

Yabancı devletin bir ticari faaliyeti ile ilgili olarak kullanılan mallarının cebri icra bağıışıklığından yararlanmayacağı görüşü ağır basmaktadır. Fakat fiiliyatta böyle bir muameleye tabi tutulan malların devletten ziyade yabancı devlet kurumlarına ait olduğu görölmektedir.

Cebri icra bağıışıklığından yararlanacak yabancı devlet mallarının ayırımında malların menşei veya kullanılma amaçları dikkate alınabiliyorsa da, menşei özel hukuk münasebetleri olan bir mal bile bir kamu hizmetinin unsuru olduysa o malın haczedilemeyeceği anlaşılmaktadır.

Yabancı devlete ait olup da hacze konu olan malların ticari bir amaçla kullanıldığıının ispatı sorunu genellikle davacı fertlere düşmektedir.

Ancak, cebri icra bağıışıklığı yabancı devletin kamu hizmetine tahsis edilmiş malları ile sınırlandırılmaktaysa da, uygulamada kalkış noktası olarak, malın kamu hizmetine tahsis edilip edilmediği değil, malın ticaretle kullanılıp kullanılmadığı, ele alınmaktadır.

## SOME LEGAL ASPECTS OF THE EUROPEAN INVESTMENT BANK AND ITS LENDING OPERATIONS

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### INTRODUCTION

The basic aim of the European Economic Community is to promote a harmonious development of economic activities, a continuous and balanced expansion, an increased stability; an accelerated raising of the standard of living and closer relations between its Member States. This end is to be reached by establishing a Common Market and progressively approximating the economic policies of the Member States<sup>1</sup>. The EEC Treaty involves a series of articles to fulfill these purposes, to prevent the Common Market from worsening the economic position of certain regions and to ensure a balanced, harmonious development within the Community. The reason of this concern is the existence of substantial differences in the level of economic development of the various parts of the Community. The central part covers only one-third of the entire territory of the Community, however it accounts for approximately 60% of its total gross product. The creation of the Common Market would have increased these imbalances because it would have benefited, mainly, the regions

which were already prosperous and which could thus attract new industries by offering a developed infrastructure, skilled labour and strong purchasing power<sup>2</sup>. In order to prevent this negative outcome the EEC Treaty itself provides some more positive measures designed to raise the income of less favoured areas. The European Investment Bank<sup>3</sup> was established with this end in view<sup>4</sup>.

### 1. GENERAL BACKGROUND

#### 1. 1. Historical Developments

The ide of an Investment Bank for

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1) Art. 2, of the Treaty Establishing the European Economic Community hereinafter referred to as "the EEC Treaty".

2) STEIN, HAY, WAELBROECK, *European Community Law and Institutions in Perspective, Text-Cases and Readings.* 1976 p. 1093.

3) Herein after referred to as "the EIB".

4) LICARI, *The European Investment Bank, (8-3) Journal of Common Market Studies, 192-193 (1969-70).*

Europe had long been foreseen before 1958. The Petsche Plan, which the French Government had adopted in 1948 had advocated the creation of a European Investment Bank with the aim of contributing to finance the reorganization on a European scale. At about the same time there had been similar proposals originated in Italy and in the Netherlands. The Paris Treaty establishing the ESCS had brought provisions concerning the financing of new and economically sound activities. However, it was not before 1958 that a European Investment Bank, in the real sense of a Bank, could be established<sup>5</sup>.

### 1. 2. Legal Basis and Functions

The EIB was created by the Treaty of Rome of March 25, 1957 which came into force on January 1, 1958 establishing the European Economic Community. Its Statute is an integral part of the EEC Treaty, to which it is appended in the form of a Protocol<sup>6</sup>. According to Article 3 (j) of the EEC Treaty, the Community shall establish a European Investment Bank to fulfill its aims. This Bank has to facilitate the economic expansion of the Community by opening up new resources. Furthermore, Articles 129 and 130 of the EEC Treaty provide that the EIB has a legal personality and that its members are the Member States of the EEC. They also provide that the purpose of the EIB is to contribute to the balanced and smooth development of the Common Market in the interest of the Community, by calling on the capital markets and its own resources.

The relevant articles of the EEC Treaty, mentioned above, clearly demonstrates the basic function of the EIB: To contribute to the balanced development of the Community. The Bank shall fulfill this function by granting loans and guarantees, from its own resources, to enterprises, public authorities and financial institutions, to facilitate the financing of certain projects. These projects shall belong to one of the following categories<sup>7</sup>:

- a) projects for developing less developed regions;
- b) projects for modernizing or conver-

ting enterprises or for creating new activities which are called for by the progressive establishment of the Common Market;

- c) projects of common interest to several Member States.

In the period 1975-1981 the EIB has also, acting as agent for the Community, been granting loans from the resources of the New Community Instrument<sup>8</sup> for borrowing and lending to finance projects deemed eligible by the Commission of the European Communities. Similarly, the EIB acts as agent in appraising and administering Euratom loans<sup>9</sup> approved by the Commission.

The Bank may, by way of exception and authorized unanimously by the Board of Governors on a proposal of the Board of Directors, grant loans for investment projects which will be carried out, in whole or in part, outside the European Territories of the Member States<sup>10</sup>. In addition to loans from its own resources, the EIB furnishes most of these projects in non-member countries with concessionary aid drawn from budgetary funds and managed on behalf of the Community<sup>11</sup>.

5) *Id. at. 193-194.*

6) *See, Articles 3 (j), 129 and 130 of the EEC Treaty.*

7) *Art. 130 of the EEC Treaty and Art. 18(1) of the Protocol on the Statute of the European Investment Bank-hereinafter referred to as "the EIB Statute"*

8) *These are the loans to promote investment within the Community in the energy, infrastructure and industrial sectors, thereby reducing regional disparities and the level of unemployment. They are financed solely by borrowings contracted by the Commission on behalf of the Community. See, Special Report of the Court of Auditors on Loans and Borrowings, O. J. of the EC, No. C 319/3 V, 25, 6 December 1982.*

9) *These are granted in order to develop nuclear facilities for the production of electricity. They are also financed solely by borrowings contracted by the Commission on behalf of the Community. See, supra note 8.*

10) *Art. 18 (1) of the EIB Statute.*

11) *EIB, Annual Report 1982 - Annex.*

### 1. 3. Administration

The Bank is directed and managed by a Board of Governors, a Board of Directors and a Management Committee<sup>12</sup>.

The Board of Governors consists of the Ministers designated by the Member States. It lays down general directives for the credit policy of the Bank and ensures that these directives are implemented. Except as otherwise provided in the Statute, decisions of the Board of Governors shall be taken by a majority of its members<sup>13</sup>.

The Board of Directors consists of 27 directors and 13 alternates. The directors and alternates are appointed by the Board of Governors. Their appointments are renewable. Members of the Board of Directors are chosen among persons whose independence and competence are beyond doubt. They are responsible only to the Bank. Each director has one vote on the Board of Directors. Save as otherwise provided, decisions of the Board of Directors are taken by a simple majority of the members entitled to vote. It has the sole power to take decisions in respect of granting loans and guarantees and raising loans. At the end of each financial year it submits a report to the Board of Governors and publishes it upon approval<sup>14</sup>.

The Management Committee of the EIB consists of a President and five Vice-Presidents. They are appointed by the Board of Governors on a proposal from the Board of Directors. The Committee is responsible for the current business of the Bank under the authority of the President and the supervision of the Board of Directors. It acts by a majority when delivering opinions on proposals for raising loans or granting loans and guarantees<sup>15</sup>.

## 2. LOAN POLICY AND COORDINATION WITH STATES AND OTHER EEC INSTITUTIONS

### 2. 1. Loan Policy

#### 2. 1. 1. Basic Distinctions

The EIB finances infrastructure and investment in all the sectors of the economy;

while energy and the manufacturing industry are prime beneficiaries, agricultural improvement projects and services are not ignored. Loans can be divided into three categories: direct individual loans, indirect individual loans and global loans. Direct individual loans are granted directly to the firm or public authority which has submitted the project to be financed. Indirect individual loans are granted to a specialized financial institution which is responsible for forwarding the funds in order to finance a specific project submitted by a firm or public authority. Global loans are granted to financial intermediaries which allocate these sums, after approval of the Bank, to a number of small and medium-sized investments<sup>16</sup>.

#### 2. 1. 2. General Directives For Granting Of Loans

The General Directives<sup>17</sup>, concerning the loan policy of the EIB, were laid down on December 4, 1958 by the Board of Governors according to the EIB Statute<sup>18</sup>. Under the relevant provision of the Statute it falls on the Board of Governors to lay these general directives down, with particular reference to the objectives to be pursued as progress is made in the attainment of the Common Market. The General Directives<sup>19</sup> state *inter alia* the following:

i - a large part of the resources shall be devoted to the financing of projects likely

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- 12) Art. 8 of the EIB Statute.  
 13) Art. 9 and Art. 10 of the EIB Statute.  
 14) Art. 11 and Art. 12 of the EIB Statute.  
 15) Art. 13 of the EIB Statute.  
 16) *Grants and Loans from the European Community, European Documentation Manuscript completed in August 1981, p. 74.*  
 17) *General Directives for the Credit Policy of the European Investment Bank, EIB Statute and other provisions, EIB publication, Texts updated by 31 December 1981, p. 32-33.*  
 18) Art. 9 (2) of the EIB Statute.  
 19) See also Van Den HOUTEN, *European Investment Bank, in RUBIN (ed.) Foreign Development Lending - Legal Aspects. Leiden, Sijthoff, 1971 p. 42.*

to contribute to the furtherance of less developed regions<sup>20</sup>;

ii - projects of common interest to several member countries shall be financed and particular schemes shall be supported which are likely to contribute to a furtherance of markets and the integration of Member Countries' markets and economies<sup>21</sup>;

iii - the Bank shall participate in the financing of schemes for modernizing or converting enterprises or the creation of new activities furthering the progressive establishment of the Common Market, as soon as the repercussions of the development of this Market on the situation of the enterprises in question can be foreseen with sufficient accuracy;

iv - the granting of loans shall be conditional upon the mobilization of other sources of finance, whether provided by the borrower or by third parties;

v - particular consideration shall be given to projects which involve the pooling of capital from a number of Community countries;

vi - operations shall be conducted in a manner complying with the general objective of fostering the progressive unification of the Member Countries' capital markets.

## 2.2. Coordination With States And Other EEC Institutions

Applications for the EIB loans and guarantees may be made either through the Commission or through the Member State in whose territory the project will be carried out<sup>22</sup>.

In order to ensure that the projects financed by the Bank are in harmony with the economic policy of the State in which the project will be carried out, as well as with that of the European Economic Community, the Statute of the EIB and the Association Agreements with States call for the approval of each loan transaction by the State concerned and a favorable opinion of the Commission of European Communities. Without the consent of the State the project shall not be financed. In case of a negative opinion of the Commission, the granting of the loan

is subordinated to a unanimous vote of the Board of Directors<sup>23</sup>.

The Bank is an autonomous body, however cooperation with the Commission is of fundamental importance. The Commission nominates one of the members of the Board of Directors and this member explains to fellow Directors the Commission's point of view on any subject under discussion<sup>24</sup>. In so far as the EIB uses budget resources which is administered by the Bank on the authorization of the EEC, the Commission retains entire responsibility for their implementation<sup>25</sup>.

In a report drawn up on behalf of the Committee on Budgetary Control of European Parliament it has been stated that the EIB, being the most important Community body for long-term financing of directly or indirectly productive investments, enjoys autonomous status with its own decision making and supervisory bodies. However it is found desirable that it should maintain relations with the European Parliament that would provide the latter with an understanding of the range of its activities and a clear idea of the way in which it carries out its role as a Community institution. Since, by providing finance the EIB contributes to the achievement of Community's economic objectives, the Parliament considers it its duty to make a political assessment of the results of its work. The Bank's statutory position means that the Commission or the Council intervenes as intermediary in re-

20) *The areas which qualify for regional development financing are basically those eligible for financial aid under national regional aid schemes, see, Some Questions and Answers, EIB Information, no. 22, July 1980.*

21) *Projects of common interest are those involving industrial, technical and financial cooperation between enterprises from different Member Countries, see, Id.*

22) *Art. 21 of the EIB Statute.*

23) *Van Den HOUTEN, supra note 19 at 43.*

24) *EIB Information, supra note 20.*

25) *See supra footnotes 8 and 9.*

lations between the Parliament and the EIB<sup>26</sup>.

### 3. INTERNATIONAL PERSONALITY

#### 3.1. In General

An argument suggests that the international personality of an international organization carries with it three main features, namely, the possession of international rights and duties; the capacity to create international rights and obligations, and the capacity to bring an international claim. The same argument defines an international organization as a body created by intergovernmental agreement to carry out a public international task<sup>27</sup>. In addition to these statements, a more recent approach, emphasizing it more strongly, shares two additional criteria with the above mentioned argument: Provision of the international personality by the drafters in the constitutive instrument and the impossibility to explain the legal nature of the acts of the international body other than through its possession of a measure of international personality<sup>28</sup>.

Moving from these two approaches, I can sum up the factors significant of the international personality of an international body as follows: Possessing and creating international rights and duties; the only reasonable explanation of the rights and duties created being the possession of a measure of international personality and the capacity to bring an international claim against other international persons..

It has been acknowledged that the constituent instrument of an organization failing to accord international personality *expressis verbis* does not necessarily mean the organization lacks it<sup>29</sup>.

#### 3.2. International Personality of the EIB

At this point it is necessary to test the international personality of the EIB against the criteria mentioned in the above subsection.

Unlike the Central American Bank for Economic Integration and the African Deve-

lopment Bank, the Statute of the Bank does not provide for an explicit International legal personality<sup>30</sup>. Nonetheless the EEC Treaty provides in Art. 129 (1) that the Bank shall have legal personality. The EIB Statute itself also indicates in Art. 28(1) that the Bank shall enjoy the most extensive legal capacity accorded to legal persons under the laws of the Member States. These two provisions, however, do only show that the EIB has a legal personality on the municipal plane because, where the grant of legal personality is by its terms limited to the territories of members, such a grant must be taken as evidence of conferring legal personality only on municipal plane<sup>31</sup>. Furthermore a charter grant of legal personality to an international body does not necessarily carry with it a grant of international personality; but the fact that a charter confers only municipal legal personality does not mean that the organization also lacks international personality. Such an international personality may be implied from the character of the organization itself as described by its charter<sup>32</sup>. Hence, it is necessary to consult other provisions of the EEC Treaty and particularly the EIB Statute to see whether the EIB has international personality.

Art. 4 of the EEC Treaty creates four institutions, namely, an Assembly, a Council, a Commission, and a Court of Justice for the achievement of the tasks entrusted to the Community. The EIB is not enumerated as

26) *Report of the Budgetary Committee of the European Parliament written by Mr. COUSTE on relations between the European Parliament and the EIB. European Parliament Working Documents 1982-1983, 25 February 1983, p. 7.*

27) BROCHES, *International Legal Aspects of the Operations of the World Bank. (98-III) Recueil des Cours, p. 318-319 (1959).*

28) SYZ, *International Development Banks. Dobbs Ferry, N. Y. Oceana Publications, 1974, p. 66.*

29) BROCHES, *supra note 27 at 324-325*

30) SYZ, *supra note 28 at 71.*

31) BROCHES, *supra note 27 at 326.*

32) *Id.*

an institution. In its two relevant decisions the Court of Justice gave the Bank a quasi-institutional status but did not explicitly acknowledge that it is an institution in the real sense<sup>33</sup>. Indeed the EEC Treaty gives the Bank a very wide autonomy with respect to the other institutions of the EEC aiming to ease the difficulties it would have faced in raising capital on the markets because of a political character<sup>34</sup>.

As an international autonomous body the EIB has duties and rights. Its main task is to contribute to the balanced development of the Community by granting loans and guarantees. In order to fulfill this task it has some rights given by its Statute and it can create some obligations for its members. The Board of Governors of the EIB may, acting unanimously, decide to increase the subscribed capital<sup>35</sup>; they can fix the percentage to be paid up and the arrangements for payment<sup>36</sup>; the Bank, under certain circumstances, by the action of its Board of Governors, may require its members to make special loans to this institution<sup>37</sup>; it shall cooperate and establish all appropriate contacts with other international organizations and with countries<sup>38</sup>. It is without any doubt that this last obligation can operate only on international plane and as between parties possessing international personality. Besides, it has been provided that the Management Committee and the staff of the Bank shall be responsible only to the Bank and shall be completely independent in the performance of their duties<sup>39</sup>. Moreover in Art. 28 of the Treaty Establishing A Single Council and Single Commission of the European Communities<sup>40</sup> it has been stated that the EIB shall also enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks. Additionally, according to the Protocol on the Privileges and Immunities of the European Communities, the premises, buildings, and archives of the EIB shall be inviolable. Its assets, revenues and other property shall be exempt from all direct taxes. It shall also be exempt from all customs duties<sup>41</sup>. Finally, the Board

of Directors of the EIB may, under the EEC Treaty<sup>42</sup>, bring claims against the Member States before the Court of Justice of the Community.

As a result, I believe, the foregoing is enough to show that the EEC Treaty, the EIB Statute and other relevant instruments endows the Bank with a separate international personality<sup>43</sup>.

#### 4 LEGAL ASPECTS OF LENDING OPERATIONS

##### 4.1. Legal Nature Of Agreements, Applicable Law And Some Jurisdictional Considerations

It has been stated that while subjects of international law can, in their relations among themselves, create rights and obligations under international law, they need not do so. They may, if they choose, subject their agreements to municipal law<sup>44</sup>. This brings us to the practice of the EIB. Although the loan agreements between the Bank and its borrowers are not made available to the public, the practice of the Bank can be pointed up by the materials pertaining to it and which are available<sup>45</sup>.

The loan agreements of the European Investment Bank are concluded on a private law basis by the free choice of the parties. These agreements are purely private law

33) *Cases 27/59 and 39/59, (1960) ECR 391-392; and case 110/75 (1976-5) ECR 955.*

34) *LICARDI, supra note 4 at 194.*

35) *Art. 4 (3) of the EIB Statute.*

36) *Id. Art. 5 (2).*

37) *Id. Art. 6 (1).*

38) *Id. Art. 16.*

39) *Id. Art. 13 (8).*

40) *Treaty of 8 April 1965.*

41) *EIB, Statute and other provisions, EIB publication, p. 30-31.*

42) *See, Art. 180 (a) of the Treaty.*

43) *For the same view, see BROCHES, supra note 27 at 355 and SYZ, supra note 28 at 70.*

44) *BROCHES, supra note 27 at 339.*

45) *DILLENBECK, The European Investment Bank, 17 The Business Lawyer 581-582 (1961-62).*

contracts and their registration with the Secretariat of the United Nations can not be considered. The law which governs these contracts is the national law<sup>46</sup>. This is a point which distinguishes the EIB from i. e. the World Bank since the agreements between the World Bank and borrowing and guaranteeing States are governed by international law. These agreements are submitted to the United Nations Secretariat for registration<sup>47</sup>. The reason of this difference between the practices of the two institutions finds its expression in the characters of the Member States. The members of the EIB consist of a considerably homogenous group of States with similar legal systems and considerable experience in international financial field. The World Bank, however, is a universal institution. Its membership includes States with the most diverse, political, cultural, financial and legal backgrounds and traditions. In these circumstances a single legal standard to govern the Bank's loan and guarantee agreements was an obvious need and this was found to be the international law<sup>48</sup>.

Concerning the applicable law, the Statute of the EIB does not contain a specific provision and the Bank is free to choose the law it deems appropriate<sup>49</sup>. In an answer to a written question submitted to the Commission of European Communities the EIB explained that it distinguished the loan contracts relating to projects being carried out in one of the Member States and in an Associated State<sup>50</sup>. In the case of a Member State the practice of the EIB is to choose the law of the borrower as the applicable law. Choosing one single national law the Bank avoids any discrimination between the different borrowers and the different national laws of the Member States<sup>51</sup>. In the case of Associated Countries the Bank chooses the law of a third country, neutral to both parties. This is the Swiss law in view of the rich experience of its application in the field of international financial transactions<sup>52</sup>.

In any dispute arising between the EIB and its creditors, debtors or any other person, the Bank accepts the competence of the muni-

cipal courts of the country in question. For the projects carried out in an Associated State, the jurisdiction of the Swiss courts, namely the Courts of the Canton of Zurich is accepted<sup>53</sup>.

When there is a dispute arising under the EIB Statute, either between a Member State and the Bank; between the Board of Governors and a Member State, the Commission or the Board of Directors; or between the Board of Directors and a Member State or Commission, the Court of Justice of the EEC is competent<sup>54</sup>. This procedure is greatly different from all other similar development banks. As contrasted to the organs empowered to give authoritative interpretations of the constitutive instruments of these institutions, the Court of Justice can be seen a truly judicial organ<sup>55</sup>.

#### 4. 2. Securities

It is the lender's interest to be repaid and the practice of borrowers is to give some sort of security to lenders in order to obtain financing on particularly favourable terms. Guarantees are one type of these securities<sup>56</sup> and are specifically stipulated in the EIB Statute<sup>57</sup>. Accordingly, the Bank shall make the granting of a loan to an enterprise

46) *Van Den HOUTEN*, *supra* note 19 at 43.

47) *BROCHES* and *SELLA*, *International Bank for Reconstruction and Development*, in *RUBIN* (ed.), *see supra* note 19 at 82.

48) *BROCHES*, *supra* note 27 at 356.

49) *HOUTEN*, *supra* note 19 at 44.

50) *Written Question No. 288/73*, *O. J. of EC*, V. 16 No. C 106, 6 December 1973, p. 14.

51) *Van Den HOUTEN*, *supra* note 19 at 44.

52) *Id.*

53) *Id.* at 45.

54) *The EEC Treaty Art. 180.*

55) *For further information see, SYZ, supra* note 28 at 83-91.

56) *For further information see, DELAUME, Legal Aspects of International Lending and Economic Development Financing, 1967, at 215 ff.*

57) *Art. 18 (3) of the Statute.*

or to a body other than a Member State conditional either on a guarantee from the Member State in whose territory the project will be carried out or on other adequate securities<sup>58</sup>. It would seem, therefore, that in the EIB context a government guarantee is to be regarded as only one form of security, which may be requested in lieu of, or in addition to, others such as mortgages or pledges<sup>59</sup>. This is contrasting with the World Bank's lending in which a government guarantee is a requirement in all loans which are not made directly to member governments<sup>60</sup>.

Security other than in the form of guarantees is only exceptionally stipulated in the EIB's practice. Nonetheless, in order to avoid that other lenders would be privileged the Bank inserts in its contracts a *pari passu* clause or, in other words, a negative pledge clause, providing that the borrower shall not create new liens or charges on its assets without giving the Bank the right of sharing equally and ratably in such collateral. This *pari passu* clause however, does not work automatically and the Bank has to demand equivalent collateral. Finally, in some cases a quasi-security is constituted by stipulating that the receipts of the project should be set aside on a special account so that the funds are available for the payments due<sup>61</sup>.

The EIB itself may also guarantee loans contracted by public or private enterprises or other bodies for the purpose of carrying out projects which contribute to the economic

development of regions in difficulty, which are of common interest to several Member States or the Community as a whole and which involve, in certain cases, modernization or conversion of enterprises or the creation of new activities<sup>62</sup>.

## CONCLUSION

The autonomy given to the EIB and its international personality are two positive factors improving its independence. These features furnish the Bank with a *sui generis* legal structure which makes a large degree of flexibility possible in its operations. This structure gives the EIB a considerable liberty from other institutions of the EEC. It seems the Bank is taking benefit of this, because the Annual Reports being published reveal a continuous enlargement of capital resources and financial activities as well as an increasing interest in different regions of the World. This enlargement in the capacities of the EIB would consequently provide a more concentration of the resources of larger development Banks, such as the World Bank, in the least developed Third World countries.

58) *Van Den HOUTEN*, *supra* note 19 at 45.

59) *Other examples may be the guarantee of a first-class Bank or the parent company of the borrower.*

60) *BROCHES*, *supra* note 27 at 355-356.

61) *Van Den HOUTEN*, *supra* note 19 at 45.

62) *Art. 18 (4) of the EIB Statute.*