

Solution proposal on the refusal of the European Investment Bank to grant public access to the minutes of Management Committee meetings (case 1252/2020/PB)

Solution - 08/06/2021

Case 1252/2020/PB - Opened on 27/07/2020 - Decision on 21/04/2022 - Institution concerned European Investment Bank (No further inquiries justified) |

Background

1. The case concerns a refusal by the EIB to give public access to three sets of meeting minutes of its Management Committee.
2. A civil society organisation had requested access to those minutes to obtain information on the EIB's deliberations on possible co-financing of a biomass power generation plant in Spain ('Curtis Biomass Power Generation Plant').
3. Following the EIB's refusal, the civil society organisation, together with two others, complained to the European Ombudsman.
4. This complaint is a secondary point in a complaint-letter concerning possible improvements to the EIB's *active* publication of 'environmental information' under the Aarhus rules [1] . For reasons of clarity and procedural flexibility, the Ombudsman registered three separate inquiries [2] on the basis of that complaint letter.
5. This complaint concerns specifically the EIB's reasoning in not granting public access to the minutes.

Assessment

[3]

The reasons for not disclosing the minutes

6. In its confirmatory decision refusing access to the minutes, the EIB stated the following



reasons. Referring to its administrative rules for handling requests for public access to information and documents [4] , the EIB confirmed the conclusion in its initial reply that disclosure of the documents would seriously undermine the EIB's decision-making process:

- a) The documents in question were intended for internal use as part of preliminary consultations and deliberations within the EIB.
- b) Their disclosure would reveal the information, considerations and opinions examined by or expressed within the [Management Committee], or exchanged between the latter and the EIB's services.
- c) Such disclosure would deprive the EIB's governance and services of the necessary 'space to think' in which the individuals and bodies involved trust they can communicate freely, express frank professional judgement and deliberate independently.
- d) The initial reply was also correct in concluding that disclosure of the information contained in the documents would undermine the commercial interests of the project promoters and identifiable third parties involved with the numerous financing operations to which the documents refer.

Specifically with regard to such commercial information, the EIB stated that “[t] his information concerns, *inter alia*, finance contract conditions, interest rates, risk pricing, securities and guarantees , spread curves, loan amounts and budget allocations. If disclosed, this information would provide the public, including investors and competitors, with privileged financial information about the undertakings concerned . This information would affect the decisions of market operators and the competitive position of the undertakings concerned. Additionally, as some of the undertakings concerned are listed companies, disclosure could affect their share prices. We note, in this regard , that Regulation (EU) No 596/2014 on market abuse (hereinafter, "MAR") sanctions the unlawful disclosure of inside information such as non-public information relating directly or indirectly to an issuer, which , if it were made public, would likely have a significant effect on the price of financial instruments.

The EIB finally mentioned that, for reasons of privacy, the names of individuals could not be disclosed [5] .

7. The correspondence contained points regarding the applicable rules. The Ombudsman does not consider it necessary in this case to reach a final assessment on that matter. The EIB handles requests for public access to documents on the basis of its 'Transparency Policy', which the EIB has adopted in the context of the applicable Treaty framework.

Exception of data protection

8. The EIB informed the complainants that the minutes contained some personal data, and that these data could not be disclosed.



9. The Ombudsman confirms that the EU applies a high standard of protection when it comes to personal data. The EIB's reference to data protection in this case is, however, brief and lacks contextualisation.

10. The minutes of the Management Committee appear to have been drafted with close attention having been paid to anonymisation. For instance, rather than listing the various staff members of the EIB services present at the meeting, the minutes say “ *The Management Committee discussed the proposal in the presence of representatives of CS/PERS, OCCO, OPS, PJ, RM, JU and SG.* ”

11. Personal data appear to be limited to names, and these appear to number only four: three of staff referred to as ‘secretaries’ [6] and one of a person involved in an EIB-financed project and whose appointment within the beneficiary organisation the EIB had to approve [7] .

12. The remaining few names are of members of the EIB's Management Board and of its Board of Directors, which are in the public domain and presumably do not (in this context) merit non-disclosure as personal data.

13. Whilst this does not mean that the names of the three junior EIB staff and the one private sector person should not be redacted, it helps to show that protection of personal data issue alone is unlikely to play a significant role determining requests for access to the minutes of the EIB's Management Committee. The redaction of the names here in question would have taken a few minutes only.

Commercial interests - inadequate match between the EIB's letter and the content of the minutes

14. Whilst exceptions must generally be interpreted narrowly, the case-law under Regulation 1049/2001 is in fact relatively generous to the protection of commercial interests. The Ombudsman understands from the EIB that this is also the case in banking practices.

15. To allow the EIB to attain the “*highest possible level of transparency*” , it is important that the exception be applied in the most rigorous and precise manner possible including that the reasons for non-disclosure must be specific to the documents in question.

16. Having carefully examined the minutes, the Ombudsman finds that the invoking of the commercial interest exception is characterised by a degree of routine reasoning rather than the outcome of a document-specific assessment.

17. The Ombudsman has not, for instance, identified in these minutes “ *risk pricing, securities and guarantees* ” or “ *spread curves* ”. As for “ *interest rates* ”, one sees formulations that refer to non-specific rates (such as the rate applicable at a date of the contract signature). As such, these would seem to be neutral and objective as opposed to contract-specific and contractually



negotiated rates for the project in question.

18. The key sentence in the EIB's confirmatory decision moreover begins with “ *This information concerns , inter alia ...* ”, which gives the reasoning an unusually wide scope.

19. With regard to the EIB's concern that disclosure could influence the share price of some of the companies mentioned in the minutes, the Ombudsman is not in a position substantively to confirm or to rebut such a presumption. However, the reference to this concern is stated in very general ‘as a matter of fact’ terms. At the very least, a non-disclosure letter should point out the number of companies (per set of minutes) for which such a concern is deemed relevant.

20. This observation also appears valid for the letter's statement that “ *This information would affect the decisions of market operators and the competitive position of the undertakings concerned.* ”

21. It is also difficult to understand these two concerns, presented as facts, given that the EIB already systematically publishes, on its website, company related information prior to the final decision on the financing of projects [8] .

22. The Ombudsman recognises the difficulty in giving reasons for applying an exception to public access to documents as one has to balance the giving of reasons with the risk of disclosing information deemed confidential. However, the Ombudsman finds that, taken together, the EIB's attempted explanations related to commercial interests give rise to a de facto ‘general presumption of confidentiality’ for documents of this kind.

23. If the EIB's concerns are partly related to a more general worry that companies will not work with it if it discloses information, that is an issue that can be examined separately. When applying transparency rules, such a concern is normally placed in the context of the protection of the specific procedure in question, and not in the context of a commercial interest exception.

Protection of decision-making process - inadequate match between the EIB's letter and the content of the minutes

24. The EIB's reasoning for invoking this exception implies that the minutes contain an explicit and dynamic account of the dialogue between the Management Committee and the EIB's technical services.

25. This impression does not bear scrutiny. The minutes are sparse, technical and written in a neutral style. The EIB's related reasoning for non-disclosure was therefore in this respect misleading.

26. The Ombudsman is therefore concerned that the EIB essentially attempts to establish a de facto general presumption of confidentiality for all such minutes.



27. An automatically applicable protection of a “space to think” is not generally recognised in EU transparency rules or in the related case-law [9] .

28. The Ombudsman notes that the reasoning behind the ‘decision-making process’ exception is particularly weak and difficult to justify when the document concerned relates to a matter for which the relevant decision-making has been finalised. EU case-law has it that documents related to finalised decision-making procedures are, as a starting point, non-confidential.

29. The Ombudsman cannot make any conclusive statements on precisely what parts of the minutes related, on the date of the EIB’s reply, to matters for which the relevant decision-making process had ended [10] . It is for the EIB, when handling such requests, to identify the content that relates to matters for which the relevant decision-making process has ended, and then to apply the significantly higher standard of openness as compared to matters for which the related decision-making process is still on-going. This appears not to have been done in this case.

Proposal

The Ombudsman proposes that the EIB reviews the reasoning in its ‘confirmatory decision’, including the substantive decision not to disclose the minutes.

The Ombudsman encourages the EIB to take into account the time that has passed since its decision was taken. Any redactions that the EIB may now implement would most likely be significantly less extensive than if access had been granted in 2019.

The EIB is invited to respond to the above proposal by the **end of September 2021** .

Emily O'Reilly European Ombudsman

Strasbourg, 08/06/2021

[1] The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (<https://unece.org/environment-policy/public-participation/aarhus-convention/text> [Link]) and the EU’s Aarhus Regulation 1367/2006 (<https://eur-lex.europa.eu/eli/reg/2006/1367/oj?locale=en> [Link]).

[2] This case and 1065/2020 and 1251/2020.

[3] The Ombudsman’s assessment is focused on the EIB’s stated reasons for not disclosing the



documents here concerned. The report of the EIB's Complaint Mechanism covered a number of additional issues related to communication and procedure. It has not been necessary to examine those here.

[4] EIB Transparency Policy <https://www.eib.org/en/publications/eib-group-transparency-policy#>
[Link]

[5] The Ombudsman understands the reference to 'privacy' to be a reference to the EU's data protection rules.

[6] Minutes of 20 March 2018.

[7] Minutes of 9-13 July 2018, final paragraph of page 204/2.

[8]

<https://www.eib.org/en/projects/pipelines/index.htm?q=&sortColumn=projectStatusDate&sortDir=desc&pageNumber>

[9] The Ombudsman is conscious of the fact that the situation is very different in a number of EU Member States, and, therefore, that the EU in an informed manner opted for another approach to public access to documents.

[10] Taking as an example the specific project of particular interest to the complainants here concerned, it appears that the EIB published the project information on 30 May 2018, i.e. more than one year prior to the EIB's decision on the complainants' confirmatory application.
<https://www.eib.org/en/registers/all/82180853>