Counter Balance Challenging Public Investment Banks

CEE bankwatch network

ClientEarth

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Complaint to the European Investment Bank's Complaint Mechanism - Non-compliance of the European Investment Bank's Transparency Policy with EU and international law on access to information

1. In March 2015 the European Investment Bank (the Bank) published a new Transparency Policy (TP), replacing the version that had existed since 2010. This complaint deals with the non-compliance of the new TP with EU and international laws on access to information, namely with the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, Regulation 1367/2006[1] (the "Aarhus Regulation") and Regulation 1049/2001 (the "Regulation")[2]. Some information that should be publicly accessible is still withheld by the Bank and as a result of the new policy will continue to be or if available on request is not actively disseminated on the public register as explained in section 1.2.2.

1 Arguments

1.1 Applicability of Regulation No 1049/2001/EC, Regulation 1367/2006/EC and the Aarhus Convention to the EIB (Article 3.7, 3.8 and 5.1)

2. Article 3.7 of the Bank's Transparency Policy rightly recalls that Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) provides for the right of public access to documents and that the general principles and limits governing this right are contained in Regulation (EC) No 1049/2001. Article 3.8 also states that according to Article 15(3) TFEU, the Regulation only applies to the EIB when exercising its administrative tasks. However, the EIB makes an error in law when it states that "*the EIB understands that the intention of this provision is that the EIB itself should determine, in a way consistent with the principles of openness, good governance and participation, how the general principles and limits governing the right of public access should apply in relation to its specific functions as a bank*. *The EIB does this through the policy and specifically through the applications of the exceptions to access set out in Article 5 below.*"

3. It is not for the Bank itself to determine the extent to which Regulation 1049/2001 applies to the documents in its possession. Public law classes the activities exercised by public authorities either as legislative, administrative or judicial tasks. The Bank does not carry out any legislative or judicial activities. The Bank's tasks are therefore administrative in nature. This particularly applies to the lending activities of the Bank. Regulation 1049/2001 applies accordingly. However, that does not prevent some of the information on the activities of the Bank from being confidential, provided it falls under the scope of one of the exceptions

[1] Regulation (EC) 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.

[2] Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament Council and Commission documents.

provided either by Regulation 1049/2001 or by the Aarhus Convention and Aarhus Regulation.

4. This distinction is recognised by the Court of Justice of the European Union (CJEU) in its case law, which also demonstrates that administrative functions do not only cover organisational tasks but on the contrary refer to very substantial actions. For example, in case T-111/07, the General Court considered that when the Commission acts as a control body in proceedings related to merger investigations under Regulation 139/2004, it does so as an administrative authority[3]. Similarly, in case C-139/07 P, the Court of Justice held that "*documents relating to procedures for reviewing state aid, such as those requested by TGI, fall within the framework of administrative functions specifically allocated to the said institutions by Article 88 EC*"[4]. An environmental impact assessment is also considered to be an administrative procedure.

5. The wide range of activities that fall into the category of administrative tasks is also reflected in the wording of the Aarhus Regulation. Article 2(2) defines "administrative acts" as "*any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects*". The Regulation also refers to "administrative omissions" as the failure of a Community institution to adopt an administrative act. The Regulation also refers to the capacity of the Commission to act as "an administrative review body", such as under competition rules and infringement proceedings, and includes Ombudsman and OLAF proceedings under that definition.

6. It follows that Regulation 1049/2001 applies to the lending activities of the EIB.

7. Articles 3.7 and 3.8 of the TP do not mention the Aarhus Convention or the Aarhus Regulation. The Aarhus Convention is, however, mentioned in Article 5.1, where it is said that the applicable EIB rules are "without prejudice" to the rights which individuals and NGOs derive from the Aarhus Convention. The European Union (EU) ratified the Aarhus Convention with Decision 2005/370/EC[5]. According to Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*". The Aarhus Convention therefore became, with the adoption of Decision 2005/370/EC, an integral part of the EU legal order[6].

8. According to the European Court of Justice in case C-344/04, "*in accordance with the Court's case-law, those agreements prevail over provisions of secondary Community legislation (case C-61/94 Commission v. Germany (1996) ECR I-3989 paragraph 52; C-286/02 Bello Fratelli (2004) ECR I-3465 paragraph 33).*" [7] With regard to EU institutions and bodies, the Convention was implemented by the Aarhus Regulation, which applies to the Bank.

9. It follows from this that the Aarhus Convention prevails over EU regulations and directives and therefore over Regulation 1049/2001 and the Aarhus Regulation, but also over EU

[3] T-111/07, *Agrofert Holding a.s.* v *Commission*, 7 July 2010, ECLI:EU:T:2010:285, paragraphs 93 and 129.
[4] C-139/07 P, *European Commission v Technische Glaswerke Ilmenau GmbH*, ECLI:EU:C:2010:376, paragraph 60.
[5] Decision 2005/370/EC, OJ EU 2005, L 125 p.1.
[6] Case 181/73 Haegeman [1974] ECR 449, paragraph 5; Case 12/86 Demirel [1987] ECR 3719, paragraph 7; Case C-344/04, IATA and ELFA, [2006] ECR I-403, paragraph 36.
[7] Case C-344/04, IATA and ELFA, [2006] ECR I-403, paragraph 35.

institutions' and bodies' policies including the Bank's. The fundamental right of access to information in environmental matters, granted by the Aarhus Convention and its ratification by the EU, cannot be restricted by EU secondary legislation and EU bodies' policies.

10. Moreover, the Convention's implementation guide states that "(i) national legislation should set out a framework for the process of answering information requests in accordance with the Convention and that (ii) national legislation may limit access to information in accordance with the optional exceptions outlined in Article 4, paragraphs 3 and 4." The national framework established at national level, in the present case at EU level, may therefore only reproduce the limits provided for by the Convention, "*Paragraphs 3 and 4 [of Article 4 of the Convention] outline the only circumstances under which exceptions to the general rule apply*".[8] Therefore, the TP should comply with Regulation 1049/2001 and Regulation 1367/2006, as interpreted by the Courts of the European Union, and with the Aarhus Convention, in respect of all lending information held by the Bank. Additionally, for the sake of coherence and consistency, the Aarhus Convention and Aarhus Regulation should be mentioned under Section 3 "The institutional Framework".

1.2 First ground: Breach of duty to provide access to documents through a public register (Article 4 TP)

1.2.1 Duty to publish the location of documents in the public register (Articles 4.1 - 4.4)

11. Article 4.4 of the TP states that "*[w]ithin the limits imposed by applicable laws and regulations, the final determination as to what information may be released to the public shall rest with the Bank who shall also decide which documents to publish, through its website and/or paper form, and which documents are available on requests only*".

12. Article 11 of Regulation 1049/2001 obliges the institutions to "*provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay*." Similarly, Articles 5(2) and (3) of the Aarhus Convention, and Article 4 of the Aarhus Regulation provide for the active dissemination of environmental information through electronic registers.

13. It is true that the Bank has a margin of discretion in deciding which documents will be published on the public register and those that will be made publicly accessible on request. Nevertheless, Article 12(4) of Regulation 1049/2001 contains an obligation to publish the location of documents held by the Bank, even if the contents of the documents are not published on the register. Article 5(2)(a) of the Aarhus Convention also provides that each Party shall provide "*sufficient information to the public about the type and scope of environmental information held by the relevant public authorities*". The purpose of the register is also to inform the public on the existence of information whether the institutions intend to publish it or not. Without knowing what information exists, the public cannot ask to have access to it. Neither the TP, nor the Bank's current practice concerning the public register, fulfil this obligation.

[8] The Aarhus Convention, an implementation guide, ibid, p.53

1.2.2 Duty to publish all environmental information relevant to the Bank's functions on the public register

14. The Bank's public register was set up in January 2014. According to the Bank's web site, the following documents are supposed to be published on the register[9]:

- EIB Environmental and Social Data Sheets (ESDS), which summarise the EIB's environmental and social appraisal of individual projects.
- EIB Environmental and Social Completion Sheets (ESCS), which summarise the Bank's assessment of environmental and social issues at project completion stage.
- Non-Technical Summaries (NTS) of Environmental Impact Assessments (EIA) carried out by the project promoters and published.
- The equivalent of the NTS (for projects outside the EU), carried out by the project promoters and published on the Register during project appraisal when received by the EIB.
- Environmental and Social Impact Study/Statement (EIS) (for projects outside the EU), carried out by the project promoters.

15. It should be noted that not all of these documents are in fact published on the register. For example, we have been unable to locate one single Environmental and Social Completion Sheet on the register. We provide the following examples as evidence of the documents that are missing:

- MHP Agri Food Project: only the Environmental and Social Impact Assessment (in the Ukranian language, provided by the borrower and produced for the purpose of obtaining development consent at national level) can be found on the register[10]. The ESDS can also be found on the project page. However, we know that the following documents exist but have not been published anywhere: EIB translations of parts of the EIB, the Results and Measurement Framework and the Environmental Appraisal.
- ETAP South Tunisian Gas Project: The EIAs for different components of the project and the ESDS can be found on the register[11]. We know that the following documents exist but have not been published: the management proposal for the Board, including the part dealing with environmental issues, the Environmental Summary Sheet and the Results and Measurement Framework.
- Revithoussa LNG terminal extension: The ESDS and the EIAS is available on the register[12]. We know that an EIB Environmental and Social Assessment exists but has not been published.
- AUTOSTRADA BREBEMI PPP: the ESDS is available on the register and the Non-Technical Summary of the EIA is available on the project page[13]. We know that the EIB Environmental and Social Assessment exists but has not been published.

[9] http://www.eib.org/infocentre/register/faq/index.htm

[10] http://www.eib.org/infocentre/register/all/56551882.htm

[11] http://www.eib.org/projects/pipeline/2012/20120053.htm

[12] http://www.eib.org/projects/pipeline/2011/20110269.htm

[13] http://www.eib.org/projects/pipeline/2011/20110555.htm

16. This means that the register does not hold any of the documents drawn up by the Bank for the purpose of decision-making, monitoring and project evaluation. The Environmental and Social Data Sheets are created specifically for the purpose of publication on the register. They are not documents used in the decision-making process, and they contain only the environmental information gathered during the appraisal process, which is selected by EIB staff for the purpose of publication. The documents placed on the register are therefore redacted and summarised versions of the documents held by the Bank. This practice does not allow the public to know the information that is in the Bank's possession. It also prevents public scrutiny on the exceptions to the right of access provided under Regulation 1049/2001 and the Aarhus Regulation relied on by the Bank to withhold the relevant information.

17. As a result, the EIB has not entirely fulfilled its commitment made to the European Ombudsman to actively disseminate the content of documents related to the Project such as the Value Added Sheet, the Environmental Appraisal Report, the Environmental Assessment Forms D1/D2 and the environmental conditions included in the Finance Contract.[14] The Bank had also committed to provide additional environmental information in the event of divergence between the environmental clauses of a specific finance contract and the Model Finance contract.[15]

18. Therefore, both the EIB's practice and the TP still fail to fulfil the specific requirements in Article 4 of the Aarhus Regulation, which provides that environmental information "relevant to their functions" [of EU institutions] shall be organised "with a view to its active and systematic dissemination to the public". This wording is very strong and implies a stricter obligation than under Regulation 1049/2001 and therefore reduces the margin of manoeuvre of the Bank. By requiring the institutions to carry out "systematic dissemination" of the information they hold, the regulation obliges them to publish most if not all environmental information they are willing to disclose. The list of information provided by Article 4(2) of the Aarhus Regulation is not exhaustive and includes "*data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment*", as well as "*authorisations with a significant impact on the environment, and environmental agreements*" and "*environmental impact studies and risk assessments concerning environmental elements*".

19. In the context of the Bank's activities, this should at the very least include the following project documents being published on a consistent basis (most of these documents are referred to in the Bank's Environmental and Social Handbook, Version 9.0 of 02/12/2013 but are not available on the public register):

- Project Summaries
- Environmental Impact Assessments (EIA) of P
- projects, including Non-Technical Summaries (NTS) or Environmental Impact Statements (EIS)[16]

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[14] Decision of the European Ombudsman closing her own-initiative inquiry OI/3/2013 concerning the European Investment Bank, Decision of 25 June 2014, para.44.

[15] para. 45

[16] The findings of the Aarhus Convention Compliance Committee (e.g ACCC/C/2005/15 ECE/MP.PP/2008/5/Add.7 16 April 2008 and ACCC/C/2004/3 and ACCC/S/2004/1;

- EIB’s environmental and social assessments of projects, including Environmental and Social Data Sheets, Overall Environmental and Social Assessment Forms D1/2/3, Environmental and Social Impact Rating and GHG Footprint Assessment Form
- Fiches submitted by the intermediary of Mid-Cap Loans, which includes environmental and social information
- The results of the environmental and social screening carried out for all schemes under Mid-Cap Loans, known at the time of pre-appraisal. The results of these assessments of the intermediary of Mid-Cap loans focus on the capacity and capability of the intermediary to manage the environmental and social aspects, including impacts and risks, arising from its operations
- Environmental and social reviews of particular Global Loan operations, including the assessment of the environmental social risk management capacity of the intermediary
- Environmental and social due diligence of particular fund operations, including the assessment of the environmental and social risk management capacity of the promoter and/or fund manager
- Stakeholder Engagement Plans
- Declaration Forms for Sites of Natural Conservation (forms A and B)
- The proposals of the Management Committee to the Board of Directors
- The part of project contracts that refer to environmental and social conditions applied to the projects
- Reports from monitoring missions
- Assessments, reviews and reports commissioned by the EIB with third parties regarding the environmental aspects of the Bank's projects
- Project completion reports and project evaluation reports
- Justification for any deviation from EU implementation standards for projects conducted outside of the EU (a document produced pursuant to p.40 of the Bank's statement on Environmental and Social Principles and Standards (ESPS))
- Methodologies used for evaluation, such as the Result Measurement Framework and Three-pillars assessment (3PA);
- The contact details of the relevant persons at the EIB.

ECE/MP.PP/C.1/2005/2Add.3,14 March 2005) state clearly that Environmental Impact Assessments must be published in their entirety, including specific methodologies of assessment and modelling techniques used in their preparation. This case, in which Romania and Ukraine were found to be in breach of the Convention for introducing a general rule exempting full EIA studies from public disclosure, also highlights that the EU's Member States cannot always be relied on to publish the necessary project information. This is all the more reason for the Bank to make this information available on a consistent basis for the projects it finances. The Committee (ACCC/C/2004/3 and ACCC/S/2004/1, para. 31) confirmed that "*public authorities should possess information relevant to its functions, including that on which they base their decisions, in accordance with article 5, paragraph 1, and should make it available to the public, subject to exemptions specified in article 4, paragraphs 3 and 4. The issue of ownership is not of relevance in this matter, as information is used in a decision-making by a public authority and should be provided to it for that purpose by the developer. The fact that such misinterpretation took place again points to a lack of clear regulatory requirements in the national legislation*".

20. Under Article 19 of the Bank's statute, the Bank must provide an opinion on all financing applications to the Commission and to the Member State on whose territory the investment would be carried out. Where the financing application is made directly to the Commission or to the Member State concerned, it is the Commission or the Member State that is responsible for providing an opinion. These opinions should also be available to the public on the register.

1.2.3 Insufficient dissemination of project information (Article 4.6)

21. Article 4.6 states that "*the Bank shall publish project summaries of all investment projects at least 3 weeks before the project is considered for approval by the EIB's Board of Directors. However, a limited number of projects are not published before Board approval and, in some cases, not before loan signature to protect justified interests based on the exceptions to disclosure laid down in this Policy*".

22. This amounts to a presumption of confidentiality in relation to certain, non-specified projects. The Bank's reference to "justified interests" is ambiguous; we do not even know the grounds on which the presumption is deemed to exist. In addition, it is unclear whether the project summaries that are not published will be available upon request. It seems that the information will not be disclosed on request. If this were the case, this provision would not comply with the test set out by the case-law according to which an EU institution can rely on an exception provided by Regulation 1049/2001 and has to demonstrate that access would specifically and effectively undermine the protected public interest, and that the risk is foreseeable and not purely hypothetical[17]. The institution must also demonstrate the lack of an overriding public interest in disclosure. Article 4.6, in being too broad and leaving too much discretion to the EIB with regard to the disclosure and publication of information, circumvents the provisions of Regulation 1049/2001 but also the requirement provided under Article 1(a) of the Regulation to "ensure the widest possible access to documents".

1.3 Second ground: Exceptions from the presumption of disclosure upon request

1.3.1 Differentiation between the exceptions applicable to requests for environmental information and those for non-environmental information

23. As pointed out in section 1.1 above, the EIB is bound by Regulation 1049/2001, Regulation 1367/2006 and the Aarhus Convention. Therefore, it can only apply exceptions to the presumption of disclosure to the extent allowed by the Convention and the Regulations.

24. Therefore, the TP should differentiate between environmental information, which is subject to the specific regime provided for in the Aarhus Convention and the Aarhus Regulation, and non-environmental information.

[17] C-39/05P, *Sweden and Turco v Council*, ECLI:EU:C:2008:374

25. Regulation 1049/2001 provides for “absolute” grounds for refusal. Article 4(1) and 4(2) provide that “[t]he institutions *shall* refuse access…” with regard to several grounds, whereas Articles 4(3) and 4(4) of the Aarhus Convention state only that “a request for environmental information *may* be refused if…” one of the conditions listed in the paragraph is fulfilled. In other words, where Regulation 1049/2001 sets out an obligation to refuse access, the Convention only provides the possibility of doing so, allowing public authorities a margin of discretion when it comes to environmental information. The distinction between the obligation and the mere possibility of refusing access is not correctly transposed in EU law which results in more environmental information being kept confidential. The difference may have significant repercussions on the way access to information requests are dealt with.

26. Furthermore, the exception in Article 5.4(a) of the TP for information the disclosure of which would undermine the protection of "*financial, monetary or economic policy of the EU, its institutions and bodies or a member State*" does not exist in the Aarhus Convention. Thus, this exception should not apply to environmental information in accordance with the arguments provided in paragraphs 8 to 10 above.

1.3.2 Confidentiality agreements (Article 5.5)

27. The first indent of Article 5.5 of the TP states that "*access to information/documents shall also be refused where disclosure would undermine the protection of: commercial interests of a natural or legal person*". A footnote then states that "*the term 'commercial interest' covers, but is not limited, to cases where the Bank concluded a confidentiality agreement. Also commercial interests can be protected even after the expiration of the confidentiality agreement*." The Aarhus Convention Compliance Committee has held that finance contracts concluded by the Bank may contain environmental information falling under the scope of the Convention. The Committee held that:

28. "The argument of the Party concerned that almost none of the finance contract constitutes environmental information in the sense of the Convention appears to be based on a narrow interpretation of the definition of "environmental information". That definition includes "factors... and activities or measures ... affecting or likely to affect the elements of the environment..." A list of examples of types of "activities or measures" that fall within the definition ("administrative measures, environmental agreements, policies, legislation, plans and programmes") is preceded by the word "including", implying that this is a non-exhaustive list and recognizing that other types of activities or measures that affect or are likely to affect the environment are covered by the definition. Thus, financing agreements, even though not listed explicitly in the definition, may sometimes amount to "measures... that affect or are likely to affect the elements of the environment". For example, if a financing agreement deals with specific measures concerning the environment, such as the protection of a natural site, it is to be seen as containing environmental information. Therefore; whether the provisions of a financing agreement are to be regarded as environmental information cannot be decided in a general manner, but has to be determined on a case-by-case basis;..."[18] Agreements cannot therefore be rubber stamped "confidentiality agreements" and be withheld from the public in their entirety.

[18] ACCC/C/2007/21 Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Union adopted by the Compliance Committee on 3 April 2009, para.30(b).

29. The Bank must also carry out a case specific examination to be argued on its merits, in accordance with the CJEU's case law, which takes into account whether the risk of a protected interest being undermined by disclosure is reasonably foreseeable and not purely hypothetical[19]. It must also be demonstrated that the interest will be specifically and effectively undermined[20].

30. Article 5.5 therefore provides far too much discretion to the Bank to be in conformity with the relevant legislative framework.

1.3.3 Presumption of confidentiality regarding investigations (Article 5.5)

31. The exception on "inspections, audits and compliance and due diligence" provided in Article 5.5 of the TP is much too broad for the following reasons. First, the exemption applies a presumption of confidentiality to "*all information and documents collected and generated during inspections, investigations and audits...even after these have been closed, or the relevant act has become definitive and the follow-up action has been taken*." In essence, the Bank is applying the case-law of the CJEU setting out the conditions according to which access to documents contained in administrative files mostly under competition law procedures may or may not be provided. However, first, Regulation 1049/2001, the Aarhus Convention and Regulation do not allow for a general presumption of confidentiality that would apply to all documents held by EU institutions pertaining to an investigation. Second, the CJEU set up such a presumption but only in very limited cases and specific contexts.[21] Third, Case C-612/13 shows that the way the presumption must be applied, and its scope, are still subject to the interpretation of the Court. In this case, the Court reconfirmed that "*as the law stands, the Court has recognized five types of documents which enjoy a general presumption of confidentiality [...]".*[22] The Bank's documents do not fall under these categories. Furthermore, the CJEU ruled that the cases in which a general presumption was recognised were clearly defined by a particular fact: the documents were either part of (a) an administrative procedure or (b) a judicial procedure: *"In all the cases which gave rise to the judgments cited in the preceding paragraph, the refusal of access in question related to a set of documents which were clearly defined by the fact that* ***they all belonged to a file relating to ongoing administrative or judicial proceedings****[…]".*[23] The CJEU emphasised again that "*a presumption must be interpreted and applied strictly*".[24] The Court finally rejected the application of the presumption to certain documents depending on the stage of the (infringement) proceeding when the request was made. It therefore acknowledged that the scope of the presumption bore some limits.

[19] Case C-64/05P, *Sweden v Commission,* ECLI:EU:C:2007:802.
[20] Case C-64/05P.
[21] Case C-139/07 P, Commission v Technische Glaswerke Ilmenau GmbH, ECLI:EU:C:2010:376; Case C-514/07P, C-528/07P and C-532/07P, *Sweden and Others v API and Commission*, ECLI:EU:C:2010:541; Case C-514/11P and C-605/11P, *LPN and Finland v Commission*, ECLI:EU:C:2013:738; Case C-404/10, *Lagardere SCA v Editions Odile Jacob*, ECLI:EU:C:2013:808; Case C-365/12P, *Commission v EnBW*, ECLI:EU:C:2014:112; Case T-447/11, Lian Catinis v Commission, ECLI:EU:T:2014:267; Case C-612/13P, *ClientEarth v Commission*, ECLI:EU:C:2015:486.
[22] Case C-612/13P, *ClientEarth v Commission*, ECLI:EU:C:2015:486, para. 77.
[23] Case C-612/13P, para.78.
[24] Case C-612/13P, para. 81.

32. The extension of a general presumption to all documents pertaining to investigations carried out by the Bank has therefore no basis in EU law, let alone once the investigation is closed.

33. In case C-139/07, the Court established a presumption of confidentiality applying to the administrative file held by the Commission within state aid review procedures. The Court held that for the purpose of interpreting the exception laid down in Article 4(2), third indent, of Regulation 1049/2001, there was "*a general presumption that disclosure of documents in the administrative file [in state aid review procedure] in principle undermines protection of the objectives of investigation activities*".[25]

34. The CJEU also accepted a general presumption of confidentiality for pleadings in court proceedings[26]as well as documents concerning an infringement procedure during its pre-litigation stage.[27]

35. This presumption of confidentiality has been replicated in the context of merger control proceedings in case C-404/10P[28], as well as for documents relating to a proceeding under Article 101 TFEU[29] and in investigations carried out by Olaf in case T-447/11[30].

36. However, in the state aid and merger control contexts, the Court drew its presumption from the applicable legal frameworks for both fields of EU law enshrined respectively in Regulation 659/1999[31] and Regulations 4064/89[32] and 447/98,[33] which contain specific provisions on access to information pertaining to the relevant files. With regard to the enforcement procedure under Article 101 TFEU, the Court accepted a presumption of confidentiality, holding it was also important to "[*take] account of the specific rules governing access to those documents, which are laid down in this instance by Regulation Nos 1/2003 and 773/2004*."[34]In these contexts, specific EU legislation already provided that parties other than the Member States concerned in the procedures do not have the right to consult the documents in the Commission's file and that certain documents would not be disclosed. No such specific legislation exists with regard to the EIB. This case law therefore applies to very specific contexts, and cannot automatically be extended to the Bank's activities.

37. Second, the blanket exemption provided in the TP goes further than what the court allows in the specific situations listed above. In cases where the presumption applies, the institution involved is still required to carry out an assessment in order to determine whether the requested documents and information even fall under the scope of the exception provided for in Article 4(2) third indent of Regulation 1049/2001, to provide adequate reasons and assess whether there is an overriding public interest in disclosure. The TP states that "*the Bank may disclose a summary of investigations that have been closed*". However, once an investigation is closed, disclosure cannot undermine the protection of the purpose of an investigation as required by Article 4(2) third indent of Regulation 1049/2001. Publishing only

[25] Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, ECLI:EU:C:2010:376 para.61
[26] Case C-514/07P, C-528/07P and C-532/07P, *Sweden and Others v API and Commission*, ECLI:EU:C:2010:541, para. 94.
[27] Case C-514/11P and C-605/11P, *LPN and Finland v Commission*, ECLI:EU:C:2013:738, para. 62.
[28] Case C-404/10, *Lagardere SCA v Editions Odile Jacob,* ECLI:EU:C:2013:808.
[29] Case C-365/12P, *Commission v EnBW*, ECLI:EU:C:2014:112, para.93.
[30] Case T-447/11, *Lian Catinis v Commission*, ECLI:EU:T:2014:267
[31] Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L83, p.1)
[32] Regulation No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p.1)
[33] Regulation No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1998 L 61, p.1).
[34] Case C-365/12P, para. 83.

a summary is therefore not enough and does not comply with the standards provided in the relevant legislation.

38. In these respects, Article 5.5 of the policy stretches the case-law of the Court beyond any reasonable limits and unduly applies it to the EIB's activities.

39. Moreover, with regard to OLAF investigations, the General Court, in case T-447/11, insisted several times that the investigation was still ongoing at the time the access to document request was made[35]. The Court held that "*it is common ground that the eight documents in question do in fact relate to investigations within the meaning of that provision and that investigations were on-going at the time that decision was adopted*[36]". The court explained how disclosure of certain information would have undermined the investigation at the time it was being carried out[37]. It is very likely that had the investigation been closed, the Court would have decided differently.

40. According to the Court, OLAF had carried out the required examination and provided adequate reasons and could therefore apply the presumption of confidentiality.

41. It should also be pointed out that the Ombudsman has already had the opportunity to make recommendations to the Bank regarding the disclosure of an investigation that had been concluded three years previously[38]. That case concerned the Bank's decision not to provide access to the report of an investigation into possible tax evasion by a loan beneficiary on the basis of the exception protecting the purpose of investigations. Instead, the Bank provided a summary of the investigation report. The Ombudsman found that the summary released by the Bank did not meet its transparency obligations. First, the Ombudsman found that the Bank had not explained specifically why the investigation report itself could not be released three years after the investigation was closed. Specifically, the Bank had not explained how disclosure would actually disclose details of the investigation methodology or how disclosure of the methodology would compromise its effectiveness in future investigations. Second, the summary provided by the Bank did not reveal information about the investigation's findings.[39]

42. Fourth, during the public consultation meeting held on the 10th September 2014, the Bank raised the issue that the EIB and OLAF should have similar policies so that investigations carried out by both bodies are consistent and that a climate of mutual trust is ensured. However, not all investigations on the EIB's activities are carried out with OLAF. The Bank is therefore not bound by OLAF's policy and stance when it investigates on its own.

43. Finally, this section of the policy contravenes the commitment of the EIB to act openly and transparently. Section 8 of the TP "*Promoting Transparency"* stresses the fact that *"Weak governance, corruption and lack of transparency are a major issue in some of the regions in which EIB operates, and act as serious brakes on economic and social development. The EIB actively promotes transparency and good governance in the projects it finances, in the companies in which it participates and generally with its counterparts*." (Article 8.1). Article 8.5 further states that "*The EIB will continue to strengthen its efforts to improve its*

[35] Case T-447/11, paras 51, 56, 60.
[36] Case T-447/11, para 51.
[37] Case T-447/11, para. 54.
[38] Decision of the European Ombudsman closing the inquiry into complaint 349/2014/OV against the European Investment Bank (EIB).
[39] Para. 33.

transparency, accountability and governance and to be at the forefront as a transparent and responsible institution". However, the TP as reviewed allows the Bank to withhold more information than before, in particular with regard to corruption and fraud matters following the adoption of the confidentiality presumption provided in Article 5.5 of the TP. It is indeed transparency that prevents corruption, and confidentiality that encourages it. There is therefore a clear contradiction between the commitment of the Bank to act transparently and combat corruption and the right they arrogate themselves to keep confidential the information that would allow them to do exactly that.

44. The Bank should deal with maladministration, illegality, fraud and corruption in a responsible and accountable manner. Article 5.5 gives the exact opposite impression, i.e. that the EIB intends to keep any matter related to corruption, fraud and violation of the law internal and confidential.

45. The interpretation of the Bank in adopting a presumption of confidentiality in Article 5.5 fails to recognise the fundamental nature of transparency set out in the Treaty, the Regulation and the case-law of the CJEU, and the particular and restricted circumstances in which the CJEU has accepted a general presumption. It follows from the case-law set out in the above that it is incorrect to interpret the CJEU's case-law to mean that an institution refusing access to documents can rely on a general presumption of non-disclosure if that institution considers that there is a risk that an internal procedure could be affected.

46. The new wording of the TP should be amended and keep a simple reference to the exception on the protection of the purpose of the inspections, investigations and audits enshrined in Article 4(2) third indent of Regulation 1049/2001.

1.3.4 Intermediated Loans and investor activities (Articles 5.12 and 5.13)

47. The EIB should ensure that intermediated loans (operations aiming at reaching final beneficiaries - usually SMEs and micaps - via a financial intermediary - usually commercial banks or investment funds) are subject to the same transparency requirements as other types of loans. The information pertaining to these projects should also be placed on the public register. The fact that the EIB is a public body makes its loans subject to more stringent transparency requirements, which consequently should also apply to intermediated loans. This is all the more important given the Bank's policy to engage in intermediary lending in order to reach SMEs. And it appears unacceptable that the EIB should be able, just by reaching out to ultimate clients through an intermediary bank, to avoid all obligations on transparency and accountability to the public.

48. Not applying the same standards to these loans would exempt a whole part of the Bank's lending activity from the transparency and openness principles, and fail to ensure any accountability as to the way loans are spent and projects are carried out, and what impacts they have on the environment. In 2015 the EIB Group's operations totalled 84,5 billion EUR. This includes the 77,5 billion EUR of the EIB, and the 7bn EUR of the European Investment Fund (EIF). In total, support by the EIB Group to improve access to finance by small and medium sized companies during 2015 included both EUR 29.2 billion of lending through

local partner banks and the 7bn EUR by the EIF. This equals 40% of the EIB Group total volume of operations that go through intermediaries[40].

49. Contrary to what is provided in Article 5.13, it is not enough for the Bank to encourage "*the intermediary bank to make information covering its relationship with the EIB available*". It is up to the EIB to ensure that its loans are not used in a detrimental way and to show the public that it is doing what is necessary to avoid this. It is up to the Bank therefore to ensure that its relationship with the intermediary bank is transparent and it should disclose the necessary information

50. There are three types of intermediated loans which are subject to the EIB's environmental due diligence and that should be subject to transparency requirements: Mid-Cap Loans, Global Loans and Funds. This due diligence is described in the Environmental and Social Handbook of the EIB (further called "Handbook")[41].

51. The EIB's due diligence regarding Mid-Cap Loans requires an assessment of the approach and capacity of the intermediary and the context in which it operates[42]. The assessment of the intermediary focuses on the capacity and capability of the intermediary to manage the environmental and social aspects, including impacts and risks, arising from its operations. This includes an assessment of the adequacy and effectiveness of the environmental and social systems that the intermediary has in place. The results of this assessment should be subject to disclosure requirements and be placed on the public register.

52. Furthermore environmental and social screening is carried out by the EIB for all schemes (individual allocations proposed by the financial intermediary to the final beneficiaries), that are expected to have significant environmental and/or social impacts and risks known at the time of pre-appraisal within the Mid-Cap Loans[43]. Further, the approval of individual allocations between EUR 25 million and 50 million is the responsibility of the EIB's services, based on a fiche submitted by the intermediary, which includes environmental and social information[44]. The result of the screening of individual allocations, as well as fiches with environmental and social information, should also be subject to disclosure requirements and be placed on the public register.

53. The EIB's due diligence regarding Global Loans may include an environmental and social review of a particular Global Loan operation, including an assessment of the environmental social risk management capacity of the intermediary[45].

54. The EIB's due-diligence regarding Global Loans may also include an environmental and social review of a particular sub-project (individual allocation)[46].

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[40] EIB Press release, 14 January 2016, EIB Group lends record EUR 84.5 billion in 2015 and mobilises over EUR 50 billion investment under Investment Plan for Europe.

[41] Environmental and Social Handbook, Version 9.0 of 02.12.2013, point 64-65, p. 23

[42] Handbook, Section C, point 304, p. 153

[43] Handbook, Section C2, point 304, p. 153

[44] Handbook, Section C2, point 305, p. 154

[45] Handbook, Section C3, point 309, p. 154

55. The EIB may carry out environmental and social due diligence of a particular fund operation, including an assessment of the environmental and social risk management capacity of the promoter and/or fund manager. It may also carry out environmental and social assessment of a particular sub-project investment[47].

56. Both processes come with assessments including sub-projects which should be on the register.

57. The EIB has reserved the right to receive from the intermediaries supporting environmental and social documents on request (e.g. copies of E&S procedures and policies, NTS/ESIS, resettlement action plan, indigenous peoples plan, etc.)[48]. These documents should be subject to disclosure requirements and be placed on the public register.

58. The EIB follows up on all individual allocations under its intermediary financing.[49] The EIB does not publish a number of other documents that contain environmental information, such as Non-Technical Summaries of EIAs or EIA Reports for individual allocations on its own website, but requires the intermediary or fund manager to do so. The EIB should not delegate its own responsibility to act in compliance with Aarhus Convention with regard to disclosure of information to third parties or counterparts. These documents should be disclosed by the EIB in accordance with the Regulation, the Aarhus Regulation and the Convention.

59. The same considerations apply with regard to investor activities as mentioned in section 5.12.

1.4 Third ground: The procedure for handling information requests

1.4.1 Time limits (Article 5.22 to 5.24)

60. Footnote 8 of Article 5.22 of the TP states that deadlines to reply to requests to access documents originating from third-parties may be extended. Neither Regulation 1049/2001 nor the Aarhus Convention allows this time-limit to be extended for third parties documents.

61. The right to have timely access to information cannot be circumvented by the TP.

1.4.2 Avenues of redress following confirmatory application (Article 5.33 and 5.34)

62. Article 5.33 and 5.34 fail to provide citizens with accurate information regarding the available avenues of redress once a confirmatory application has been refused or ignored. These

[46] Handbook, Section C3, point 309, p. 154
[47] Handbook, Section C4, point 316, p. 155
[48] Handbook, Section C4, point 316, p. 155
[49] Handbook, Section, point 66, p. 23

sections state that in the event that the Bank refuses to provide access following a confirmatory application or fails to reply within the prescribed time limit, the applicant may make a complaint using the complaint mechanism in accordance with Section 6 or initiate proceedings against the Bank before the Court. However, Article 8(1) of Regulation 1049/2001/EC provides that "*in the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively*".

63. The additional step of making a complaint to the complaint mechanism of the Bank is confusing and may result in the applicant being unable to challenge the decision before the EU Courts. Article 263 TFEU provides that actions must be brought before the Court within two months following the adoption of an institution's decision. Consequently, once the applicant has lodged its complaint to the complaint mechanism, the two month period will have elapsed and the Bank's decision won't be challengeable anymore. This provision is a way to prevent citizens from exercising their right to access to justice and to prevent external pressure on the Bank.

64. This section therefore needs to be rectified and provide the same clarification as Article 6.6 does, that when deciding to challenge the EIB before the complaint mechanism stakeholders should take into consideration the fact that the administrative appeal may preclude access to the Court.

Conclusion

65. The EIB's Transparency Policy represents the first port of call for EU citizens trying to exercise their fundamental right to access the information held by the Bank. It should therefore contain clear and accurate information that can be relied on by EU citizens. This is not the case at present. Among other things, the TP provides for exceptions to the right of access that do not exist in law and contains confusing information on citizens' rights of redress that may result in them forgoing their right to access the courts.

66. Such failures represent an instance of illegality and maladministration. We urge the Complaint Mechanism to remind the Bank of its obligations under the Aarhus Convention, the Aarhus Regulation and Regulation 1049/2001 and to make detailed recommendations as to how the TP can be rectified so that it provides a truly useful tool to EU citizens seeking access to information and that ensures the Bank is accountable.