



Annex

EIB's Reply to the EO's Preliminary findings on how the European Investment Bank discloses environmental information in relation to projects it finances through intermediaries (case 1251/2020/PB)

1. General remarks

1.1 The European Investment Bank (EIB)

1.1.1 In paragraph 5 of her Preliminary Findings, the EO suggests that “[...] *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 financial intermediaries*”.

1.1.2 This representation of the EIB requires a rectification. In accordance with Articles 308 and 309 of the TFEU and the EIB Statute¹, the EIB has been established as a body entrusted with a specific financial mission the aim of which is to contribute to the development of the internal market in the interest of the Union and to help pursue EU objectives through offering financing to eligible projects. The special traits of operational and functional autonomy of the EIB within the framework of the Union have been acknowledged by the long-established case-law of the Court of Justice of the European Union (CJEU). The EIB's methods, function, products and procedures therefore are those of the banking sector.

1.2. The EIB Complaints Mechanism

1.2.1 The EIB Complaints Mechanism was established in 2008 (and not in 2009, as indicated in paragraph 8 of the Preliminary Findings).

1.3 The purpose and features of intermediated operations

1.3.1 The European Ombudsman (EO) rightfully explains that, when providing direct loans, the EIB does not run/manage the project it finances, nor does it issue the related public authorisations (paragraph 2 of the Preliminary findings), those being the respective responsibilities of the project promoter and the competent national authorities. The same consideration applies to EIB's intermediated operations where the EIB provides its financial support through financial intermediaries (FIs).

¹ Protocol (No 5) to the Treaties.



1.3.2 The purpose of intermediated operations is to fully exploit the potential provided by the financial market in order to support final beneficiaries, which, due to their nature or the size of their projects (hereinafter referred to as “sub-projects”), could not be considered by the EIB for direct operations and could not access the same type of financing on the financial market. Through intermediated finance, the EIB successfully implements its public policy goals, including the one in support of small and medium sized enterprises (SMEs).

1.3.3 Responsibilities between the EIB and the FIs are shared in order to secure the beneficial features of the intermediated operation (both for the EIB and its FIs²) and, ultimately, ensure that final beneficiaries can benefit from the funding opportunities offered by the intermediated operation.

1.3.4 The role and responsibility of the EIB (i.e. the procedures and the terminology adopted) significantly vary depending on the type of intermediated operation. This Note focuses on the following types of intermediated operations: Multi-Beneficiary Investment Loans (MBILs), Framework Loans intermediated through a financial institution (FLs) and Funds, i.e. operations which are intermediated by FIs.

1.4 The role and responsibilities of FIs

1.4.1 The financing for final beneficiaries³ is provided by FIs in intermediated operations. FIs are responsible for the identification, assessment and monitoring of sub-projects based on contractual models agreed with the EIB.

1.5 Contractual safeguards and exclusion list for MBILs

1.5.1 It is worth considering the contractual structure used in EIB’s MBILs. This is in particular relevant for MBILs with smaller sub-projects (total sub-project’s cost ≤ EUR 25m) in the EU and EFTA countries, as these operations present the highest degree of delegation to FIs. These operations, based on their contractual structure, embed already several non-negligible safeguards.

1.5.2 The finance contract between the FI and the EIB governs the overall relationship and utilisation/management of the loan. It sets out various contractual requirements the FI has to replicate in its template loan documentation for the sub loans it will grant to final beneficiaries from EIB funds. This includes, but is not limited to, compliance with EU (where applicable) and national law and other EIB requirements.

² E.g. greater proximity of the FI to the potential final beneficiaries; capacity to cover a wider array of smaller projects which would not be considered by the EIB for direct lending; empowering/strengthening the financial sector and its beneficiaries in situations of restricted access to liquidity etc.

³ In the Preliminary findings refer to “final project promoters or beneficiaries”. The EIB reply to the EO uses the term “beneficiaries”.



1.5.3 Furthermore, a side letter complements the finance contract and describes in detail for which purposes/activities FIs may use EIB funds; it also stipulates the allocation process⁴. To guide FIs in detail on the activities, which can be supported by the EIB, the EIB provides FIs with dedicated NACE codes lists, broken down in accordance with the nature of the final beneficiary (i.e. SMEs, Midcaps, public and private sector entities). The NACE code helps defining which activities are eligible and which ones are not. Currently, when operations target also public sector entities, large private sector entities and/or Midcaps carrying out large projects, an additional category of sensitive activities is introduced with the aim to ensure that an EIB pre-approval takes place before formal submission of the allocation request by the FI, for allocations to sub-projects above a certain size related to these activities. This concerns for example waste projects, water projects, health projects, etc. which are less likely to be promoted by SMEs and often require increased Environmental and Social (E&S) due diligence.

1.5.4 Finally, in addition to excluded sectors determined through NACE codes, the EIB's list of exclusions screens out a range of controversial activities including any sub-project that is likely to have significant impacts on the environment not likely to be remedied and/or compensated.

1.6 The role and responsibilities of the EIB

1.6.1 For all types of intermediated operations covered by this Note, the EIB applies a risk-based approach to the assessment of E&S risks and impacts associated with the relevant portfolio of its FIs. The extent of EIB's role and responsibilities is commensurate to the type of financial product, the nature of the FI's existing portfolio as well as the size, nature and location of the sub-projects.

1.6.2 For what concerns FIs, the EIB conducts a due diligence on the E&S management capacity of the FI for intermediated operations.

1.6.3 Based on type of operation and total sub-project's costs, the EIB's approach varies namely:

- *For MBILs:*
 - ≤ EUR 25m in the EU and EFTA countries: the EIB delegates the review of the sub-project to the FIs based on the applicable EU and national legal framework as far as E&S risks are concerned;
 - ≤ EUR 25m in the rest of the world: the EIB reviews the sub-project reported with higher E&S risks;

⁴ For more information on the allocation process, see par. 3.3.3 of this Note.



- > EUR 25m: the EIB always reviews the E&S risks and impacts of the sub-project.
- *For FLs intermediated through financial institutions:*
 - ≤ EUR 50m: the EIB reviews the E&S risks and impacts of the sub-project before approving the allocation of EIB funds to it, using a risk based approach:
 - Inside EU and sub-projects with cost < EUR 25m: sub-projects are sampled ex post subject to clearing any issues or questions related to them with the FI.
 - Inside EU and sub-projects with cost EUR 25-50m: sub-projects are analysed for E&S issues ex ante.
 - Sub-projects outside EU are typically reviewed ex ante irrespective of the size.
 - > EUR 50m: the EIB reviews the E&S risks and impacts in a way that resembles the procedure for direct lending operations (full appraisal and EIB's approval of the allocation of EIB's funds).
 - Thresholds modification may be considered in both directions: depending on the residual risks, the EIB may propose stricter thresholds to cover cases of special difficulties or weaknesses. In addition, if a sub-project represents a specific high risk, the EIB may decide to undertake an additional appraisal independently of the total sub-project's cost.
 - Higher thresholds may be proposed (for which the Board approval would be required) on the basis of the specific merits of a particular operation (e.g. strong promoter, sector maturity, adequate procedures, limited E&S risk, positive past experience).
- *For Funds*: the FIs are exclusively responsible for assessment, compliance and monitoring of the sub-projects they finance. The EIB is not involved in the review of the sub-projects and does not approve the Fund's underlying investments. The EIB appraises the E&S capacity of the Fund and monitors its E&S performance through periodic reporting by the FI.

1.7 "Presumption" concerning operations within the EU

1.7.1 In paragraph 45 of the Preliminary findings the EO refers to the "[...] EIB's presumption that, within the EU, there is no need either to impose particularly precise contractual obligations, or carry out related controls [...]". The EIB would like to note that such statement is inaccurate to the extent that it implies that the EIB exercises a less rigorous approach for operations inside the EU compared to operations outside the EU. This is not the case.



1.7.2 In terms of the contractual obligations, the EIB requires FIs to comply with law and to cascade such requirement in their contractual documentation with the final beneficiaries. Therefore, in the EU, the contractual obligations imposed by the EIB already include compliance with the Aarhus regulatory framework to the extent that this applies to FIs and/or competent national/local authorities. In terms of the controls, in the EU, the competent national authorities are responsible to ensure that national law is enforced. Therefore, in the EU, EIB's due diligence focuses particularly on countries and/or specific laws where there is evidence to suggest that EU environmental and social law has not been correctly transposed into national law⁵. This may derive from, *inter alia*, administrative or judicial review procedures as well as an infringement procedure launched by the European Commission. Whilst, within the EU, counterparties are bound by EU legislation and an enforcement framework, this is not the case for operations outside the EU, where it might be necessary to include specific contractual obligations to ensure alignment with the EIB E&S requirements, which are based on EU law⁶.

1.7.3 In line with the principles of subsidiarity and proportionality, the EIB respects the multi-layer governance of the EU and acts with due regard to the competences of EU and national authorities. It is the responsibility of the European Commission and ultimately of the CJEU to determine whether EU law has been correctly transposed into national law; similarly the competent national authorities are responsible for overseeing the enforcement of national law.

1.7.4 The EO has a duty to act with due regard to the competences of EU institutions, bodies, offices or agencies which are the subject of its inquiries⁷. The EIB takes note of the EO's statement in paragraph 46 of the Preliminary findings, according to which the relevant parts of EU administration play an active role to ensure compliance with the applicable laws in question. In this regard, the EIB respectfully notes that such a role must be exercised by each EU institution/body within its remit, as per its institutional mandate and without interfering with other EU/national authorities.

1.7.5 The EIB would like therefore to reassure the EO that it does not have a "simplified perception of the state of the rule of law within the EU". On the contrary, the EIB:

- respects (i) the guardianship of the European Commission and the CJEU when it comes to the correct implementation of EU law as well as (ii) the role of the competent authorities of the Member States as regards the enforcement of law; and

⁵ https://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf

⁶ https://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf

⁷ Statute of the European Ombudsman, Recital 5



- tailors its due diligence and monitoring of operations inside the EU on the basis of evidentiary issues identified by the EIB as explained in paragraph 1.7.2 of this Note.

1.8 Transparency of intermediated operations

1.8.1 The EO refers to the complainants' point that *"the current circumstances may actually prevent the public from knowing whether projects financed through intermediaries are, or may be, contrary to EU Treaty objectives"* (paragraph 28 of the Preliminary findings).

1.8.2 In addition to the FIs financing the sub-projects, three other possible channels of communication are available to the public for obtaining information and voicing concerns about EIB's intermediated operations:

- **Competent national/local authorities:** when sub-projects have a significant impact on the environment, national/local authorities are responsible for reviewing and making publicly available the relevant environmental information to the extent required by EU and/or national law. Administrative decisions of national/local authorities, including those concerning the environmental impacts of a sub-project (or the disclosure of environmental information pertaining to a sub-project), can be challenged before the competent judicial and non-judicial review mechanisms at local, national or international level.
- **Final beneficiaries:** they are primarily responsible for implementing the sub-project, and, as such, are best placed to engage with the public and address concerns about the impact of the sub-project where the latter is likely to have significant E&S impacts. When in the context of intermediated operations outside of the EU national/local authorities and FIs are not required by national law to disclose environmental information, FIs are required to ensure that final beneficiaries comply with EIB requirements, which include disclosure, stakeholder engagement and access to project-level grievance mechanisms.
- **The EIB:** In line with the new EIB Group Transparency Policy (EIB-TP) adopted on 17 November 2021⁸, the EIB publishes on its website project summaries of the sub-projects⁹ it finances through FIs with a total project cost > EUR 50m¹⁰. Moreover, accepting a suggestion from the EO, the EIB-TP no longer contains the provision on individual allocations (sub-projects) that appeared in Article 5.13 of the 2015 EIB Group Transparency Policy (2015 EIB-TP). Going beyond the

⁸ Available at: [EIB Group Transparency Policy](#), accessed on 22 November 2021.

⁹ All projects benefiting from EIB support through intermediated finance are designated as sub-projects.

¹⁰ Considering that the EIB typically finances only up to 50% of project costs, the related EIB loan would normally be EUR 25m or higher.



EIB-TP's requirements, the EIB also publishes the list of FIs with which it cooperates (see section 6 of the Inspection Report).

1.8.3 As noted in section 14 of the Inspection Report, the EIB has examples of sub-projects in which Civil Society Organisations (CSOs) and/or Project-affected people with the support of CSOs have scrutinised the EIB Group's actions. These examples indicate that information is available for CSOs and other third parties to scrutinise sub-projects financed by FIs.

1.9 Concluding general remarks

1.9.1 The EIB rejects the complainants' representation of the EIB's approach to intermediated operations as "*hands-off*" or "*black-box*" (paragraph 15 of the Preliminary findings). The EIB has a balanced, risk-based approach, based on a delegation of responsibilities from EIB to FIs. The EIB maintains contractual provisions and well-defined assessment/eligibility assessment procedures, which require the FIs to ensure compliance of sub-projects with EIB requirements. The EIB's position is based on explanations provided in this Note with regard to:

- The purpose and features of intermediated operations (section 1.3 of this Note)
- The respective role and responsibilities of FIs and of the EIB (sections 1.4 - 1.6 of this Note)
- The EIB's approach in operations within the EU (section 1.7 of this Note).

1.9.2 The EIB does not share the complainants' view that CSOs and the public concerned are prevented from obtaining information or expressing concerns on sub-projects financed through FIs. The public has access to information pertaining to intermediated operations through four channels of communication: FIs financing the sub-project, competent national/local authorities, final beneficiaries, as well as the EIB itself (paragraph 1.8.2 of this Note). Furthermore, the EIB's experience shows that international NGOs, local CSOs and interest groups as well as individuals are able to raise concerns about potential impacts of sub-projects financed through FIs (paragraph 1.8.3 of this Note). Finally, the EIB publishes all of its intermediated operations on its website and regularly reports on these operations. It also addresses access to information requests in relation to intermediated operations according to EIB-TP (both 2021 and 2015).

1.10 Scope of the EO's inquiry

1.10.1 In July 2020, the EO informed the EIB of its decision to launch an inquiry into a complaint from three NGOs about the EIB's disclosure of environmental information in relation to indirect financing through intermediaries. The letter of the EO also referred to the complainants' concern that, in the context of its financing of projects through intermediaries, the EIB is not taking adequate measures to ensure sufficient



collection of environmental information and disclosure thereof to the public. In paragraph 11 of the Preliminary findings, the EO states that “[t]he complainants invoke [the Aarhus Regulation] to support their views that the EIB’s lending activities should be more transparent regarding the initial decision-making and the monitoring/reporting”.

1.10.2 In November 2020, the EIB expressed its willingness to submit additional views on the complaint. In order to ensure effectiveness of this exercise, the EIB requested the EO to clarify which were the issues raised in the complaint that the EO considered relevant for her inquiry and intended to address. In June 2021, the EO provided the EIB with her preliminary findings and suggestions, before the EIB had expressed its additional views on the subject matter of the inquiry. The EIB notes that the EO may make suggestions for improvement regarding issues related to the inquiry during the course of the inquiry¹¹.

1.10.3 The EIB notes that there are three types of information, namely:

- Environmental information which falls under Article 4 of the Aarhus Regulation and, as such, shall be organised and pro-actively disseminated, provided that no exceptions to disclosure apply;
- Environmental information which does not fall under Article 4 of the Aarhus Regulation and shall be disclosed upon request, provided that no exceptions to disclosure apply; and
- Information that does not constitute environmental information and whose (pro-active or reactive) disclosure is exclusively governed by the EIB-TP.

1.10.4 Although the complaint concerns the EIB’s compliance with the Aarhus Regulation, the EIB notes that some of the EO’s preliminary findings and suggestions relate to information that does not constitute environmental information (e.g. the allocation list of final beneficiaries). The EIB would like to emphasise that its practice to pro-actively disseminate non-environmental information should be reviewed exclusively in the light of the EIB-TP.

2. The applicable regulatory framework

2.1 Despite the complainants’ concerns about the compliance of the EIB’s disclosure practices with the Aarhus Regulation, the EIB notes that, in several passages, the Preliminary findings make reference to the Aarhus Convention and only marginally (paragraph 10 of the Preliminary findings) refer to the Aarhus Regulation, which is

¹¹ Article 6.1 of the Decision of the EO adopting Implementing Provisions, available at: [Implementing provisions | European Ombudsman \(europa.eu\)](https://european-ombudsman.europa.eu/en/decisions/2021/01/2021-0001), accessed on 12 October 2021.



the relevant EU legislative instrument implementing the provisions of the Aarhus Convention. The EIB wishes to emphasise that, as any other EU institution or body, the EIB is bound to comply with the Aarhus Regulation, the relevant provisions of which have been incorporated into the EIB-TP.

2.2 Article 1 of the Aarhus Regulation specifies that its objective is to contribute to the implementation of the obligations arising under Aarhus Convention, by laying down rules to apply the provisions of the Convention to EU institutions and bodies.

2.3 The Aarhus Regulation provides for specific rules regarding the collection and pro-active dissemination of environmental information, under Article 4(1). Namely, it provides that:

- the EU institutions and bodies shall organise the environmental information (i) which is relevant to their functions and (ii) which is held by them, with a view to its active and systematic dissemination¹²;
- such systematic dissemination shall be conducted, in particular, by means of computer telecommunication and/or electronic technology;
- The information shall be made progressively available in electronic databases that are easily accessible to the public through public telecommunication networks.

2.4 Environmental information, which is relevant to the EIB's functions, is the information requested by the EIB from FIs or generated by the EIB for the purpose of the performance of its statutory functions, which corresponds in this context to lending and financing of operations.

2.5 Considering the EIB's functions and pursuant to Article 4(2) of the Aarhus Regulation, there are some categories of environmental information that typically the EIB may hold depending on the intermediated operation at stake¹³ and that can fall in the categories enlisted by the Aarhus Regulation for proactive dissemination, including:

- data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment (Article 4(2)(e));
- environmental impact studies and risk assessments concerning environmental elements, or a reference to the place where such information can be requested or accessed. (Article 4(2)(g)).

3. EIB's position on the EO's assessment

¹² The Aarhus Regulation does not forbid the extraction and organisation of environmental information with a view to its proactive dissemination.

¹³ This should be read in conjunction with the information provided in section 1.6 of this Note.



3.1 Standard approach for larger sub-projects (total sub-project's costs > EUR 25m)

3.1.1 As explained in sections 1.4 - 1.6 of this Note, FIs are responsible for identification, assessment and monitoring of the sub-projects they finance with the support of the EIB. The EIB's involvement in terms of E&S due diligence of a sub-project (before approving the FI's request to allocate EIB's funds to the concerned sub-project) is commensurate to the type of financial product¹⁴, as well as the size, nature and location of the sub-projects.

3.1.2 The EIB aims at the highest possible degree of transparency in intermediated operations, taking into consideration the differences between the types of operations highlighted in this Note as well as paragraph 1.8.2, item 3 of this Note. However, the fact that the EIB carries out a review of E&S risks and impacts pertaining to "larger" sub-projects does not automatically imply that the EIB "*holds important environmental information related to the projects in question*" (see paragraph 32 of the Preliminary findings), and that such information is subject to any duty of pro-active dissemination under the applicable regulatory framework.

3.1.3 The EIB notes that the EO's "suggestions for larger projects" financed through intermediated operations take into account (i) the Aarhus Convention and (ii) the EO's findings in case 1065/2020/PB¹⁵. In this respect, (i) the EIB draws the EO's attention to the fact that the complainants focus on EIB's compliance with the Aarhus Regulation (para. 1.10.1 of this Note), as well as to the information provided in section 2 of this Note; (ii) the EIB refers to its reply to the EO of 22 November 2021.

3.2 Balanced approach for smaller sub-projects (total sub-project's costs < EUR 25m)

3.2.1 The EIB shares the EO's view (paragraphs 35-36 of the Preliminary findings) on the complainants' request to oblige FIs to collect and pass on to the EIB all the relevant environmental information, for the EIB to centrally process it and systematically publish it online: such a centralised approach is incompatible with the delegated approach of EIB intermediated financing (see sections 1.3 - 1.6 of this Note) and would ultimately have the effect of undermining the capability for the EIB to achieve its institutional mandate.

3.2.2 The EIB wishes to rectify the EO's representation of the EIB's view made in paragraph 37 of the Preliminary findings:

- the account of the relevant contractual obligations provided by the EO is incomplete (see para. 3.2.3 of this Note); and

¹⁴ See section 1.6 of this Note.

¹⁵ The EIB also notes that paragraph 34 of the Preliminary findings contains an incomplete footnote (n. 17).



- in addition to the necessary contractual provisions, the EIB's involvement in relevant cases contributes to ensuring compliance of sub-projects with EIB requirements (see section 1.6 of this Note).

3.2.3 It is a matter of fact that, in intermediated operations, the EIB's client is the FI, and the final beneficiary is the client of the FI. The EIB has direct contractual relationship with the FIs only. As noted in para. 1.5.2 of the Note, the contract between the EIB and FIs includes provisions:

- requiring FIs to insert certain provisions into the contractual documentation with the final beneficiaries, so that the applicable law and EIB requirements cascade to the underlying contractual relationship;
- imposing on FIs certain reporting obligations enabling the EIB to assess if sub-projects are carried out in line with relevant EIB requirements;
- imposing on FIs and final beneficiaries visit rights enabling the EIB and other EU institutions and bodies to follow up and carry out further checks on-site if appropriate.

3.2.4 Paragraph 42 of the Preliminary findings suggests that the existence of the above contractual obligations may not be sufficient for sub-projects to comply with EIB requirements. In this regard, the EIB notes the following additional safeguards. :

- sectors which systematically raise concerns in terms of environmental impact are not eligible for EIB financing under intermediated operations such as hydropower projects for MBILs;
- risk mitigation measures are foreseen (such as capacity building) if the EIB's E&S due diligence finds that a FI does not have sufficient capacity to ensure compliance with the EIB requirements; and
- depending on the type of intermediated operation, the EIB reviews the E&S performance of the FI in line with the EIB's risk-based approach.

3.2.5 It is therefore not clear on which grounds the EO qualifies the risk-based approach adopted by the EIB as "somewhat technocratic" (paragraphs 37-38 of the Preliminary findings). The EIB could not find in the Preliminary findings any element/justification supporting the EO's view that "*the EIB does not systematically make itself adequately aware of the projects that it finances and which have a significant impact on the environment*" (paragraph 43 of the Preliminary findings).

3.3 Allocation list of final beneficiaries

3.3.1 The "*allocation list of final [...] beneficiaries of intermediary finance operations*" does not fall within the concept of "environmental information" to be proactively disseminated under the Aarhus Regulation and the EIB-TP. Furthermore, the proactive dissemination of this information is not required by the EIB-TP. In fact, the



complainants' request (referenced in paragraph 48 of the Preliminary findings) does not challenge the EIB's compliance with the regulatory framework (see also section 1.10 of this Note).

3.3.2 The EIB would like to rectify the EO's statement in paragraph 49 of the Preliminary findings. With very limited exceptions, the EIB does collect data on all sub-projects to which EIB funding has been allocated (e.g. amount, final beneficiary, sector). However, the EIB-TP does not require to pro-actively disseminate this information, the reason being the confidential nature of the information and the considerable number of yearly allocations (more than 71 000 in 2020).

3.3.3 As explained to the EO (section 6 of the Inspection Report and section 1.8 of this Note), the EIB does already proactively publish project summaries of its intermediated operations and a list of its FIs on the EIB website. At the time of publication of the project summary, the list of final beneficiaries of an intermediated operation is not known to the EIB. The FI informs the EIB about proposed allocations at varying points during the life of the intermediated operation. Furthermore, if the intermediated operation so requires, the EIB needs to review and approve the FI's request for allocation of EIB support to a final beneficiary. Ultimately, the FI may decide not to finance a sub-project, although the EIB had pre-approved allocation of its support to it, and informs the EIB of its decision at a later stage. The ultimate list of final beneficiaries depends on the ultimate financing decision made by the FI, and is known to the EIB only at the end of the allocation period established for each intermediated operation.

3.3.4 Finally, the EIB is not in a position to comment on the complainants' suggestion (concerning non-environmental information) in light of recent and ongoing work on the EU taxonomy as the link between the two is not clear (see footnote 22 of the Preliminary findings).

4. EIB's position on the EO's suggestions

4.1 Standard approach for larger projects

4.1.1 The EIB recalls that the Aarhus Regulation requires EU institutions and bodies to organise the environmental information which is relevant to their functions and which is held by them with a view to its proactive dissemination. Furthermore, the EIB recalls a number of considerations made in the EIB's response to the EO's Preliminary findings concerning case 1065/2020/PB, in particular with regard to:

- the concept of "factual" information (section 3.5 of the EIB's reply on case 1065);



- the fact that economic assumptions and calculations do not qualify as environmental information to be proactively disseminated as per Article 4 of the Aarhus Regulation (section 3.5 of the EIB's reply on case 1065); and
- the non-derivative nature¹⁶ of the Environmental and Social Data Sheet - ESDS (section 1.5 of the EIB's reply on case 1065).

4.1.2 The EIB also emphasises that the introduction of transparency requirements for FIs, other than those resulting from the applicable regulatory framework (as suggested by the EO in the light of a document-transparency by design approach), is not feasible in legal and practical terms. Furthermore, it would significantly affect the *modus operandi* of the EIB and its interaction with FIs, ultimately undermining the EIB's capability to fulfil its tasks as established by the EU Treaties.

4.1.3 Finally, the EIB notes that, when the total sub-project's costs is > EUR 50m, the EIB already publishes the ESDS of sub-projects financed through FIs intermediated through financial institutions, as well as the corresponding EIAs. In this regard, it is worth noting that, in its new 2021 EIB-TP, the EIB commits to publish on its website project summaries of sub-projects it finances through FIs with a total project cost > EUR 50m¹⁷ in accordance with Articles 4.7 and 4.8 of the EIB-TP as applicable. Article 4.8 of the EIB-TP, concerning the types of information included in project summaries, notably refers to: *"the name of the project, the project promoter or financial intermediary (for intermediated loans), the location of the project, the sector it represents, a project description, its objective(s), its environmental and, if relevant, social aspects, procurement data, proposed EIB finance, the total project cost, and the status of the project, noting whether it is "under appraisal", "approved" or "signed". Project summaries inform the public about how to submit enquiries, comments and complaints. When applicable, links are provided to environmental information, as early as possible in the project cycle."*

4.2 Balanced approach for smaller projects (below EUR 25m)

4.2.1 The EIB notes that, when the Aarhus regulatory framework applies, FIs and/or competent national/local authorities are already required by national law to proactively disseminate environmental information. The finance contract between the EIB and the FI contains provisions requiring the FI to comply with national law. Furthermore, in these cases, failure to comply with the "Aarhus regulatory framework" can be brought to the attention of the competent national authorities and/or to the Aarhus Convention Compliance Committee.

¹⁶ Para 1.5.4 of the EIB reply on case 1065: "The ESDS should no longer be regarded as a derivative source, where information taken from other primary source documents is collected, selected and elaborated. On the contrary, it shall rather be regarded as a primary source document reflecting in a comprehensive way the EIB E&S due diligence and making it accessible to the EIB Board of Directors and the general public."

¹⁷ Considering that the EIB typically finances only up to 50% of project costs, the related EIB loan would normally be EUR 25m or higher.



4.2.2 When the Aarhus regulatory framework does not apply, the EIB will carefully consider what can practically be done taking into account the applicable regulatory framework and implications for the institutional mandate of the EIB. The proportionality of the suggestion should also be measured by noting that (i) the EIB contractually requires FIs to cascade EIB requirements on sub-projects and (ii) EIB requirements include stakeholder engagement and disclosure requirements.

4.2.3 With regard to the second suggestion (2b), the EIB reiterates the considerations made in section 3.3 of this Note as regards the fact that the information in question does not constitute environmental information to be pro-actively disseminated as per the applicable regulatory framework.

4.3 Related practical suggestions

Ensuring that intermediaries adequately respond to disclosure requests concerning environmental information and availability of review mechanisms

4.3.1 While the EIB encourages its counterparts to apply the principles of its EIB-TP, FIs are subject to (i) national transparency obligations, if any and (ii) EIB requirements (intermediated operations outside of the EU). The EIB draws the EO's attention to the fact that the adequacy of the FI's response should thus be measured on the basis of the two systems of requirements referred to in paragraphs 4.2.1 - 4.2.2 of this Note).

4.3.2 The public is informed of the possibility to submit a complaint concerning alleged maladministration by the EIB Group with the EIB-CM. Such complaints may pertain to any EIB operation, including intermediated operations. Information about the possibility to complain is provided via a number of channels (EIB website, communication material available online or at the EIB external offices, outreach events organised by the EIB-CM alone or in cooperation with other Independent Accountability Mechanisms). As referred to in paragraph 1.8.3 of this Note, CSOs and individuals have access to information on (and have made use of) the possibility to complain about sub-projects financed as part of intermediated operations.

4.3.3 Finally, with regard to training for FIs, the EIB envisages to implement the EO's suggestion as well as similar recommendations of the EIB-CM in case SG/G/2019/01.

Use of definitions, interpretations and classifications pertinent to the Aarhus regulatory framework when determining whether projects should be earmarked as having a significant impact on the environment



4.3.4 The EIB understands this suggestion (3b) as linked to the complainants' observations reported in paragraph 23 of the Preliminary findings.

4.3.5 In this regard, the EIB would like to point out the following:

- NACE is the industry standard classification system used in the EU. While identifying the sector of the main activity of the final beneficiary, it is not *per se* meant to provide information on the environmental impact of the specific activity to be financed;
- the Aarhus regulatory framework concerns (i) access to environmental information, (ii) public participation in decision-making and (iii) access to justice. The Aarhus regulatory framework does not contain "definitions, interpretations and classifications" pertaining to the assessment of the environmental impact of projects; and
- The definitions, interpretations and classifications used by the EIB in the assessment of the projects' impact on environment stem from the relevant sources of the EU acquis, notably the EIA Directive and the case law of the CJEU.

Publication of reasons for imposing other standards than those established by the Aarhus regulatory framework

4.3.6 The Aarhus Convention is applicable only to certain categories of entities. Private entities or public entities operating in non-EU countries, which have not ratified the Aarhus Convention, are not subject to it. The EIB fosters the respect of law, including the Aarhus regulatory framework when applicable, in its operations. When the Aarhus regulatory framework does not apply, the EIB requires FIs to cascade EIB requirements on final beneficiaries (see paragraph 4.2.2 of this Note).

Inclusion of a dedicated section of the Annual Report on the implementation of the EIB-TP on transparency in intermediated financing

4.3.7 The EIB thanks the EO for this practical suggestion, which will indeed help the EIB better communicate its actual level of transparency concerning intermediated operations. The EIB will implement this suggestion by including relevant information in future annual reports on the implementation of the EIB-TP.

5. Further evolution of EIB's practices of proactive dissemination of environmental information

5.1 The EIB reiterates its commitment to the progressive proactive dissemination of environmental information in accordance with the relevant legal framework. In addition, as the EO is aware, the EIB is currently reviewing its Environmental and



Social Sustainability Framework. Once approved, the EIB will ensure that information held by the EIB and potentially subject to progressive proactive dissemination is analysed and, where relevant, made available to the public.