



## European Ombudsman second contribution to the revision of the EIB Group Complaints Mechanism Policy and Procedures - Annex -

### Introduction

On 16 February 2017, the Ombudsman's Office submitted a first round of comments on the draft revised EIB Group Complaints Mechanism Policy and Procedures<sup>1</sup>.

On 18 May 2018, the EIB provided the Ombudsman with the final draft of the revised EIB-CM Policy and Procedures before submission to the Board of Directors for discussion and final approval by the Board (planned for the September 2018 Board meeting).

The above-mentioned drafts are based on the review of the comments provided by the Ombudsman's Office and the comments made by the public within the framework of the public consultation launched by the EIB in the first half of 2017.

This is the second contribution submitted by the Ombudsman's Office.

Whenever appropriate, reference is made to our previous comments and to the follow-up given by the EIB.

### Definitions

#### Maladministration (Section 3 of the Policy)

We are pleased to note that the EIB has accepted to align the definition of maladministration (Sections 3.1, 3.2 and 3.3 of the draft revised Policy) to that of the European Ombudsman, endorsed by the European Parliament, and also to add some examples of maladministration in the Preamble of the draft revised Policy.

We would suggest that these examples be included in Section 3 of the draft revised Policy rather than in the Preamble, in order to facilitate a better understanding by citizens of what is meant by the term "maladministration".

<sup>1</sup> <https://www.ombudsman.europa.eu/resources/otherdocuments.faces>



## Admissibility

### Scope of the EIB-CM's Policy and Procedures and admissibility criteria (Sections 1 and 4.3 of the Policy)

The scope of the EIB-CM's Policy and Procedures is set out in Section 1 of the Policy. The Policy and the Procedures apply to complaints of alleged maladministration of the EIB Group in its decisions, actions and/or omissions.

Section 4.3 of the Policy enumerates a number of situations that fall **outside the scope** of the Policy and Procedures, and thus outside the EIB-CM's mandate. These situations fall under the **inadmissibility** criteria outlined in Section 4.3.

However, in line with the Ombudsman's practice of distinguishing between complaints that are outside the Ombudsman's mandate and complaints that are within the mandate, but inadmissible because they do not comply with certain requirements, we consider that, for the sake of clarity and consistency of the text, the EIB-CM may reflect if any such similar distinction could be made between:

(i) complaints that fall **outside the scope** of the EIB-CM's Policy, and thus **outside the EIB-CM's mandate** because they:

- are not against the EIB Group, i.e.:
  - complaints against International Organisations, EIB Group counterparts such as Borrowers/Promoters, EU institutions and bodies, national, regional or local authorities (Article 4.3.3 of the draft revised Policy)
- do not concern decisions, actions and/or omissions of the EIB Group or they concern discretionary decisions of the EIB Group, i.e.:
  - complaints challenging the legality of EIB/EIF **policies** decided by the EIB/EIF Governing bodies (Article 4.3.8 of the draft revised Policy)
  - complaints concerning the investment mandate of the EIB Group, its financing or investment decisions per se, its credit policy, or other related, purely commercial or banking discretionary decisions (Article 4.3.7 of the draft revised Policy)
- fall within the remit/mandate of other internal departments of the EIB, i.e.:
  - complaints concerning the working relations between the EIB and its staff (Article 4.3.4 of the draft revised Policy)
  - project procurement complaints (Article 4.3.9 of the draft revised Policy)
  - complaints concerning allegations of prohibited conduct as defined in the EIB Group Anti-Fraud Policies (Article 4.3.10 of the draft revised Policy)
- are or have been considered by another (external) authority, i.e.:
  - complaints that (i) have already been brought against a member of the EIB Group before other administrative or judicial review mechanisms, or (ii) are brought subsequently, or (iii) are already settled by other administrative or judicial review mechanisms (Article 4.3.5 of the draft revised Policy).



(ii) **inadmissible** complaints, that is, complaints that may fall within the scope of the EIB-CM's Policy mandate of the EIB-CM, but do not comply with (procedural or other) specific requirements, i.e.:

- complaints that are submitted beyond the one-year deadline from the date on which the facts upon which the allegation is based could reasonably be known by the complainant (Article 4.3.2 of the revised draft Policy)
- complaints from anonymous parties, complaints with the objective to gain a competitive economic advantage or that are excessive, repetitive, clearly frivolous or malicious in nature (Article 4.3.6 of the revised draft Policy)
- complaints regarding a lending operation of types E and F, if the EIB has not financed, approved or is not at least actively considering the operation/project in question (Article 4.3.11 of the revised draft Policy).

The Ombudsman services understand that the above suggestions may call for changes that may give the impression to stakeholders that such changes ought to have been part of the public consultation carried out by the EIB. The Ombudsman services do not consider that the suggestion made above introduces substantive changes to the rules and procedure of the EIB-CM. It is for the EIB-CM to weigh the possible advantages that may come about as far as the early and initial handling of complaints is concerned.

One advantage stemming from the above distinction, is that, when a complaint is outside the scope of the EIB-CM's Policy/ outside the EIB-CM's mandate and cannot be dealt with by the EIB-CM, and another internal department of the EIB is competent to deal with it, then such a complaint should be referred by the EIB-CM to the competent department in question. Likewise the EIB-CM may also be in a position to further assist in some cases complainants by indicating to them the authority that may be competent to deal with their complaints. The complainants would thus have to make use of these other remedies before turning to the Ombudsman.

We therefore suggest that the EIB consider adding a provision stating that, if another internal department of the EIB is competent to deal with such a complaint, the EIB-CM will then refer the complaint 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*<sup>2</sup>. Likewise, the EIB could consider providing in the draft revised Policy, or on its website, more information about the internal procedures applicable to the complaints that cannot be dealt with by the EIB-CM<sup>3</sup>.

Finally, we welcome the amendment of Article 4.3.6 (currently 4.3.7) clarifying that "discretionary decisions" mentioned as falling outside the scope of the EIB-CM relate solely to commercial or banking decisions, and that the complaints challenging the legality of EIB

<sup>2</sup> Article 9, [http://www.eib.org/attachments/general/code\\_en.pdf](http://www.eib.org/attachments/general/code_en.pdf)

<sup>3</sup> For example, by providing, for complaints referred to in Articles 4.3.4, 4.3.7, 4.3.8, 4.3.9, 4.3.10 of the current draft revised Policy, links to the relevant procedures applicable/the relevant department responsible for dealing with the issues raised in those complaints.



Group policies will be handled by the EIB's Secretary General or by the EIF Chief Executive/ Deputy Chief Executive.

#### **Admissibility check/registration (Articles 1.1.4 and 1.1.5 of the Procedures)**

We welcome the new provisions introduced in Articles 1.1.4 and 1.1.5 of the draft revised Procedures clarifying how the EIB-CM will deal with multiple allegations, as well as with additional allegations received during the complaints handling process, and in particular during the Initial Assessment phase.

#### **Decision on admissibility (Article 1.1.3 of the Procedures)**

We are pleased to note that the EIB has taken into account our previous comments and the concerns expressed by stakeholders during the public consultation, and has removed from the draft revised Policy the provisions that would have allowed the services and/or the Inspector General to be involved in the decision-making process regarding the admissibility of a complaint.

### **Initial assessment and compliance review/mediation/investigation processes**

#### **Decision on the type of further work to be performed (Section 2.3 of the Procedures)**

We welcome the deletion of the two last sentences of Article 2.3.2 of the previous draft Procedures. This addresses, at least in part, our main concerns expressed in the previous comments that the credibility of the EIB-CM risked being undermined by the multiplication of additional layers of approval and further inter-services consultation.

However, we note that Article 2.3.2 maintains that the decision by the Head of EIB-CM to consider the complaint eligible for an investigation/compliance review will be taken "*in agreement with the EIB Inspector General*". It is not clear what would happen if the Head of EIB-CM and the Inspector General disagree.

We trust that this provision will be applied in a manner that will guarantee the independence of the EIB-CM<sup>4</sup>.

#### **Timeframe for dealing with a complaint (Sections 4.4 of the Policy and 1.11 of the Procedures)**

The draft revised Procedures should be amended to ensure consistency between the provisions of Article 1.1.2 (that provides the possibility to extend up to maximum

<sup>4</sup> In accordance with Article 5.1.4 of the Policy that states that the "*operational independence and effectiveness of the EIB-CM, as part of the Inspectorate General are ensured by the responsibility of the Head of the EIB-CM regarding (...) the type of mediation and/or investigation to be performed for a particular complaint*".



20 working days the timeframe for the admissibility check) and of Article 1.11.2 (that states that the maximum timeframe for dealing with admissibility issues is 10 working days).

## Internal and external consultation process

### Internal consultation: role of the Inspector General

The Procedures should clearly define the role and responsibilities of the Inspector General in case of disagreement between the EIB-CM and the EIB's operational services regarding the EIB-CM's reports, as set out in the reply that the EIB has provided to the Ombudsman on complaint 146/2017/DR (*'Ambatovy'* case).

We also suggest that the last sentence of Article 1.6.2 be amended so as to specify that, in case of disagreement with the services, the draft Conclusions Report will be submitted by the Inspector General to the Management Committee (or the EIF Chief Executive/Deputy Chief Executive) **without further delay**.

### Internal consultation: role of the Management Committee in the Initial Assessment

#### Report (Article 2.2.7 of the Procedures)

The current provisions do not set out a deadline for the Management Committee to provide comments on the Initial Assessment Report, nor for the EIB-CM to respond to them.

Therefore, we suggest that this article be amended to introduce indicative timeframes for both the Management Committee to provide comments, and for the EIB-CM to respond to them and to send the report for external consultation. This would allow avoiding the risk of further delaying the sending of the Initial Assessment Report for external consultation.

### Internal consultation: role of the Management Committee in the Draft Conclusions

#### Report (Article 1.6.2 of the Procedures)

The EIB has now clarified that the purpose of the formal involvement of the Management Committee at the draft conclusions phase is to provide its own comments before the draft Conclusions Report is sent out for external consultation.

We also welcome the clarification that in the consultation process, the EIB-CM has to consider the comments received by the Management Committee or other services, but is not under any obligation to accept them. However, we note that the current provisions do not set out a deadline for the Management Committee to provide comments, nor for the EIB-CM to respond to them. This may, as is the case with the comments regarding the Initial Assessment Report mentioned above, further delay sending the draft Conclusions Report for external consultation.

Therefore, we suggest that this article be amended to introduce indicative timeframes both for the Management Committee to provide comments, and for the EIB-CM to respond to them and to send the report for external consultation.



Finally, we suggest that the provisions of the Procedures be amended to explicitly limit in time the internal consultation regarding both the Initial Assessment report and the Draft Conclusions Report, as proposed in the EIB's reply to the Ombudsman on complaint 146/2017/DR.

#### **External consultation (Articles 1.6.2 and 2.2.7 of the Procedures)**

Article 1.6.2 of the draft revised Procedures provides that *“Whenever appropriate, depending on the complexity of the case (typically for the E and F cases), after the EIB-CM has given due consideration to the comments received during the internal consultation, the draft Conclusions Report will then be circulated to the external stakeholders involved in the complaint process (assessment, investigation/compliance review or mediation) for comments”*.

Article 2.2.7 of the draft revised Procedures provides that *“Whenever appropriate, depending on the complexity of the case, the draft Initial Assessment Report will be circulated to the external stakeholders involved in the complaint-handling process”*.

The above wording gives the impression that the circulation of the reports to the external stakeholders depends on the complexity of the case. However, what could be considered a “complex” case may be perceived differently by complainants and by the EIB-CM. We therefore would suggest that that the phrase *“depending on the complexity of the case”* be deleted.

## **Communication with complainants**

#### **Regarding the outcome of the complaint (Section 1.9 of the Procedures)**

The EIB Management Committee or the EIF Chief Executive/Deputy Chief Executive will decide whether to apply or not the EIB-CM recommendations and corrective actions if any, as well as how they should be implemented (Article 1.8.2 of the draft revised Procedures).

In such cases, the EIB should explain to complainants why this was so. The current wording of Article 1.9.1 (the EIB's Secretary General will communicate to complainants the final EIB Group's decision/position) should therefore be further clarified to ensure that appropriate reasons are provided to complainants in case the EIB decides not to endorse the EIB-CM's findings and not to implement the EIB-CM's recommendations. Likewise, and unless the EIB's response to the complaint is outlined in the EIB-CM's final Conclusions Report, the EIB Management Committee or the EIF Chief Executive/Deputy Chief Executive should attach the services' response (or, in the alternative, an outline of the services' response) to the final Conclusions Report sent to complainants.

We would therefore suggest that Article 1.9.1 of the draft revised Procedures be amended accordingly.



## Language

- *“Seriousness of the complaint”* (Section 1.4 of the Procedures)

The initial assessment aims at, amongst others, clarifying and understanding the complainant’s concerns, and at verifying whether they are grounded<sup>5</sup>.

To avoid misunderstandings, we would suggest that the word “seriousness” (Article 1.4.1) is replaced by a more appropriate term (such as “merits” of the complaint).

- Complaints without contact details

Article 4.1.6 of the Policy<sup>6</sup> sends out a mixed message about the (in)admissibility of complaints that do not contain contact details of the complainant. We suggest that this provision be further clarified.

<sup>5</sup> The purpose of the initial assessment of a complaint is to clarify the concerns raised by the complainant(s), to better understand the complainants’ allegations as well as the views of other relevant stakeholders and to have view on the situation on the ground (<http://www.eib.org/about/accountability/complaints/initial-assessment/index.htm> )

<sup>6</sup> *“Complaints without contact details such as the postal address or e-mail address of the complainant cannot be dealt with although they may be considered admissible”.*