

Preliminary findings on how the European Investment Bank discloses environmental information in relation to projects it finances directly

Correspondence - 08/06/2021

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Context

1. Owned by the EU Member States of the EU, the EIB is “ *the EU's long-term lending institution* ” [1] . The EIB's lending capacity for 2021 is approximately EUR 70 billion .
2. Every year, the European Investment Bank (EIB) provides direct loans for a wide range of projects. This is one way that the EU provides financial support for the maintenance and development of its economic and social activities.
3. The EIB is not the project promoter. It does not run/manage the projects, nor does it issue the related public authorisations. It also provides only part of the financing.
4. The EIB provides its loans through a decision-making procedure that includes steps and phases that are common to most procedures aimed at disbursing public money. Several elements of this procedure are illustrated in what it is referred to as the ‘project cycle’. [2]



5. Like other public bodies, the EIB has over time had to develop specific procedural steps and concepts that are unique to its field of work. In particular, because the EIB provides financial support through loans - rather than for instance through grants or subsidies - some of its working methods resemble those of the banking sector, notably its provision of 'credit lines' when its financing is done through other banks ('financial intermediaries' [3]).

6. The public character of the EIB implies that it has a particularly strong focus on public interest objectives. A topical and visible example of this is its 2019 climate strategy [4] .

7. The EIB has stated its strong commitment to the values of transparency [5] , corporate responsibility [6] , and stakeholder engagement [7] . It emphasises that the practical implementation of such values is not simply an additional procedural layer, but contributes to the substantive quality of its financing activities (" *We firmly believe that transparency contributes to the quality and sustainability of the projects we finance and helps to build trust in the EU bank* "; " *We firmly believe that stakeholder engagement conducted throughout the project cycle enhances our positive impact on the ground.* ")

8. The EIB's implementation of those values and methods is subjected to regular scrutiny by other public bodies (for instance the European Parliament [8]), civil society, or by citizens who turn to the dedicated Complaint Mechanism that the EIB created in 2009 [9] .

9. The standards that apply to the implementation of such values and methods are found in policies formulated by the EIB itself, as well as in EU Treaties and in legislation that give effect to generally applicable principles of good administration and good governance.

10. One such piece of EU legislation [10] is based on the **UN Aarhus Convention** [11] which obliges, among other things, public authorities actively and systematically to publish



‘environmental information’. This includes not only information *about* the state of the environment, but also information about activities that have a significant impact on the environment.

11. The complainants invoke this EU legislation in support of their view that the EIB’s lending activities should be more transparent about the initial decision-making and the monitoring/reporting.

12. The relevant parts of the EIB’s current policy provide, in summary, that for each lending project, the EIB actively publishes short summaries of ‘environmental information’ rather than all of the primary source documents.

13. The Aarhus rules and the EIB’s practices will be looked at in more detail below. Before that it would be useful to outline the concrete and practical changes that the complainants are calling for. [12]

The complainants’ concerns and claims

14. The complainants state the EIB has an obligation under the Aarhus rules to make significantly more ‘environmental information’ public *during* its decision-making processes and its monitoring of projects for which it lends money. They consider that the EIB ought to:

a. Generally publish minutes of the EIB’s Management Committee meetings , and do so in a timely manner.

The Management Committee is the permanent executive body that oversees the day-to-day running of the EIB. It prepares decisions for the EIB’s Directors and ensures that these are implemented. [13]

b. Generally publish the related internal proposal of the EIB’s Management Committee as soon as it has been finalised internally (i.e., before the EIB’s Board of Directors is asked to examine it).

The Board of Directors is in charge of the EIB’s strategic management, and has sole power to take decisions in respect of loans, guarantees and borrowings. It ensures that the Bank is managed in line with the provisions of the Treaty and the Statute and with the general directives laid down by the Governors. [14]

c. Publish the Directorate Appraisal Reports [15] as soon as they have been finalised in the EIB’s on-going decision-making process. These are its key documents [16] in the process leading to a final assessment of a project proposal, essentially the EIB services’ complete internal assessment of a loan request. They are submitted to the EIB’s Management Committee for the latter to adopt its conclusions on the loan request.



d. Publish the opinions of the European Commission and the Member States on specific projects [17] .

e. Publish several other specific documents : the *Three Pillar Assessment* , the *GHG Carbon Footprint Assessment* , the *EER* ('economic rate of return') and *FIRR* ('Financial internal rate of return') and the *Overall Environmental and Social Impact Assessment Form "(D1)"* .

f. Publish the monitoring reports and promoter reports that it receives and identify any other information in its possession on the monitoring of projects, so that it can be requested by the public.

15. In addition to the above claims - which are made specifically in light of the Aarhus rules - the complainants consider that the EIB should make the minutes of the Board of Directors meeting available immediately after the meetings, and that it should ensure that the minutes “ *include information reflecting the actual discussion* ”. It refers to an existing commitment by the EIB actively to publish those minutes.

16. The complainants also make more general assumptions and observations:

a) They consider that the EIB's loan-related decision-making process lacks transparency.

b) They consider that current practices for public disclosure of documents in response to requests are too slow.

c) They consider that other institutions comparable to the EIB are much more transparent in their decision-making [18] .

Inquiry steps to date

17. The Ombudsman's inquiry team held a meeting with all the EIB's relevant services in October 2020 [19] , and obtained a number of documents and information both before and after the meeting.

18. After the meeting reports were finalised and related confidentiality issues were clarified, the Ombudsman invited the complainants to comment on the content of the report. They did so in January 2021.

19. Whilst the background to the inquiry includes facts that were examined in a report by the EIB's Complaint Mechanism (report by whom?) [20] , the Ombudsman's focus is on the complainants' points of principle.

20. The Ombudsman will base her assessment on: her view of the implications of the Aarhus Convention for the EIB in this area (see **Annex I**), the background to the current EIB practice of publishing summaries (see **Annex II**) and the complainant's comments during this inquiry (see



Annex III).

Assessment

Initial contextual observations

The EIB is one of several actors related to the projects

21. The Ombudsman asked the EIB to provide a list of all the documents on which it had based the project summaries for a number of large projects with a significant impact on the environment. Their reply showed that a considerable amount of those documents and information was indeed published on websites of national public bodies or organisations. The Ombudsman therefore makes a practical suggestion below.

Transparency practices of other finance bodies

22. The complainants have referred to disclosure practices of other finance bodies they state to be more transparent than the EIB. While such comparisons may indeed be relevant the Ombudsman would need more factual information in order to assess the argument [21] .

The complainants' concern that disclosure-on-request is too slow

23. The complainants have stated that the processing of disclosure-requests are too slow. The Ombudsman has not included this element of their concerns in this inquiry, but will consider addressing it separately.

Systematic active publication of documents that contain internal deliberative content

24. The complainants claim the EIB should actively and systematically publish the minutes of its Management Committee before the EIB's Board of Directors has taken its decision on the project in question, should make public the Management Committee proposal to the Board of Directors when it is submitted, i.e., before the Board has taken its decision and that, when recorded, deliberative content of its administrative services (discussion points, exchanges) should similarly be part of actively published documents.

25. The complainants draw on a judgement of the Court of Justice, which emphasised that citizens need access to information of the legislative process not only to understand legislation that has already been adopted, but also “ *in good time, at a point that enables them effectively*



to make their views known regarding those choices ” [22] . The complainants suggest that the same logic applies to the EIB's internal decision-making procedures.

26. The Ombudsman understands that it would be valuable to the complainants' work to have copies of the said material before the EIB takes its decision on a project.

27. The Ombudsman also understands that the broader objectives of the Aarhus rules may in some cases be furthered by the active and early publication of such minutes and internal suggestions, and that the Aarhus rules do not themselves constitute an *obstacle* to such a practice.

28. However, the Ombudsman does not see any general obligation under the Aarhus rules actively to publish internal minutes and related proposals of a public body during the internal decision-making procedure.

29. The extent to which such preliminary and purely deliberative content in on-going decision-making procedures could constitute 'environmental information' is moreover not clear.

30. The analogy made with the EU legislative process is not applicable. The decision-making procedure here concerned is an internal decision-making procedure of the EIB. The Ombudsman has noted the complainants' references to the specific functions of the different organisational entities of the EIB (its administrative services, the Management Committee, the Board of Directors). However, these entities are integral parts of the EIB, and their exchanges are therefore internal exchanges of the EIB as an institution.

31. In addition, there is no general rule or standard of good administration requiring EU institutions or bodies actively to publish minutes, and related internal proposals, of their internal decision-making procedures before the taking of final decisions.

32. This does not however rule out an obligation of disclosure in relation to specific ad hoc disclosure requests.

33. With regard to an active and systematic publication *after* the related final decision, and while the Ombudsman cannot identify any obligation *actively* and systematically to publish such documents that contain internal deliberative content the same point re specific ad hoc disclosure requests applies.

Systematic active publication of factual information during the EIB's decision-making procedure

34. As noted, the EIB current practice is the active publication of what it considers to be all relevant 'environmental information' in online *summaries* , but it does not publish all of the *source documents* . They include the various internal documents produced by the EIB's administrative services, including the appraisal reports and supporting internal documents (see



the complainants' claims outlined above).

35. The first issue is whether the summaries do contain all the relevant 'environmental information'. The second issue is whether the EIB could actively publish those internal documents or versions of them.

Is the relevant environmental information currently being published in the summaries?

36. The Ombudsman asked the EIB to provide copies of the source documents for its online summaries for a number of lending files. The EIB also provided copies of the 'Directorate Appraisal Reports' (or PJ Appraisal Reports).

37. The Ombudsman inquiry team noted the following characteristics of the confidential reports (each around thirty pages): Their content is highly descriptive and factual. They contain technical-economic conclusions and largely exclude discussion-points that reflect diverging views or alternative courses of action. They also exclude sensitive political information and commercial information that, if publicly disclosed, could lead to market advantage for competitors of the project promoters involved.

38. With regard to the 'environmental information', the Ombudsman cannot conclude that the typically very short online summaries (one to four pages) contain all relevant environmental information, or that the excluded environmental information is not of public interest as defined under the Aarhus rules.

39. While professionally drafted, the summaries do not amount to the full and genuine implementation of the practice previously announced by the EIB (see Annex II). Moreover, as noted in Annex I, the Aarhus rules call for the contextual disclosure of information, and not the summarising by public authorities of what they consider to be relevant.

Does the EIB have an obligation actively to publish, before the final decision, internal facts and evaluation documents or versions thereof?

40. The Aarhus Convention states that, for the purpose of exercising one's environmental rights, "*citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters*", and that "*in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concern.*" Such environmental rights form part of the Convention's aim "*thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment*", and the Convention lays down an inclusive



approach by “[r] ecognising further the importance of the respective roles that individual citizens, non-governmental organisations and the private sector can play in environmental protection. ”

(Recitals, page 3.)

41. The Aarhus Convention therefore explicitly promotes the right of citizens as far as possible to have access to ‘environmental information’ during the decision-making processes in question, or as soon as possible.

42. In cases of *disclosure-on-request* , the Aarhus Convention states that a request for environmental information may be refused if it “ *concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law* ” (Article 4(3)(c)) and, relatedly, “ *a request for environmental information may be refused if the disclosure would adversely affect (a) [t] he confidentiality of the proceedings of the public authorities, where such confidentiality is provided for under national law* ” (Article 4(4)(a)) [23] .

43. The Aarhus Convention Compliance Committee has applied a restrictive interpretation in this regard: “ *The Convention does not define the ‘material in the course of completion’. The Committee considers that the phrase “material in the course of completion” relates to the process of preparation of information or a document and not to an entire decision-making process for the purpose of which given information or documentation has been prepared.* ” [24] .

44. With regard to the notion of the ‘ confidentiality of the proceedings ’ of the public authorities’, the Aarhus Convention Compliance Committee noted in that same case that it “ *considers that the term “proceedings” in article 4, paragraph 4 (a), relates to concrete events such as meetings or conferences and does not encompass all the actions of public authorities. While national legislation may, according to this provision of the Convention, provide for the possibility to consider the minutes of a number of meetings held in order to select feasible locations for an NPP [a nuclear power plant] , as confidential, it cannot under this provision treat as confidential all the actions undertaken by public authorities in relation to selecting feasible locations for an NPP, including all the related studies and documents.* ” [25]

45. The Ombudsman considers however that the adoption of the following practice would be consistent with the objectives of the Aarhus rules, and in line with the EIB’s previously published commitment: During the evaluation process of projects with a significant impact on the environment, the EIB could actively publish source documents that contain the facts, the factual findings and the related technical/economic assumptions and calculations. This would be done at the point when those documents have been finalised and/or received, or at any rate not later than when the EIB’s Transparency Policy provide for publication of information on the project subject to evaluation [26] .

46. The Ombudsman does not consider it appropriate to translate this finding into detailed suggestions regarding a possible active publication of the other specific documents referred to by the complainants. This is because the EIB’s internal working methods and decision-making



documents/information are relatively complex and evolve regularly [27] .

Document-transparency by design

47. The Ombudsman suggests that the EIB takes measures to ensure that, for projects that have a significant impact on the environment, it can rapidly publish source documents that contain the *facts* , the *factual findings* and the related *technical/economic assumptions and calculations* , and that it actively and rapidly publishes those source documents during the decision-making process.

48. The Ombudsman encourages the EIB to make this possible through a greater emphasis on anticipation of transparency-needs in its document management and in its document requirements for its project promoters.

49. The Ombudsman notes that there are increasing expectations to ‘openness/transparency by design’, which involves highly demanding and often complex implementation measures [28] .

50. This suggestion involves the creation of document templates and forms, internally and for project promoters, that provide and allow for an easy separation of factual information from related internal discussion points and proposals, for example via the use of annexes.

51. The Ombudsman is fully aware this may require some internal discussion within the EIB. It may, for instance, not always be completely clear what parts of an internal assessment are ‘factual findings’ as opposed to tentative assumptions related to future hypothetical scenarios. Grey-zones will obviously still exist, but the Ombudsman trusts that the EIB could and would manage this in the spirit of the ultimate *objectives* of the Aarhus rules.

52. With regard to commercial information specifically, the EIB should not find it difficult actively to publish this information without revealing commercial information that should be protected. The protection of commercial information is subject to a restrictive interpretation, and mainly covers intellectual property rights and information that, if disclosed in public, would specifically grant competitors an advantage over the project promoters [29] .

53. The Ombudsman makes the above suggestions as an alternative to proposing that the EIB introduce the cumbersome and risky practice of systematically redacting, file by file, source documents for the purpose of their systematic online publication.

Transparency related to monitoring

54. The complainants suggest that the EIB should actively publish, during the lending project, “ *the monitoring reports and [project] promoter’s reports that it receives and identify any other information that is in its possession in relation to the monitoring of projects , so that it can be requested by the public.* ” (emphases added)



55. Currently, the EIB actively publishes a summary that contains information on the EIB's assessment of environmental and social issues at project completion stage [30] . It does so when the summary is “ *available after the completion of the EIB investment* ”.

56. The *Aarhus Convention* does not expressly refer to the active publication of environmental information related to the monitoring of activities of the kind here concerned. It sets out the principle that the public authority in question shall in general make sure to *hold* the relevant environmental information (recital n° 16), and the parties to the Convention shall ensure that “ *mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment* ” (Article 5(1)(b)).

57. The EU's *Aarhus Regulation* contains an express applicable obligation: Environmental information that must be actively published in the dedicated databases or registers shall include “ *data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment* ” (Article 4(2)(e)).

58. The Ombudsman understands that the EIB is ‘monitoring activities’ in the sense of this provision whenever it monitors the implementation of financed projects that have a significant effect on the environment.

59. The provision does not however state *when* such data or summaries shall be actively published. Common methods of interpretation suggest that this shall be determined taking into account the objectives and the context of the rules, including the relevant interpretations and guidelines issued in the course of reviews related to the Aarhus rules.

60. The Ombudsman notes the Aarhus Convention's observation that “ *improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concern.* ” The term ‘concerns’ is broad and must be taken to include factual matters as well as subjective opinions. In practical terms, the Ombudsman understands it means that the public should be enabled to become aware of possible problems in the implementation of projects financed by public bodies. One way of doing so is to provide timely information on the outcome of its monitoring of such projects, including before their completion.

61. Earlier and systematic active publication of environmental information in relation to monitoring is not only useful to interested civil society organisations but also to the public, especially when the EIB's own resources do not allow for it to monitor or uncover all of the possible problems that may arise. Reports from civil society and from the public can therefore alert it to such problems in the implementation of projects. The European Commission, for instance, has shown that its role in monitoring compliance with EU law in the EU Member States is in part dependant on citizen information about possible breaches.



62. The EIB should not be afraid of letting the public have greater and more timely insights into its work. In a 2017 case study publication ('Key observations: 2017' [31]), the EIB provides the information that "[o]nly a small fraction (3%) of projects completed in 2017 received an unsatisfactory quality rating. This confirms the value of the appraisal, monitoring and implementation support provided by the Bank's services. (...) The EIB's monitoring operations are effective in helping to deliver positive project outcomes. "

63. The Ombudsman recognises that 'monitoring' will frequently involve multiple exchanges, including unstructured, between the EIB and project promoters. It would therefore be unrealistic to provide a full-scale active publication and/or public listing of all monitoring-related activities.

64. However, the Ombudsman suggests that the EIB introduces *document transparency by design* measures in order to be able to actively and rapidly publish its monitoring reports to allow the public to inform itself about the content in time for concerns to be expressed and to be taken into account for the EIB's final compliance assessment.

Publishing opinions of the Commission and Member States

65. Applications for financing made through the European Commission or through a Member State (on whose territory the investment will be carried out), must include an opinion to the EIB. The complainants would like the EIB systematically and immediately to publish those opinions.

66. The EIB has pointed out that the opinions do not have any informative content, but merely contain a list of projects with the message that they have (normally) been approved. The EIB takes the view that these documents are not 'environmental information'.

67. The Ombudsman confirms that the opinions contain no substantive content.

68. The complainants would like to have these opinions published immediately so as to know *when* the approval has been given (i.e. more so than their content). This is covered by the Ombudsman's suggestion below for a time-line of key events to be included in the project pages.

Minutes of the Board of Directors meetings

69. The EIB decided in 2016 to publish the minutes of meetings of its Board of Directors on its website. [32] The complainants find that these minutes contain too little information and are published too late.

70. The complainants also made the following observations (emphases added). "... *the minutes that are finally published give no insights into the decision-making process actually undertaken by the Bank, in particular as regards the positions defended by specific board members and how the decision was taken (e.g. by unanimity, following a vote, etc.)* ."



71. In its 2016 decision to publish the minutes, the EIB stated that “... *the minutes will replace the ‘Summary of Decisions taken by the Board’ which are published on the Bank’s website since 2007, and which were designed to provide the public with information about the non-confidential decisions taken by the Board ...*”.

72. The Ombudsman notes that the minutes currently published appear to contain the same amount and quality of information as the previously published ‘summary of decisions’. The EIB’s 2016 decision appears therefore to have retained the situation that was already in place regarding information given to the public [33] .

73. With regard to the complainants’ claims for information on “ *the positions defended by specific board members* ” and on “ *how the decision was taken (e.g. by unanimity, following a vote, etc.)* ”, the Ombudsman is now of the view that this matter merits being examined separately and only after the EIB is given the opportunity to take a position on it.

74. That said, the Ombudsman cannot rule out the possibility that the applicable rules would, in specific cases, require public disclosure of the data that the EIB holds on the votes made within the Board of Directors. This, however, would have to be assessed on a case by case basis.

75. On the timeliness of the minutes’ active publication, the Ombudsman notes that the EIB’s current practice is to have the minutes of a meeting approved in the following meeting two months later, and then publish.

76. Contemporary society has high expectations of rapid information sharing including by policy makers. The public expects that the outcome of high-level meetings will be finalised and made public within days. The minutes here concerned are relatively short, primarily consisting of an outline of decisions that have been taken. They do not contain text in need of any significant exchanges to reach agreement on their formulations and presentation.

77. The Ombudsman is convinced that the administrative management of meetings of the Board of Directors - i.e. preparation, recording and follow-up - is of a standard high enough as to be capable of having minutes finalised and approved within days. Even allowing for taking into account the absence of some Board members following the meeting it should be possible for the EIB to have approved and publish the minutes within a maximum period of three weeks.

Suggestions

1. Systematic active publication of information during the EIB’s decision-making procedure

The EIB could take measures to ensure that, for projects that have a significant impact on the environment, it can rapidly publish source documents that contain the facts, the



factual findings and the related technical/economic assumptions and calculations. This could be done at the point when those documents have been finalised and/or received, or at any rate not later than when the EIB's Transparency Policy provide for publication of information on the project subject to evaluation.

The EIB could do this through a greater emphasis on anticipation of transparency-needs in its document management and its document requirements to its project promoters.

2. Transparency related to monitoring

For projects that have a significant impact on the environment, the EIB should use 'document transparency by design' in order actively and rapidly to publish its monitoring reports to allow the public to inform itself about the content in time for concerns to be expressed and, when valid, to be taken into account for the EIB's final compliance assessment.

3. Minutes of the Board of Directors meetings

The Ombudsman suggests that the EIB publishes the minutes of the Board of Directors within a maximum period of three weeks following the meeting.

4. Practical suggestions

The Ombudsman makes the following related practical suggestions:

a. Since the EIB's online project pages relate to a well-defined and well-managed project cycle that contains main steps/events, the Ombudsman suggests that the EIB copies the good practice of, for instance, its Complaints Mechanism and systematically include an updated time-line workflow that shows at what stage a project is (see image of example below). This could usefully be connected with an email notification option that for the initiation and finalisation of each step would send an email to members of the public who have signed up for such notifications. In addition to all the steps indicated in the project cycle illustration above of this assessment, it could also include the stage when the Commission and a Member State have given the approval under Article 19 of the EIB's Statute.

Example of the time-line workflow published by the Complaints Mechanism:



Admissibility*	Assessment*	Investigation*	Mediation*	Consultation*	Closed*
16/12/2020	Ongoing				

* Admissibility date reflects the date the case was officially registered. All other dates pertain to the date in which a stage was completed.

b. The EIB's online summaries related to projects are compiled from source documents. The Ombudsman suggests that the online summaries systematically include an annex with a comprehensive and up-to-date list of those source documents. When some of those source documents are available online - be it through active publication by the EIB itself or other public bodies or project promoters - the online link should be provided.

c. EIB online summaries could, from the outset, contain information on whether the project involves or gives rise to 'emissions into the environment' (as defined in Article 6(1) of Regulation 1367/2020). This is a priority category within the EU's Aarhus rules. It is essential for the public to know if a project concerns emissions.

d. In addition to its own guide on accessing environmental information, the EIB could actively and systematically draw the public's attention to the detailed UNECE Implementation Guide on the Aarhus Convention to further guide the public on the application of the Aarhus rules.

e. The EIB could ensure that all documents - including its project summaries - are actively and systematically published, in addition to English, in the main official language of the country in which the project takes place as well as in languages of regions that are clearly and specifically significantly affected by the project in question (for instance an affected region across the border of the country where a project is implemented).

To avoid delaying publication, the translation could be uploaded once it is available following the publication of the English version.

The EIB could also ensure that each project page contains a link to one or more online translation tools that will enable rapid machine translation into other languages.

f. The EIB gave the Ombudsman's inquiry team a helpful presentation on the project cycle. It contained factual descriptive information. The Ombudsman takes the view that providing such detailed information to the public can only help to further build trust in the professionalism of the EIB's work. The EIB could consider providing such more detailed information on the online pages where it already provides some information on its handling of projects.

g. The Ombudsman has noted that the complainants request that the EIB itself should hold all possible 'environmental information'. It is however consistent with the Aarhus rules for a public authority also to refer to other sources where 'environmental information' can be found and requested [34]. On its project pages, the EIB could more systematically include information (a) on where information requests can be made at the national level where the project is



implemented (this can be a simple address of an online page for submission of information requests), and (b) information on where to seek redress at the national level in case requests are felt not to be properly handled.

The EIB is invited to reply by the **end of September 2021** .

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Strasbourg, 08/06/2021

ANNEXES:

Annex I

The Aarhus information rules: objectives and their implementation

1. The Aarhus Convention is of a dynamic nature, a feature that helps to interpret and apply it in light of its objectives and in line with the constantly evolving context of law, environment and roles of actors involved. It provides that, for the purpose of exercising one's environmental rights, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters. It provides that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.
2. Such environmental rights form part of the Convention's aim to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment. The Convention moreover lays down an inclusive approach by recognising further the importance of the respective roles that individual citizens, non-governmental organisations and the private sector can play in environmental protection.
3. The EU's Aarhus *Regulation* (2006), which has the objective to contribute to the implementation of the obligations arising under Aarhus Convention (Article 1(1)), replicates or refers to the above-cited objectives, and adds, for instance, that for the right of public access to environmental information to be effective, environmental information of good quality is essential,



and that it is therefore appropriate to introduce rules that oblige Community institutions and bodies to ensure such quality (recital 14).

4. The Aarhus rules requires both *active publication* of 'environmental information' as well *disclosure-on-request* of such information.

5. With regard to the *active publication* obligation, the categories covered by this obligation are multiple, broad and to some extent non-exhaustive and subject to a dynamic and contextual interpretation.

6. The two sets of obligations (*active publication* and *disclosure-on-request*) are mutually reinforcing and distinct. The interpretations and practices applied to either of these categories directly or indirectly influence those of the other, in particular with regard to definitions. At the same time, an obligation to disclose certain information or documents in response to a specific request does not automatically entail an obligation to systematically and actively publish the type of document concerned.

7. The information rights and obligations often revolve around the notion of 'environmental information'.

8. Because of its wide and dynamic nature, the notion 'environmental information' has been subject to numerous case-by-case interpretations in authoritative review processes and case law [35] .

9. In addition to categories of information that are readily identifiable as 'environmental', review cases show that 'environmental information' can for instance include parts of a financing agreement, a mining licence [36] , or legal assessments for the preparation of legislation [37] . [38]

10. In *disclosure-on-request* cases, the key issue is often whether the information, documents or datasets are, or contain, 'environmental information'. In the case of *active publication* of 'environmental information', an additional assessment may be required of whether the Aarhus rules clearly require *active publication* of the content in question. The Convention and the EU Regulation do not state that all environmental information shall be actively published, but lay down lists that define, albeit in terms that are subject to a wide interpretation (cf. above), what shall be subject to such active publication.

11. In relation to the obligation to actively publish environmental information, both the Convention and the EU Regulation encourage public institutions to take a practical, pragmatic and constantly improving approach . They lay down non-exhaustive lists of information and documents that shall be published, and provide for such material to be readily available electronically and in useful formats. Provision is also pragmatically made for the situation where certain material is published elsewhere, by allowing for a simply link to be provided to the (online) location of such material.



12. Numerous practices have been developed in this respect. As previously noted, the Aarhus rules contain *minimum* standards only. A public body may for instance decide to adopt more progressive practices regarding *when* and in *what form* it actively publishes 'environmental information'. In the UN Guide on the Aarhus Convention, one for instance finds the following description of what is sometimes published: "*Lists, registers and files can also contain all of the documents pertaining to a specific case. They can contain collections of documents relating to a decision-making process, including drafts, background analyses, public comments, alternative proposals, interim decisions and the proceedings of any meetings.*"

13. The Ombudsman notes that the term '**environmental information**' in the Aarhus rules is not about only giving information:

1. The Ombudsman understands the breadth of the term 'environmental information' to ensure that its scope will not be limited by notions or definitions related to formats ('document', 'datasets' or similar), and that it will remain dynamic.
2. The Aarhus rules do not as such encourage public authorities to identify, extract and summarise 'environmental information' meticulously for the purpose of actively publishing that information only.
3. The Aarhus rules attribute importance to communication about the 'environmental information', including its context. As a minimum, the documents in which the environmental information is contained form part of the context. To actively publish 'information' instead of the source documents in which it is contained is as a rule a compromise. To the extent that such a practice provides added value - for instance by making complex environmental information easily available to non-specialist members of the public - the practice is potentially highly valuable in the overall scheme of things. However, it may have to be primarily considered 'added value', as opposed to a full implementation of the rules and the spirit of the Aarhus rules.

Annex II

Background to current EIB practice of publishing 'summaries'

1. The EIB's current practice of actively publishing environmental information in summaries was introduced in its present form in 2015. The Ombudsman was made aware of those changes in the course of her inquiry OI/3/2013. The new practice was presented as a means of implementing a recommendation of the EIB Complaints Mechanism "*to aggregate all environmental information collected as part of the EIB's due diligence into a single document in order to facilitate EIB's compliance with transparency requirements whilst affecting to the least extent possible the efficiency of the operational cycle of the Bank*".



2. The complainant in that case welcomed the EIB's decision to set up its public register of documents actively to disseminate the environmental information thus collected. It took the view that, in this way, the EIB would comply with the requirement of proactive dissemination of environmental information provided for in the Aarhus rules.

3. In the EIB's *Transparency Policy* (March 2015), the above practice is implemented, first, by posting online a project summary when the EIB requests the opinions of the Member State or the project host country and the European Commission, and, second, by publishing project summaries of all investment projects at least 3 weeks before the project is considered for approval by the EIB's Board of Directors.

4. Early 2016, the complainants in this case submitted their complaint to the EIB, arguing that it does not fully respect its obligations under the Aarhus rules to actively publish environmental information.

5. Rejecting the complainants' allegation, the EIB essentially referred to its recent practice of extracting 'environmental information' from source documents and summarising this in its above-mentioned publications (the environmental and social data sheets). It took the view that summarising environmental information for publication suffices. [39]

In light of all the above, the Ombudsman notes the following:

6. The EIB appears to have intended to set up a practice whereby the 'environmental information' of internal documents such as (but apparently not excluding) the various 'D'-forms and the internal 'appraisal report' would genuinely be contained in the systematically and actively published online summaries ('ESDS', 'ESCS', 'TNS').

Whether the 'environmental information' contained in the EIB's internal assessment documents is genuinely contained in the actively published summaries is a question that lends itself to a factual assessment, even taking into account the not always very precise meaning of 'environmental information'.

7. The complainants here concerned do not fundamentally dispute that the EIB's approach has actual and potential advantages. The core of their concerns is rather that the EIB ends up actively publishing too little too late.

In addition to their specific legal views, the complainants are clear and explicit about their practical need to receive more information or documents during the EIB's ongoing decision-making processes related to the initial lending decision as well as the subsequent monitoring. It is not merely to 'learn about' the EIB's decisions, or to be able to express views on them after a project has been concluded, but is about being given the opportunity to "*scrutinize whether there have been any errors in the [EIB's] appraisal*" [40] and to voice their views prior to the EIB's final decision [41].



Annex III

The complainants' comments (summarised)

The Environmental and Social Data Sheet does not contain all relevant environmental information

1. The complainants noted the EIB's point that the Environmental and Social Data Sheets relies on information contained in other formal key documents, commenting that "*it is exactly these key documents that the EIB should disclose. The right to access environmental information is an entitlement for the public to access the document itself, not a right to see a summary created by the public authority concerned*". "*The [Environmental and Social Data Sheet] describes in narrative form the results of the Bank's assessment and what the Bank will do. However, it does not give a clear explanation of how the Bank has reached these conclusions, which is crucial information for anyone wishing to understand the decision-making and scrutinize whether there have been any errors in the appraisal.*"

2. The complainants outlined their views on the content and purpose of specific documents, concluding that the EIB's current Environmental and Social Data Sheets do not suffice to fulfil the Bank's obligations to actively publish environmental information.

3. Alleged confidentiality of appraisal documents and administrative burden

4. The complainants took the view that the EIB's understanding of confidentiality-needs - especially of 'commercial information' - is too restrictive. They moreover considered that when the various source documents do contain commercial information that is worthy of protection, it would not require too much work for the EIB's services to redact that information to make active disclosure possible.

5. Opinions of the European Commission and Member States

6. The complainants noted that the 'opinions' here concerned contain so little information that it would not require too much work for the EIB's services to redact that information to make active disclosure possible.

7. More importantly, the complainants emphasised that one reason "*why [active] publication of these Opinions is important is also to have timely information about a crucial step in the decision-making procedure relating to new projects.*"

8. The assessment form D1



9. With regard to the assessment form D1, the complainants were critical of the fact that the EIB had not actively informed the public of the fact that the D1 form is no longer used. They take the view that the EIB is under an obligation to actively provide such information to the public.

10. *The expansion of the EIB's Transparency Register*

11. The complainants expressed the view that the EIB's Transparency Register has evolved only in quantitative terms: *" Since 2016 there has not been a significant content increase, especially in the scope of the documents that the EIB publishes."*

12. The complainants finally noted that, in its most recent annual report on the EIB's activities, the European Parliament has called on the EIB *" to review its transparency policy in 2020 with a view to the timely [active] publication of more ample information on all its financing activities, so as to ensure that its transparency policy is compliant with its social, climate and environmental commitments "*.

[1] https://www.eib.org/en/investor_relations/overview/index.htm

[2] This illustration is for instance contained in this EIB report:

<http://reports.eib.org/eib-group-sustainability-report-2017/responsible-guidance> [Link]

Information specifically on appraisals is provided here:

<https://www.eib.org/en/projects/cycle/appraisal/index.htm> [Link]

Information specifically on monitoring is provided here:

<https://www.eib.org/en/projects/cycle/monitoring/index.htm> [Link]

[3] See:

https://www.eib.org/attachments/country/acp_fs_lines_of_credit_to_financial_intermediaries_en.pdf [Link]

[4]

<https://www.eib.org/en/press/all/2019-313-eu-bank-launches-ambitious-new-climate-strategy-and-energy-lending-policy> [Link]

[5] <https://www.eib.org/en/about/partners/cso/access-information-transparency/index.htm> [Link]

[6] <https://www.eib.org/en/about/cr/index.htm> [Link]



[7] <https://www.eib.org/en/about/partners/cso/index.htm> [Link]

[8] See for instance 'Role of the European Parliament' at the end this fact-sheet:

<https://www.europarl.europa.eu/factsheets/en/sheet/17/the-european-investment-bank> [Link],

and related information by the EIB itself:

<https://www.eib.org/en/press/news/european-parliament-reports-on-eib-annual-activities> [Link]

[9] <https://www.eib.org/en/about/accountability/complaints/index.htm> [Link]

See also, in this regard, the Ombudsman's *Memorandum of Understanding* with the EIB available at:

<https://www.eib.org/en/publications/memorandum-of-understanding-between-the-eo-and-the-eib> [Link]

[10] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, <http://data.europa.eu/eli/reg/2006/1367/oj> [Link]

[11] <https://unece.org/environment-policy/public-participation/aarhus-convention/text> [Link]

[12] The complaints made most of their concerns and claims known to the EIB's Complaints Mechanism in early 2016. In early 2019, the Complaints Mechanism issued its finding that the EIB respected the applicable rules. See

<https://www.eib.org/attachments/complaints/conclusions-report-transparency-policy-sg-g-2016-012.pdf> [Link]

[13]

<https://www.eib.org/en/about/governance-and-structure/statutory-bodies/management-committee/index.htm> [Link]

[14]

<https://www.eib.org/en/about/governance-and-structure/statutory-bodies/board-directors/index.htm> [Link]

[15] Known in the EIB as PJ Appraisal Reports

[16]

<https://www.eib.org/en/about/governance-and-structure/organisation/services/entity/pj/index.htm> [Link]

[17] Article 19(2) of the EIB's Statute provides that " *Applications made through the Commission shall be submitted for an opinion to the Member State in whose territory the*



investment will be carried out. Applications made through a Member State shall be submitted to the Commission for an opinion. Applications made direct by an undertaking shall be submitted to the Member State concerned and to the Commission”, and “ The Member State concerned and the Commission shall deliver their opinions within two months .”

[18] The observation has also been made by the Financial Times, 15 July 2019, *European Investment Bank: the EU's hidden giant*).

[19] A full on-site inspection-meeting had been planned, but had to be cancelled due to the Covid19 situation.

[20] <https://www.eib.org/en/about/accountability/complaints/cases/eib-intermediated-lending> [Link]

[21] Separately from this inquiry, the Ombudsman is looking into whether and how this issue can usefully be examined, for example via an expert study.

[22] Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v European Commission* , Case C-57/16 P

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0057&qid=1622541851336> [Link], paragraph 84.

[23] Cf. also [Fact-sheet of the European Court of Justice](#) [Link], referring to case law (appeals case) that “ *the concept of ‘decision-making process’ referred to in that provision must be construed as relating to decision-making, without covering the entire administrative procedure which led to the decision* ” (p. 15).

[24] Findings and recommendations of the Aarhus Convention Compliance Committee with regard to communication ACCC/C/2010/51 concerning compliance by Romania Adopted by the Aarhus Convention Compliance Committee on 28 March 2014, para 85.

[25] Ibid, para 89. The approach of the European Court of Justice is similarly strict, cf. e.g. the account in its Fact sheet - Public Access to Environmental Information”, p. 15, summarising the case *Saint-Gobain Glass Deutschland v Commission* (C-60/15 P), “[t] he requirement of strict interpretation entails, moreover, that the mere reference to a risk of negative repercussions and to the possibility that interested parties may influence the procedure do not suffice to prove that disclosure of internal documents would seriously undermine the ongoing decision-making process ”.

[26] See Part 4 of the EIB’s Transparency Policy.

[27] In their comments, the complainants expressed surprise about a certain ‘D1’-form no longer being used, and essentially ask the Ombudsman to check if the EIB’s online summaries now genuinely contain the information that used to be in such an internal form ‘D1’. They also suggest that the Ombudsman could examine whether the online summary should contain *more*



information on the calculation of the carbon footprints as opposed to only the outcome of that footprint calculation. Also the cited Ombudsman case of 2013 (OI/3/2013) contains further examples of how the terminology and methods have evolved.

[28] See for instance “Draft updated Recommendations on the more effective use of electronic information tools, Seventh meeting (Geneva 2020), Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters”: “*Develop, where missing, continuously maintain and update a nationwide digital environmental information system using the best available state-of-the-art digital technologies, in accordance with the approach of “open by design and by default”*” (<https://unece.org/env/pp/tfai/consultation-recommendations-eit> [Link]), or “Transparency-by-Design as a Foundation for Open Government” (<https://repository.tudelft.nl/islandora/object/uuid:550f0ecf-20e7-447e-a28c-5d4a349d6611?collection=research> [Link]).

[29] The UN Guide on the Aarhus Convention illustrates the likely non-use of the protection, referring to “*state-run enterprises ... since there are no competitors that could gain an advantage by access to the information*.” (P. 88).

[30] Environmental and Social Completion Sheets

[31] <http://reports.eib.org/eib-operations-inside-the-eu-2017/key-observations-2017> [Link]

[32] For part of the background, see <https://www.ombudsman.europa.eu/en/correspondence/en/74880> [Link]

[33] The Ombudsman has compared such previous ‘summaries of decisions’ with currently produced minutes
https://www.eib.org/attachments/documents/governing_bodies/ca_provisional_summary_20160616_en.pdf [Link]

https://www.eib.org/attachments/strategies/ca_provisional_summary_20161115_en.pdf [Link]
https://www.eib.org/attachments/documents/ca_minutes_20201013.pdf [Link]

and https://www.eib.org/attachments/documents/ca_minutes_20200917.pdf [Link]

Although each project description is now less elaborate, the information is available on the dedicated project pages that can easily be found on the EIB’s website (or through a simple ‘Search with Google’ through the right button on the mouse).

[34] Cf. for instance Article 4(2) (f) and (g) of EU Regulation 1367/2006, and UN Guide, p. 83 (Part 3., (a)).

[35] See for instance the ACCC’s compilation of findings



https://unece.org/sites/default/files/2020-12/Compilation%20of%20CC%20findings_20.11.2020.pdf
[Link]

and the EU Court of Justice's fact sheet publication
https://curia.europa.eu/jcms/jcms/p1_1043173/en/ [Link]

[36] *"... a mining licence is an administrative measure affecting or likely to affect the state of elements of the environment. While not at this point of the findings precluding that one of the exceptions in article 4, paragraph 4, may exempt certain aspects of the mining licences and the mining-related information from disclosure, the Committee finds that the licences and other mining-related information requested, including the "quantities of non-ferrous ore" that were entitled to be extracted under those licences, are clearly "environmental information" within the scope of article 2, paragraph 3, of the Convention. Thus, it was not open for the Party concerned to refuse access to this information on the ground that it was not "environmental information". "*
(Paragraph 51 of Findings and recommendations with regard to communication ACCC/C/2012/69 concerning compliance by Romania Adopted by the Aarhus Convention Compliance Committee on 26 June 2015.)

[37] Findings and recommendations with regard to communication ACCC/C/2013/93 concerning compliance by Norway Adopted by the Aarhus Convention Compliance Committee on 19 June 2017 (cf. paragraphs 66-67).

[38] The Compliance Committee's manner of reasoning is illustrated in for instance case ACCC/C/2007/21 (Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Community Adopted by the Aarhus Convention Compliance Committee on 3 April 2009 (para 30, point (b)): *" 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."*

[39] Cf. Part 5.3 of the EIB's reply:
<https://www.eib.org/attachments/complaints/conclusions-report-transparency-policy-sg-g-2016-012.pdf>
[Link]

[40] The complainants' comments of 13 January 2021, paragraph 13.

[41] The complaints' complaint, paragraph 38 et seq.