

Deċiżjoni fil-każ 1316/2016/TN dwar l-allegati nuqqasijiet fil-Politika ta' Trasparenza tal-Bank Ewropew tal-Investment

Deċiżjoni

Każ 1316/2016/TN - Miftuħa fil- 27/02/2017 - Deċiżjoni fil- 23/05/2018 - Istituzzjonijiet ikkonċernati Il-Bank Ewropew ta' l-Investment (Ma nstabet l-ebda amministrazzjoni ħażina) | Il-Bank Ewropew ta' l-Investment (Solvuti mill-istituzzjoni) |

Dan il-każ jikkonċerna lment dwar l-allegati nuqqasijiet fil-Politika ta' Trasparenza tal-Bank Ewropew tal-Investment (BEI). L-ilmentatur l-ewwel ġab din il-kwistjoni għall-attenzjoni tal-Mekkaniżmu tal-Ilmenti intern tal-Bank Ewropew tal-Investment (EIB-CM, li) ddikjara l-ilment inammissibbli. Imbagħad l-ilmentaturi rrikorrew għand l-Ombudsman sabiex jikkontestaw id-deċiżjoni tal-EIB-CM u jtennu t-tħassib tagħhom li l-Politika ta' Trasparenza tal-BEI ma kkonformatx mar-regoli tal-UE u dawk internazzjonali dwar l-aċċess għal informazzjoni.

L-Ombudsman eżaminat kif l-EIB-CM indirizza l-ilment. Hija nnotat li l-BEI nieda reviżjoni tal-Politika u l-Proċeduri tal-EIB-CM, li se tiċċara kif il-BEI għandu jindirizza t-tħassib pubbliku li jaqa' barra l-mandat tal-EIB-CM.

L-Ombudsman iavalutat ukoll jekk il-Politika ta' Trasparenza tal-BEI tikkonformax mal-qafas legali applikabbli tal-UE.

L-Ombudsman sabet li għalkemm hemm lok għat-titjib ta' ċerti dispożizzjonijiet fil-Politika ta' Trasparenza tal-BEI, il-Politika mhix ifformulata b'tali mod li twassal għal amministrazzjoni ħażina. L-Ombudsman għamlet għadd ta' suġġerimenti għal titjib bil-għan li l-BEI jiġi inkoraġġut itejjeb il-formulazzjoni ta' ċerti artikoli fil-Politika ta' Trasparenza tiegħu.

Background to the complaint

1. The complaint submitted by three environmental organisations - ClientEarth, CEE Bankwatch Network and Counter Balance - concerns alleged shortcomings in the European Investment Bank's (EIB) Transparency Policy, as well as the manner in which the EIB's internal Complaints Mechanism (EIB-CM) responded to the complaint originally made to the EIB.

2. On 6 March 2015, following a public consultation, the EIB Board of Directors adopted a new



Transparency Policy replacing the version that had existed since 2010 [1] . On 16 February 2016, the complainants lodged a complaint with the EIB-CM about the noncompliance of the Transparency Policy with EU and international rules on access to information.

3. The EIB-CM acknowledged receipt of the complaint on 1 March 2016, informing the complainants that their complaint had been registered and that the EIB-CM was carrying out a review of the complaint. The letter informed the complainants that they may expect a formal reply by 23 September 2016.

4. By letter of 10 June 2016, the EIB-CM declared most aspects of the complaint inadmissible, except point 1.2.2 in the complaint, which set out the allegation that EIB's practices did not comply with its own Transparency Policy. On 6 September 2016, the complainants turned to the European Ombudsman.

The inquiry

5. According to the Memorandum of Understanding signed between the Ombudsman and the EIB [2] , before turning to the Ombudsman, complainants should have recourse to an effective internal EIB complaints procedure. The record of how the EIB-CM has dealt with the matters raised in a complaint is the appropriate starting point for the Ombudsman's own inquiry.

6. The Ombudsman declared the complaint admissible, except for the concerns expressed under point 1.2.2 of the original complaint to the EIB-CM, which was the only point that the EIB-CM had declared admissible and was still examining. The Ombudsman opened an inquiry into the complainants' position that:

1) The EIB-CM wrongly declared inadmissible most of the original complaint.

2) The EIB's Transparency Policy is not compatible with the Aarhus Convention, Regulation 1367/2006 **on the application of the provisions of the Aarhus Convention** ('the Aarhus Regulation') and Regulation 1049/2001 regarding public access to documents ('Regulation 1049/2001').

7. The Ombudsman asked the EIB to explain why the EIB-CM considered most aspects of the complaint to be inadmissible. Given that the complainants had put forward certain concerns related to procedural aspects of the EIB-CM complaints handling procedure, the Ombudsman also asked the EIB for clarification on these aspects, such as on the EIB-CM rules and practices as regards acknowledging receipt of complaints and on its procedure for communicating the outcome of the admissibility check to complainants.

8. Finally, the Ombudsman asked the EIB to reply to the complainants' allegation that the EIB Transparency Policy is not compatible with EU and international rules on access to information.

9. On 24 May 2017, the EIB clarified the EIB-CM's position. The EIB explained that it had



addressed most of the complainants' substantive concerns on the Transparency Policy's alleged incompatibility with EU and international rules on access to information in the context of the public consultation on the revision of the EIB Transparency Policy in 2014-2015 and also on other occasions. The EIB nevertheless replied to the complainants on 24 May 2017 and provided the Ombudsman with a copy of the letter. On 31 August 2017, the complainants submitted comments on the EIB's reply.

10. The Ombudsman's decision takes all the above into account. It also takes into consideration the fact that the EIB has launched a review of the EIB-CM framework. The draft revised EIB-CM Policy and Procedures were submitted to the Ombudsman for comments on 13 December 2016. In May 2017, the EIB launched a public consultation. The new EIB-CM Policy and Procedures should enter into force in 2018.

On the EIB-CM's decision to declare the complaint inadmissible

Admissibility of complaints challenging the legality of an EIB policy

11. The EIB-CM is governed by a set of Principles, Terms of Reference and Rules of Procedure adopted by the EIB Board of Directors on 2 February 2010 [3] and supplemented by Operating Procedures approved by the Management Committee in December 2011 [4] - 'EIB-CM rules'.

12. The complainants put forward that under the EIB-CM rules, the EIB-CM was competent to handle a complaint challenging the legality of an EIB policy. The complainants argued that their complaint did not fall under the inadmissibility criteria outlined in the EIB-CM rules [5] .

13. The complainants also put forward that under the EIB-CM rules [6] , any person or group alleging that there may be a case of maladministration within the EIB can lodge a complaint. The complainants stated that maladministration includes a failure to comply with EU legislation. They also stated that the adoption of transparency rules by the EIB Board of Directors is a "decision" in the sense of the EIB-CM rules [7] , according to which a complaint is considered admissible if the allegations relate to a **decision** , **action or omission** by the EIB.

14. The EIB disagreed and argued that the EIB-CM inquires on **EIB's activities** rather than on the **policy framework** adopted by EIB governing bodies. The EIB put forward a number of provisions in the EIB-CM rules to support its views [8] .

15. The Ombudsman notes that it is not clear from the EIB-CM rules whether the EIB-CM is competent to handle complaints challenging the legality of an EIB **policy** . The Ombudsman acknowledges that the Principles and Terms of Reference suggest that the EIB-CM is primarily focused on assessing compliance of EIB's decisions and activities with the existing policy framework. The Ombudsman observes, however, that the Principles and Terms of Reference



do not explicitly prevent the EIB-CM from handling complaints challenging an EIB policy, since this type of complaints does not fall under any inadmissibility criteria and that maladministration includes any failure to comply with applicable EU law.

16. The EIB plays an important role in achieving EU policy objectives and it considers itself to be accountable to EU citizens [9] . In that context, the Ombudsman is of the view that citizens must have access to effective complaints procedures in relation to the work of the EIB and that all public concerns brought to the EIB's attention must be adequately addressed by it. Whether a policy adopted by the EIB Board of Directors could be scrutinized by the EIB internal complaints mechanism, or by another service within the EIB, is to be decided by the Bank. Nevertheless, to ensure accountability towards citizens, the EIB must have procedures in place so that one of its services address any public concerns on the compatibility of its internal policies with EU legislation.

17. The Ombudsman raised this issue in the comments her Office submitted to the EIB on the draft revised EIB-CM Policy [10] . The EIB took the Ombudsman's comments into account and amended the draft Policy, specifying that complaints challenging the legality of EIB policies are not handled by the EIB-CM **but will be addressed by the Secretary General** [11] .

Alleged breach of the EIB-CM's procedural rules

18. The complainants put forward to the Ombudsman that the EIB-CM breached its own procedural rules by failing to include the admissibility decision in the acknowledgement of receipt.

19. The Ombudsman raised with the EIB that it was not clear from the EIB-CM Rules of Procedure and Operating Procedures whether the result of the admissibility check **must** or **may** be communicated at the same time as the acknowledgement of receipt, as the texts contain discrepancies [12] . The EIB replied that these discrepancies were being addressed as part of the review of the EIB-CM framework.

20. The Ombudsman notes that the draft revised EIB-CM Procedures will clarify the matter by stating that *"[a]n acknowledgement of receipt is sent to the complainants within 10 working days of the reception of the complaint . If the decision of admissibility has already been taken , it will be communicated at the same time "* (Article 1.3.1).

21. In their complaint to the Ombudsman, the complainants also argued that the wording of the acknowledgment of receipt, in which the EIB-CM informed them that their complaint had been registered and indicated when they could expect a formal response, implied that the complaint was admissible.

22. The Ombudsman observes that, under the current Operating Procedures [13] , *"[a]fter admissibility check , complaints are registered and admissible complaints follow the internal complaints handling process. Complainants are informed (i) that the complaint has been*



registered, (ii) that an inquiry/assessment is initiated and (iii) about the date by which they may expect a response (40/140 working days). *If a complaint is inadmissible, the complainants are informed of the reasons of inadmissibility and provided with suggestions as to whom they may address their concern, if applicable”.*

23. The Ombudsman thus considers that, by indicating that the complaint had been registered and that the EIB-CM would send a formal reply within 140 working days, the EIB-CM conveyed the impression that the entire complaint was admissible and not only part of it. That does, all things being equal, not prevent the EIB-CM from reconsidering the admissibility.

24. The Ombudsman considers that the draft revised EIB-CM rules clarify how the EIB will communicate with complainants on this issue, by stating that: *“[i]f a complaint is declared admissible, the complainants are informed (i) that the complaint has been registered, (ii) of the registration number (iii) that an inquiry/assessment is initiated and (iv) of the date by which they may expect a response.”*

25. To avoid any misunderstanding, the Ombudsman suggests that, whenever the EIB-CM has not finalised the admissibility check when sending the acknowledgement of receipt, it explicitly state that the acknowledgement of receipt does not imply that the EIB-CM has taken a position on the admissibility of the complaint.

26. In line with the conclusions set out in paragraphs 16 and 17 above, the EIB must address also those questions and concerns from the public that do not fall within the mandate of the EIB-CM. When declaring the complaint about the EIB transparency policy inadmissible, the EIB should thus have provided the complainants with advice on alternative measures or should have referred them to the relevant department, in line with the Code of good administrative behaviour for the staff of the EIB in its relations with the public [14]. The Ombudsman notes, however, that the EIB has responded to the complainants on the substance following the Ombudsman’s suggestion in the context of the present inquiry.

Conclusion on the procedural issues

27. The Ombudsman concludes that the EIB is in the process of clarifying which department will address public concerns about issues such as the legality of its policies and how the EIB-CM should communicate the outcome of the admissibility check to complainants. Provided that these provisions are maintained in the final EIB-CM rules, the Ombudsman considers that the EIB has taken the necessary steps to settle these issues.

28. The Ombudsman also considers the EIB to have resolved, in the context of her inquiry, the issue of originally not having replied to the complainants on the substance of their concern, namely the alleged incompatibility of the EIB Transparency Policy with EU and international law on access to information. The substance of this issue will be addressed in the following.



Compatibility of the EIB Transparency Policy with the Aarhus Convention, Aarhus Regulation and Regulation 1049/2001

29. The complainants expressed their concern that the EIB Transparency Policy (EIB TP) is not compatible with the Aarhus Convention, the Aarhus Regulation and Regulation 1049/2001.

30. According to the complainants the EIB TP can be considered as an administrative decision, which may be vitiated by maladministration if not in line with rules and principles binding upon the EIB.

Applicability of Regulation 1049/2001, the Aarhus Regulation and the Aarhus Convention to the EIB (Articles 3.7, 3.8 and 5.1 of the EIB TP)

31. EU legislation on access to documents - currently Regulation 1049/2001 - applies to the EIB only when the EIB is exercising its “administrative tasks” [15] .

32. The complainants argue that the EIB makes an error in law when setting out, in Article 3.8 TP 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 .*” The complainants argued that, as the EIB does not carry out legislative or judicial activities, its activities, including lending, are administrative in nature and subject to Regulation 1049/2001. The complainants also argued that the Aarhus Convention and the Aarhus Regulation apply to all lending information held by the Bank.

33. In its response, the EIB argued that, instead of limiting the scope of its TP to its administrative tasks, the Bank had gone further than what is required [16] “ *by taking into account and reflecting the provisions of Regulation 1049/2001 into its Transparency Policies (both in its current and previous versions) and applying them to all EIB activities* ”.

34. The EIB agreed that it is subject to the Aarhus Regulation and Aarhus Convention. It argued, however, that it was sufficient to set out in Article 5.1.b) that the TP applies “without prejudice” to the right of public access to information or documents held by the EIB which might follow from the Aarhus Convention and the Aarhus Regulation.

35. The Ombudsman notes that she suggested the wording of Article 3.5 to 3.8 TP when she contributed to the revision of the EIB TP in 2014. This wording must be read in conjunction with Article 5.1.a) of the TP, which creates a general **presumption of disclosure** by stating that “*[a]ll information and documents held by the Bank are subject to disclosure upon request, unless there is a compelling reason for non-disclosure (see “Exceptions” below) .*”.



36. In the Ombudsman's view, the wording of Article 5.1.a) of the TP made it unnecessary for the EIB to define the scope of its administrative tasks, as Article 5.1.a) of the TP acknowledges that *all information and documents, including documents on its lending activities, could be subject to disclosure upon request*. As the Ombudsman highlighted at the time, any attempt to define the scope of EIB's administrative tasks compared to non-administrative tasks " *would be fraught with problems, legal and practical, and would be likely to give rise to a lengthy series of disputes, in each of which the EIB would appear to be seeking to narrow the scope of the general principle of transparency* " [17] .

37. The Ombudsman observes that Article 5.1.b) of the TP acknowledges that the Aarhus Convention and the Aarhus Regulation are applicable to the EIB. The Ombudsman understands the wording of Article 5.1.b) TP as implying that, in case there would be a conflict between the TP and specific access to documents or information rules in the Aarhus Convention and the Aarhus Regulation, the latter would prevail in respect to all EIB activities.

Access to documents through a public register (Article 4 of the EIB TP)

38. Regulation 1049/2001 [18] set out the obligation to provide public access to a document register and, where direct access to documents is not given through the register, to indicate as far as possible where the document is located. The Aarhus Regulation [19] states that EU institutions and bodies must organise the environmental information which is relevant to their functions and which is held by them, with a view to active and systematic dissemination to the public of such environmental information, in particular by means of electronic databases.

39. Article 4.4 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 which shall also decide which documents to publish, in electronic and/or in paper form, and which documents are available on request only ". Article 4.6 TP states that " [t]he 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 . "

40. The complainants argued that Article 4.4 TP does not fulfil the Bank's legal obligations. The complainants also criticised the wording of Article 4.6, which in their view leaves too much discretion to the EIB with regard to disclosure and publication of information and therefore circumvents the provisions of Regulation 1049/2001.

41. In its response, the EIB said that it has set up and is progressively developing a public register of environmental information, in compliance with the Aarhus Regulation. Information on the type and scope of environmental information held by the Bank is provided through a "frequently asked questions" section of the EIB's website. According to the EIB, the "frequently



asked questions” section is similar to the Ombudsman's public register,

42. The EIB argued that Article 4 TP does not introduce any exception to the right of access to information additional to the exceptions described in Article 5 of the TP. The EIB also pointed out that all projects financed by the Bank, including projects which are not published before approval or signature, are published once they have been signed and that all information regarding those projects held by the Bank is subject to the principles of disclosure upon request.

43. The Ombudsman notes that the EIB has set up a public register of environmental information. The Ombudsman has previously had the opportunity to examine the EIB's practices regarding proactive disclosure of environmental information [20] . The present inquiry, however, does not assess the EIB's *practices* but whether the *formulation* of the EIB TP is in line with the rules and principles binding upon the EIB. The Ombudsman considers that, although the wording of Article 4 TP could be improved, it offers sufficient guarantees of compliance with Regulation 1049/2001 and the Aarhus Regulation by stating that the EIB's margin of discretion applies **within the limits imposed by applicable laws and regulations**.

44. The Ombudsman considers that the EIB's reply on Article 4.6 TP is reasonable, without prejudice to the Ombudsman's assessment of the complainants' arguments concerning the exceptions for disclosure described in Article 5 of the TP (see below).

Exceptions (Article 5 TP)

45. Article 5 of the EIB TP sets out a presumption of disclosure of information, but also provides for exceptions where disclosure would undermine the protection of certain interests.

Whether to differentiate between environmental and non-environmental information

46. The complainants argued that the TP should differentiate between environmental information, which is subject to the specific regime of the Aarhus Convention and the Aarhus Regulation, and non-environmental information. The complainants argued that Article 5.4 a) TP, which states that “ *access shall be refused where disclosure would undermine the protection of [...] the financial, monetary or economic policy of the EU, its institutions and bodies or a Member State* ” does not exist in the Aarhus Convention and should not apply to environmental information.

47. The EIB replied that the TP takes into account the particular nature of the information and documents related to the environment, as well as the Bank's obligations to comply with the Aarhus Regulation.

48. The Ombudsman considers the EIB's explanations to be reasonable, given that the EIB TP applies “without prejudice” to the right of public access to information and documents on the



basis of the Aarhus Convention and the Aarhus Regulation.

Confidentiality agreements

49. The complainants pointed out that Article 5.5 TP allows the EIB to refuse access to a document “ *where disclosure would undermine the protection of commercial interests of a natural or legal person* ”. A footnote specifies 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.* ” In the complainants’ view, Article 5.5 TP provides too much discretion to the Bank, since finance contracts concluded by the Bank may contain environmental information.

50. The EIB argued that the footnote only serves to provide an example of cases which are common in banking. The EIB acknowledged that finance contracts may contain environmental information and cannot be withheld from the public. The EIB further stated that it analyses each case individually, in light of the case law of the Court of Justice, to determine whether there are public interests at stake which would override the protection of other legitimate interests.

51. The Ombudsman considers the EIB’s explanations to be reasonable.

Presumption of confidentiality concerning inspections, investigations and audits

52. Article 5.5 TP provides that “[d]isclosure of information and documents collected and generated during inspections, investigations and audits **shall be presumed** to undermine the protection of the purpose of the 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.”

53. The complainants put forward that the extension of a general presumption to all documents pertaining to investigations carried out by the EIB, including when the investigation is closed, has no basis in EU law.

54. The EIB’s main argument was that this provision “ *strikes a balance between the Bank’s need to ensure the proper operation of its investigation procedures, past, current and future, and its firm commitment to transparency. This is especially relevant given the possibility that internal investigations are followed up not only by subsequent internal investigations or audits, but also by national criminal investigations.* ” The EIB also pointed out that it publishes a summary of the investigations covered by the exception, and that the exception does not cover cases handled by the EIB-CM.

55. The Ombudsman already made a recommendation to the EIB concerning the disclosure of a report concerning an internal fraud investigation under the previous EIB TP [21] .



56. The EU Courts have not ruled on the application of a general presumption of non-disclosure to EIB investigations.

57. Investigations and audits are administrative in nature. The Ombudsman prefers to note the EIB's willingness to take into account and reflect the provisions of Regulation 1049/2001 in its TP and **apply them to all its activities** , without making any distinction between administrative and non-administrative tasks.

58. The Ombudsman therefore considers that any exception to access that is additional or different to the exceptions set out in Regulation 1049/2001 should be identified and clearly justified in the TP. Such exceptions should also not encroach upon the right of access to environmental information and documents provided for in the Aarhus Convention and the Aarhus Regulation.

59. The Ombudsman is not convinced that the difference in wording of Article 5.5 TP compared to the similar exception provided for in Regulation 1049/2001 [22] is proportionate to the general objective of ensuring the proper operation of “past, current and future” investigations. While the EIB could justify a presumption of non-disclosure for on-going EIB investigations, it cannot rely on a general presumption of non-disclosure for **all** inspections, investigations and audits indefinitely .

60. The Ombudsman further notes that the EIB TP extends the general presumption of non-disclosure to **after the investigation has been closed** . Even in the case of a fraud investigation, the general presumption of non-disclosure would in principle apply only as long as the investigation is ongoing. The Ombudsman believes that the EIB could guarantee the protection of the purpose of any subsequent internal investigations or national criminal investigations by assessing requests for access on a case-by-case basis.

61. The Ombudsman therefore encourages the EIB to reflect the wording of Article 4.2 third indent of Regulation 1049/2001 in its TP and to remove the presumption of non-disclosure related to information and documents collected and generated during inspections, investigations and audits , including after these have been closed.

Intermediated loans

62. Article 5.13 TP sets out that *“[e]xceptions also cover information on individual allocations made by local banks to support investment by their own customers **under credit lines established with the EIB** . This information falls within the competence of the intermediary bank as part of the normal business relationship between the respective bank and its customers. However, the EIB encourages the intermediary bank to make information covering its relationship with the EIB available .”*

63. The complainants argued that Article 5.13 TP creates an additional exception to disclosure



for intermediated loans. In the complainants view, this exception exempts an important part of the EIB's lending activities from the transparency and openness principles, since a number of documents related to Mid-Cap Loans [23] , Global Loans [24] and Funds contain environmental information [25] .

64. The EIB replied that intermediated loans are subject to the same transparency requirements as other types of loans. The EIB pointed out, however, that the environmental information held by it relating to intermediated loans is different. Given that the EIB has no contractual relationship with the final beneficiaries, the publication of environmental information for individual allocations under intermediated loans fall under the responsibility of the financial intermediaries and/or the competent authorities.

65. The Ombudsman understands that Article 5.13 TP does not introduce any exception additional to the exceptions relating to the protection of commercial interests and third-party documents. **The Ombudsman therefore suggests that the EIB carefully considers whether it is necessary to maintain the current drafting of Article 5.13, as this article can be misleading to the public.**

Procedure for handling information requests

66. Article 5.22 TP sets out that the EIB normally replies to requests for information within 15 working days. Footnote 8 of Article 5.22 states that, in practice, requests for information may face longer deadlines in a number of cases, such as in cases of request for **information relating to third parties**.

67. The complainants pointed out that neither Regulation 1049/2001, nor the Aarhus Convention, allow for such extension of the deadline in case of requests for information relating to third parties.

68. The EIB argued that footnote 8 does not alter the deadlines but that it explains that, in some cases the EIB cannot adhere to the deadline due to circumstances beyond its control. The EIB pointed out that this is also acknowledged in Regulation 1049/2001 [26] , which provides that, in exceptional cases, the time-limit of 15 working days may be extended.

69. The Ombudsman notes that Article 5.23 TP already reflects Regulation 1049/2001 [27] . The Ombudsman therefore agrees with the complainant that footnote 8 can be misleading for the public. **The Ombudsman encourages the EIB to amend Article 5.22 TP and the corresponding footnote.**

70. The complainants are also concerned that Article 5.33 TP and Article 5.34 TP [28] fail to provide citizens with accurate information on the available means of redress in case the EIB refuses or ignores a confirmatory application (that is, a request for the EIB to review a decision refusing access). They put forward that the additional step of making a complaint to the EIB-CM is confusing and may result in the applicant being unable to challenge the decision before the



EU Courts.

71. The Ombudsman considers Article 5.33 TP to reflect the wording of Article 8.1 of Regulation 1049/2001 [29] , while taking into account the Memorandum of Understanding signed between the EIB and the Ombudsman.

Conclusions on the compatibility issue

72. Although there is room for improvement of certain provisions, the Ombudsman does not consider the EIB's Transparency Policy to be worded in such a way as to amount to maladministration. The Ombudsman encourages the EIB to improve the formulation of certain articles in its Transparency Policy by making a number of suggestions for improvement set out below.

Conclusions

Based on the inquiry, the Ombudsman closes this case with the following conclusions:

The adoption of the EIB Transparency Policy does not constitute maladministration.

The EIB has settled the issues of how it addresses public concerns on the legality of internal EIB policies and how it communicates the outcome of the admissibility check of complaints handled by its internal Complaints Mechanism.

The complainant and the European Investment Bank will be informed of this decision.

Suggestions for improvement

The Ombudsman encourages the EIB to:

- **reflect the wording of Article 4.2 third indent of Regulation 1049/2001 in its Transparency Policy and remove the presumption of non-disclosure related to information and documents collected and generated during inspections, investigations and audits , including after these have been closed.**
- **consider redrafting Article 5.13 of its Transparency Policy concerning intermediated loans;**
- **redraft Article 5.22 on deadlines for handling information requests.**

Whenever the admissibility decision on a complaint has not been taken when sending the acknowledgement of receipt, the EIB-CM should explicitly state that the acknowledgement of receipt does not imply that the EIB-CM has taken a position on the admissibility of the complaint.



Emily O'Reilly

European Ombudsman

Strasbourg, 23/05/2018

[1] Available at: <http://www.eib.org/infocentre/publications/all/eib-group-transparency-policy.htm> [Link]

[2] Available at:
<https://www.ombudsman.europa.eu/activities/cooperation.faces/en/3809/html.bookmark> [Link]

[3] <http://www.eib.org/infocentre/publications/all/complaints-mechanism-policy.htm> [Link]

[4]
<http://www.eib.org/infocentre/publications/all/complaints-mechanism-operating-procedures.htm> [Link]

[5] Article 2 of the Rules of Procedure: complaints concerning international organisations, Community institutions and bodies, national, regional or local authorities; complaints concerning the working relations between the EIB and its staff; complaints which have already been lodged with other administrative or judicial review mechanisms; complaints from anonymous parties; complaints with the objective to gain a competitive economic advantage or that are excessive, repetitive, frivolous or malicious in nature.

[6] Article 2.1 of the Rules of Procedure.

[7] Article 4.3 of the Operating Procedures.

[8] Article 1.1 of the Terms of Reference provides that the EIB-CM scope of review focuses on “*the handling of complaints concerning [EIB] activities*”. Article 3.1 of the Principles provides that the CM “*[e]valuate[s] and report[s] compliance with the **EIB Group’s policy framework** [...]*”. Article 4.2. c) of the Terms of Reference therefore restrict the EIB-CM review to “*assessing whether the EIB Group’s policies and procedures have been followed*”. Article 4.2. g) of the Terms of Reference recalls that the EIB-CM “*makes recommendations regarding corrective actions and/or possible improvements of **existing procedures***”, thus excluding EIB policies.

[9] <http://www.eib.org/about/index.htm>

[10] Available at: <https://www.ombudsman.europa.eu/en/resources/otherdocuments.faces> [Link]



[11] Article 4.3.7,

http://www.eib.org/attachments/consultations/public_consultation_complaints_mechanism_policy_draft_en.pdf
[Link]

[12] According to Article 7.1 of the Rules of Procedure, “ *the acknowledgement [...] may include the communication of the admissibility or the inadmissibility of the complaint*”. The EIB \square CM Operating Procedures contain a different provision according to which “*[t]he admissibility check is performed within the 10 working days and the result is communicated to the complainant(s) at the same time as the acknowledgement of receipt*” (Article 4.3).

[13] Article 4.3

[14] Article 9, http://www.eib.org/attachments/general/code_en.pdf [Link]

[15] Article 15(3) TFEU.

[16] By Article 15 TFEU.

[17] The Ombudsman’s contribution of 21 October 2014 to the revision of the EIB Transparency Policy is available at:

<https://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/60106/html.bookmark>
[Link]

[18] Articles 11 and 12(4)

[19] Article 4

[20] Decision of the European Ombudsman closing her own-initiative inquiry OI/3/2013 concerning the European Investment Bank. Available at:

<https://www.ombudsman.europa.eu/cases/decision.faces/en/54587/html.bookmark> [Link]

[21] Decision of the European Ombudsman closing the inquiry into complaint 349/2014/OV against the European Investment Bank (EIB). Available at

<https://www.ombudsman.europa.eu/cases/decision.faces/en/59317/html.bookmark> [Link]

[22] Article 4(2), third indent

[23] Lines of credit to a financial intermediary, which on-lends the proceeds for the financing of projects promoted by mid-cap companies.

[24] Lines of credit provided to a financial intermediary, which then on-lends the proceeds, at its own risk, to finance small and medium-sized projects.

[25] Such as the EIB’s assessment of the approach and capacity of the intermediary and the



context in which it operates; the environmental and social screenings carried out for schemes that are expected to have significant environmental and/or social impacts and risks; the environmental and social review of particular sub-projects or any follow-up on individual allocations in the context of the EIB's environmental and social due diligence.

[26] Article 7(3)

[27] *"5.23. In exceptional cases, for example in the event of an application relating to a very long document or when the information is not readily available and complex to collate, the time-limit may be extended and the correspondent shall be informed accordingly no later than 15 working days following receipt."*

[28] *"5.33 In the event of a total or partial refusal following a confirmatory application, the Bank shall inform the applicant of the remedies open to him or her, namely making a complaint to the Complaints Mechanism or initiating court proceedings against the Bank before the Court of Justice of the European Union. 5.34 Failure by the Bank to reply to a request within the prescribed time limit shall be considered as a negative reply and entitle the applicant to make a complaint to the EIB Complaints Mechanism or institute court proceedings against the Bank before the Court ."*

[29] *" In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him, namely instituting court proceedings [...] and/or making a complaint to the Ombudsman [...]"*