal conducted by the Bank's services, or that of the proposals adopted by the Management Committee for submissions to the Board of Directors. The Bank also enclosed some documents relating to the complaint, such as information deriv ing from a recent site visit to the project, and hoped that the information would help the Ombudsman to better U11derstand the general context of the project which was the subject of the complaint.

#### The complainant's observations on the third opinion

The third opinion of the Bank was sent to the complainant. In its observations, the complainant maintained me complaint and put forward in summary the following: The northern part of the MO motorway was not even mentioned in the Hungarian decree which lists the main national roads to be constructed. There was no proof that the road will reduce the existing environmental degradation caused by the traffic crossing central Budapest. Further, the Hungarian Minister of Transport admitted in August 1999, that he had no data on the expected environmental impacts of the northern part of the motorway.

The complainant also referred in general to the Bank's lending policies. It thereby stated that one of the greatest problems of the Bank's activity is that there is no specific environmental policies for it to follow and further, the importance of the environmental considerations could have lower priority than the economical or other considerations. There is no appropriate legal framework for the Bank, which would make the Bank more responsible for its loans before die public.

Following the Bank's third opinion and the complainant's observations, the Ombudsman was still not satisfied that the Bank had supplied the requested information. The Ombudsman

wrote again to the Bank stating that it was the last time that he asked the Bank to supply the information. The Ombudsman also informed the Bank that, if the Bank refused again to co-operate, the Ombudsman would have to inform the European Parliament in accordance with Article 3 (4) of the Statute of the European Ombudsman.

#### The European Investment Bank's fourth opinion

In its fourth opinion, the Bank did not dispute the Ombudsman's mandate to inquire into the complaint. The Bank put forward that the complaint concerned an assessment of the exercise of discretion that the application of the Bank's lending policies entails in the decision-making by the Bank's Board of Directors, Thus reflecting a disagreement with the discretionary judgements that have been made on a particular project. These discretionary judgements are subject to the limits of the Bank's legal authority and to general limits on equal authority as established by the jurisprudence of the Court of Justice requiring that the Bank should act in accordance with fundamental principles of law. The Bank understood the Ombudsman's inquiry to concern whether the Bank had indeed acted within these limits when deciding to finance the project in question .

As regards the project that the Bank decided to finance in 1993, the Bank took into consideration the investment priorities of its client, the Government of Hungary, among which were the modernisation of its national and international road network through the rehabilitation of existing roads and the construction of new roads, aiming at inter alia reducing urban traffic congestion and thereby improving the quality of the environment. The Bank then applied its usual criteria in examining the project's viability from an economic, technical, environmental and financial point of view. The Bank enclosed a list of all documents taken into consideration during the appraisal of the project.

The Bank again referred to the fact that although Hungary did not have an environmental legislation comparable to Directive 85/337, the documents submitted by the Ministry of Transport, Communication and Water Management in Hungary, demonstrated that the impact of the by-pass construction and operation on land, water, air, landscape, built-up areas and fauna had been fully investigated and that appropriate environmental impact reduction and mitigation measures, had been included in the design.

The Bank also followed up on environmental issues after the decision to finance the project. In 1995, a special Environmental Impact Study was initiated by the European Commission in co-ordination with the Bank. The objective of the study was to compare the requirements of the Hungarian and Community environmental legislation applied to this specific road project. The findings and recommendations of this study were well taken into account during the final design and implementation of the project. Further, the Bank made disbursement of its loan conditional to receipt of confirmation by the Hungarian authorities that the relevant project components had received final environmental approval and development consent, which occurred in the period 1993-1996, and for phase III and the relevant by-pass in July 1996 as regards the final environmental permission and in September 1996 as regards the construction permit.

The complainant's observations on the fourth opinion

The Bank's fourth opinion was forwarded to the complainant with an invitation to submit observations. No observations appear to have been received from the complainant.

### Inspection of documents

After careful consideration of the information supplied by the Bank and the complainant, the Ombudsman found it necessary to inspect the documents submitted to the Bank by the Hungarian Ministry of Transport, Communication and Water Management. The Ombudsman therefore wrote to the Bank announcing the examination of those documents. Upon this request, the Bank chose to send copies of the documents to the Ombudsman. Following this action, the Ombudsman considered that the Bank had fully co-operated in the Ombudsman's inquiry.

## THE DECISION

### 1 Preliminary remark

1.1 In the light of the fact that the European Investment Bank during the inquiry at first contested the Ombudsman's mandate to conduct inquiries into allegations relating to discretionary decision, the Ombudsman finds it necessary to make the following preliminary remarks.

1.2 According to Article 195 of the EC- Treaty, the Ombudsman conducts inquiries, either on his own initiative or on the basis of complaints submitted to him, concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. Article 19 of the EC. Treaty does not provide for any exceptions other than those relating to the Community courts acting in their judicial role. Specifically, it does not provide for any exception relating to the Bank.

1.3 **The Ombudsman's Annual Report for 1997<sup>1</sup> contained the following definition of maladministration:**

*Maladministration occurs' when a public body fails to act in accordance with a role or principle which is binding upon it.*

On 16 July 1998, the European Parliament adopted a resolution welcoming this definition<sup>2</sup>.

<sup>1</sup> The European Ombudsman's Annual Report for 1997. Section 2.2.1, OJ 1998 C 380/14.

<sup>2</sup> OJ 1998 C 292/168,

4 The Ombudsman also noted in his Annual Report for 1997 that there are limits to what could be considered as maladministration. When carrying out the administrative tasks conferred on it by the EC Treaty .a Community institution or body may have the legal authority to choose between two or more possible courses of action. The Ombudsman does not seek to question such discretionary administrative decisions, provided that the body concerned has acted within the limits of its legal authority. Discretionary powers does thus not mean absolute powers. General limits to the discretionary powers are established by the jurisprudence of the Community Courts which requires, for example, that administrative authorities should act consistently and in good faith, avoid discrimination, comply with the principles of proportionality, equality and legitimate expectations and respect human rights and fundamental freedoms<sup>1</sup>.

## 2 The Bank's financing of the northern part of the MO motorway in Hungary

2.1 The complainant alleged that the European Investment Bank's financing of the northern part of the MO orbital motorway around Budapest violated both the Hungarian Constitution and other Hungarian laws, as well as Council Directive 85/337/EEC. The complainant claimed that it had written to the Bank asking it to withhold its loan.

2.2 The Bank explained that it applied its usual criteria in examining the project's viability from an economic, technical, environmental and financial point of view. The documents submitted by the Ministry of Transport, Communication and Water Management in Hungary, demonstrated that the environmental impact of the bypass construction and operation on land, water, air, landscape, built-up areas and fauna had been fully investigated. A follow-up on the environmental aspects took place after the decision to finance the project, and the findings were taken into account during the final implementation of the project.

2.3 Firstly, it is necessary to establish the responsibilities of the Bank as regards environmental considerations when granting loans. The Ombudsman notes that there are no established rules to this respect. However, there are rules, principles and guidelines, that should be

] Also relevant in this context is Council of Europe Recommendation No. R (80) 2 which states that an administrative authority, when exercising Q discretionary power:

- 1 does not pursue a purpose other than that for which the power has been conferred:
2. observes objectivity and impartiality, taking into account only the factors relevant to the particular case.
- 3, observes the principle of equality before the law by avoiding unfair discrimination:
- 4, maintains a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;
- s. takes its decision within 11 time which is reasonable having regard to the matter at stake;
6. applies any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case

See *The Administration and You: a handbook*, 1996 p. 362.

considered in aiming at establishing these responsibilities. The Statute of the European Investment Bank<sup>1</sup> does not give much guidance as regards the environmental concern but states that the Board of Directors has sole power to grant loans upon applications submitted to it by the Management Committee (Articles 11 and 21). The Bank itself stated that its lending activities are guided by Community policies; which is natural and logical, To that respect it is important to point out that Article 174 of the EC Treaty mentions the environment as a Community policy. Further, there are several secondary legislative acts in relation to the protection of the environment, of which Council Directive 85/337/EEC<sup>2</sup> should be mentioned.

The Bank has issued an Environmental Policy Statement and published Environmental Guidelines on its Website. From these documents it is clear that the viability of projects is evaluated from an economic, technical, environmental and financial point of view, that consideration of environmental issues is an integral part of the project appraisal regardless of sector and further, that the appraisal verifies the projects' compliance with Community and/or national legislation. In countries aiming for EU membership, such as Hungary, Community legislation is an obvious guideline.

Usually, the basis for the environmental appraisal is the Environmental Impact Assessment (EIA) and other environmental studies carried out by or on behalf of the promoter. Should the EIA or other studies reveal a particular environmental concern the Bank will review the proposed abatement measures and may, if necessary, introduce appropriate covenants into the loan contract between the Bank and the borrower. According to the Environmental Policy Statement; there are limits to its role and responsibilities in the environmental field. Thus, the promoter is responsible for compliance with the legal obligations and standards relating to environment, including the obligation to carry out an EIA.

2.4 Against this background, the Ombudsman concludes that when granting a loan it appears to be the Bank's responsibility to check whether a proper EIA or other sufficient environmental studies have been carried out for the project. What is a proper EIA or environmental study must necessarily depend on the context but for applicant states, the appropriate requirements set by the Community legislation should be taken into account.

2.5 In the present case, the Bank appraised the environmental impact of the road project in 1993. Regarding the environmental impact on the by-pass being the subject of this complaint, the Ministry of Transport, Communication and Water Management supplied the Bank with an Environmental Assessment Summary, According to the Bank, the documents demonstrated that the impact of the by-pass construction and operation on land, water, air, landscape, built-up areas and fauna had been fully investigated and appropriate

<sup>1</sup> Protocol (No A) to the Treaty establishing the European Community.

<sup>2</sup> Council Directive 85/337 of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/40.

environmental impact reduction and mitigation measures had been included in the design of the project. The complainant alleged however in particular that a satisfactory investigation on air quality and residential areas was missing. The Ombudsman's inspection of the Environmental Assessment Summary revealed that the assessment covered the ca. 35 km section of road E77 north of Budapest of which the by-pass forms part and that the environmental effects of the project, as regards plans completed in August 1993, in relation to the impact on land water, air, landscape, built-up areas and fauna were examined in the Summary, and further that mitigation measures had been foreseen.

2.6 According to the Environmental Policy Statement, the Bank will review the proposed abatement measures should the EIA or other studies reveal a particular environmental concern. Although the Ombudsman concludes that the Environmental Assessment Summary did not reveal any particular environmental concern, the Summary is dated August 1993, while some Plans for Approval for some sections of the road project were foreseen to be documented and completed in September and October 1993. It is however noted that a second Detailed Environmental Impact Study was carried out in 1995 on the initiative of the European Commission and the Bank. The study was carried out with the objective to compare the requirements of the Hungarian and EU environmental legislation applied to the project. The findings and recommendations were taken into account during the final design and implementation of the project and the Bank made disbursement of its loan conditional to receipt of confirmation by the Hungarian authorities that the relevant project components had received final environmental approval and development consent. For the by-pass relevant to the complaint, consent was given in July and September 1996.

2.7 In relation to the complainant's allegations that some risks had been pointed out by experts, the Ombudsman notes that the mere fact that differing views regarding the environmental effects of a project are put forward cannot automatically mean that the Bank is obliged to refrain from granting a loan when acting as a financing institution.

2.8 In view of the above findings, the Ombudsman finds it established that the Bank did confirm that a proper EIA had been carried out. Moreover, the Bank also ensured that a second study was carried out, and it made its loan conditional to receipt of confirmation by the Hungarian authorities of final environmental approval. The Bank did thus take due consideration of the environmental aspects as required and it appears that the Bank acted within its legal authority. The Ombudsman's inquiries did therefore not reveal any maladministration.


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## Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Investment Bank" The Ombudsman therefore closes the case.

The President of the European Investment Bank will also be informed of this decision.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jacob Söderman', with a horizontal line above the final part of the signature.

Jacob Söderman