

**Dr Werner Hoyer**  
President

Ms Emily O'Reilly  
The European Ombudsman  
1, avenue du Président Robert Schuman  
67001 Strasbourg  
France

Luxembourg, 27 October 2021

Complaint Reference: 1252/2020/PB

Dear Ms O'Reilly,

I refer to your letter of 8 June 2021 concerning the above-mentioned complaint. In the letter, you proposed that the EIB reviews its decision not to disclose the Management Committee (MC) minutes concerning possible co-financing of a biomass power generation plant in Spain ('Curtis Biomass Power Generation Plant').

I am pleased to inform you that the EIB has accepted your proposal for solution and decided to partially disclose the minutes. In the enclosed annexes you will find the following:

- EIB's Reply to the EO's Solution proposal on the refusal of the European Investment Bank to grant public access to the minutes of Management Committee meetings; and
- Redacted MC minutes of weeks 4 – 8 December 2017, 20 March 2018, 9 – 13 April 2018, and 9 – 13 July 2018, in parts that concern the Curtis Biomass project.

I trust that the information provided is satisfactory and I remain at your disposal for any further clarifications.

Yours sincerely,



Enclosures: 2



## **Annex 1 - EIB's Reply to the EO's Solution proposal on the refusal of the European Investment Bank to grant public access to the minutes of Management Committee meetings (Proposal) (case 1252/2020/PB)**

### **1. General remarks**

1.1 Paragraphs 1 and 2 of the Proposal state that the European Ombudsman's (EO') case concerns the EIB's refusal to grant the complainant access to the minutes of the Management Committee (MC) meetings (the minutes) which were requested to obtain information on the EIB's deliberations on possible co-financing of the Curtis Biomass Power Generation Plant project (Curtis Biomass project).

1.2 As rightly pointed by the EO in paragraph 7 of the Proposal, the *"EIB handles requests for public access to documents on the basis of its 'Transparency Policy', which the EIB has adopted in the context of the applicable Treaty framework."* In its reply to the confirmatory application, the EIB has provided information about the applicable rules and the reasons underpinning its decision not to disclose the minutes.

1.3 The EIB's reply to the confirmatory application stresses that the EIB Group Transparency Policy (EIB-TP) must be interpreted and applied in the light of the Treaty and the specific guiding principles of the EIB-TP, acknowledging the specificity of the EIB as a bank and striking the balance between openness and the need to safeguard relevant information, including on decision making, and client relationships that is crucial for a financial institution operating in the market.

1.4 The EIB-TP is based on the principle of presumption of disclosure, meaning that all information and documents held by the Bank are subject to disclosure upon request, unless there is a compelling reason for non-disclosure (as defined by the exceptions)<sup>1</sup>. The application of the defined exceptions, supported by a sufficient statement of reasons, can lead to partial or full non-disclosure.

1.5 The EIB-TP does not provide for a general presumption of confidentiality or non-disclosure of the MC minutes. The EIB reiterates its commitment to transparency, as set out in the EIB-TP, ruling out any *"de facto general presumption of confidentiality"*. Indeed, at the time of responding to the request, the EIB appropriately assessed the access to documents request and considered that relevant disclosure exceptions applied. The EIB provided a sufficient statement of reasons, justifying the non-disclosure in accordance with the EIB-TP, taking into account the circumstances of the request and the special qualification of the requester (an organisation of *"200+ staff, over half of whom are legally trained"*).

### **2. Exceptions identified**

#### **2.1 Personal data protection**

2.1.1 One of the grounds for non-disclosure of the minutes that is set out in the reply to the confirmatory application is the protection of personal data<sup>2</sup>. Paragraph 9 of the Proposal states that the EU applies a high standard of protection when it comes to personal data. The same paragraph further states that the EIB's reference to data protection *"in this case is, however, brief and lacks contextualisation"*. In this regard, the EIB would like to point out that the exception relied upon is correctly formulated in a punctual manner and that neither the EIB-TP nor relevant EU privacy law require that explanations should be voluminous or rich in contextualisation.

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<sup>1</sup> Art. 5.1(a), EIB-TP.

<sup>2</sup> Art. 5.4(b), EIB-TP.



2.1.2 Paragraphs 11 to 13 of the Proposal refer to the number, names and positions of the individuals whose personal data is mentioned in the minutes, specifying that *“it helps to show that protection of personal data issue alone is unlikely to play a significant role determining requests for access to the minutes of the EIB’s Management Committee”*. On this point, the EIB notes that it has never claimed that the protection of personal data issue played a *“significant role”* in the refusal to disclose the minutes. The EIB only stated that the names of individuals appearing in the minutes could not be disclosed in order to protect their privacy. It is worth noting that the use of this exception was not contested in the confirmatory application and in the complaint to the EO. The EIB decision relied on several exceptions applicable to various parts of the information contained in the minutes and not just the privacy exception specifically applicable to personal data.

## **2.2. Commercial interests**

2.2.1 Paragraph 14 of the Proposal specifies that *“whilst exceptions must generally be interpreted narrowly, the case-law under Regulation 1049/2001 is in fact relatively generous to the protection of commercial interests”*. In this regard, the EIB points out that the mentioned Regulation is not applicable, that the relevant reference is the EIB-TP, and that the latter’s provisions must be interpreted in the light of the Policy’s guiding principles<sup>3</sup>, which take into account the EIB’s nature as a bank<sup>4</sup>.

2.2.2 Paragraph 16 of the Proposal states *“that the invoking of the commercial interest exception is characterised by a degree of routine reasoning rather than the outcome of a document-specific assessment.”* The EIB disagrees with this statement and confirms that it carried out an assessment of the specific documents identified as falling within the scope of the request. In its reply to the confirmatory application, the EIB provided a specific statement of the reasons that reflects the case-by-case assessment of each document in the light of its specific content. This specific assessment was conducted when handling the initial request and the confirmatory application. There was therefore no routine or superficial assessment.

2.2.3 Paragraph 17 of the Proposal states that the EO *“has not, for instance, identified in these minutes “risk pricing, securities and guarantees” or “spread curves”*. The EIB would like to clarify that:

- The references to risk pricing and spread curves refer to the sub-section titled “Modulation”, which is part of section 2.1.3 of the minutes of the MC meeting of 20 March 2018, as well as to the first bullet point in the relevant paragraph of the minutes of the week from 9 to 13 July 2018. The basis points (“bps”) modulation expresses a spread over a base rate that reflects the EIB’s assessment of financial risk. The reference to risk pricing also covers the last sentence of the penultimate paragraph, as well as the last paragraph, of the above-mentioned section 2.1.3.
- The reference to securities and guarantees refers to the sub-section titled “Security / Guarantee”, which is part of the above-mentioned section 2.1.3.

In addition, the EIB notes that the statement of reasons relating to the application of the commercial interests exception does not refer only to the examples mentioned by the EO, but also to other information contained in the minutes. The EIB considered that *“[i]f disclosed, this information would provide the public, including investors and competitors, with privileged financial information about the undertakings concerned. This information would affect the decisions of market operators and the competitive position of the undertakings concerned”*. The EIB considers that the detailed statement of reasons provided at the time of replying to the confirmatory application was sufficient to justify non-disclosure.

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<sup>3</sup> See Section 2 of the EIB TP.

<sup>4</sup> As recalled, for instance, in Articles 3.8 and 5.3 of the EIB-TP.



2.2.4 Paragraph 18 of the Proposal specifies that *“The key sentence in the EIB’s confirmatory decision moreover begins with “This information concerns, inter alia...”, which gives the reasoning an unusually wide scope.”* The EIB would like to point out that its response to the confirmatory application should be read in its entirety. The quoted extract cannot be understood as expressing or summarising the whole of the EIB’s reasoning. The extract referred to by the EO constitutes part of the EIB’s justification for invoking the applicable exception showing that the EIB carried out a case-by-case assessment of the relevant documents. The term *“inter alia”* does not widen the scope of application of the exception. It is worth recalling that the EIB’s reply covered several documents and that the EIB-TP does not require the EIB to repeat the reasoning and to adapt/detail such reasoning for each specific piece of information contained in the documents. Nevertheless, the EIB transparently accompanied its statement of the reasons with the main types of information covered by exceptions and clearly explained that the information included in the minutes would, if disclosed, undermine the commercial interest of third parties.

2.2.5 In paragraph 21 of the Proposal, the EO explains *“that the EIB already systematically publishes, on its website, company related information prior to the final decision on the financing of projects”*. The EIB would like to confirm its high level of proactive transparency under the EIB-TP. At the same time, the EIB recalls that systematic publication does not rule out that exceptions may apply in specific cases.

2.2.6 In paragraph 22 of the Proposal, *“the Ombudsman finds that, taken together, the EIB’s attempted explanations related to commercial interests give rise to a de facto ‘general presumption of confidentiality’ for documents of this kind”*. In fact, a *“general presumption of confidentiality”* would imply that the EIB does not undertake a specific assessment of the requested documents and does not provide justifications for its refusal. On the contrary, in line with the EIB-TP, the EIB carried out an assessment of the documents concerned and provided a statement of the reasons for the application of disclosure exceptions (see §§ 1.5 and 2.2.2 of this Reply).

2.2.7 Paragraph 23 of the Proposal states that *“if the EIB’s concerns are partly related to a more general worry that companies will not work with it if it discloses information, that is an issue that can be examined separately”*. The EIB would like to point out that its decision is not based on a “worry” but on the application of the EIB-TP, which obliges the Bank not only to be transparent, but also to protect legitimate interests, including those of its clients, by refusing disclosures that would undermine those interests. In this regard, the specific nature of the EIB as a bank must be taken into account in line with the Treaties and the EIB-TP.

2.2.8 Concerning the statement that *“[w]hen applying transparency rules, such a concern is normally placed in the context of the protection of the specific procedure in question, and not in the context of a commercial interest exception”*, the EIB would like to note that the EIB-TP requires the protection of legitimate interests based on a case-by-case assessment of the disclosure request. It is therefore not clear to which *“specific procedure in question”* the EO refers. In general, it would not be in line with the EIB-TP for the EIB to add conditions for the application of its provisions, which are not based on the EIB-TP itself.

### **2.3 Protection of decision-making process**

2.3.1 Concerning the reference, in paragraph 24 of the Proposal, to a *“dynamic account of the dialogue between the Management Committee and the EIB’s technical services”*, the EIB would like to recall that its reasoning was that *“[t]he documents in question are intended for internal use as part of preliminary consultations and deliberations within the EIB. Their disclosure would reveal the information, considerations and opinions examined by or expressed within the MC, or exchanged between the latter and the EIB’s services.”* The EIB-TP does not require that the relevant information should constitute a *“dynamic account”*, as quoted above, in order to apply the decision-making exception.



2.3.2 Paragraph 26 of the Proposal expresses the concern *“that the EIB essentially attempts to establish a de facto general presumption of confidentiality for all such minutes.”* The EIB would like once again to dispel such concern and reiterate its commitment to transparency, as set out in the EIB-TP, ruling out any *“de facto general presumption of confidentiality”*. As explained above, such a general presumption would imply that the EIB does not undertake an assessment and does not provide justifications for its refusal. On the contrary, at the time of handling the request, and in line with the EIB-TP, the EIB carried out an assessment of the documents concerned and provided a statement of the reasons for refusing the disclosure of the specific documents requested.

2.3.3 Paragraph 28 of the Proposal states that *“the reasoning behind the ‘decision-making process’ exception is particularly weak and difficult to justify when the document concerned relates to a matter for which the relevant decision-making has been finalised.”* In this regard, the EIB highlights that Article 5.6 of the EIB-TP provides for the protection of an ongoing decision-making process (first subparagraph) and a finalised one (second subparagraph)<sup>5</sup>. Paragraph 29 of the Proposal implies that in, its assessment, the EIB did not consider if the disclosure request related to a finalised decision-making process or to an on-going one. When applying the decision-making exception, the EIB’s reply to the confirmatory application referred to the second subparagraph of Article 5.6 of the EIB-TP.

### **3. Proposal**

3.1 The EIB considers that, at the time of its reply to the disclosure request, relevant exceptions applied to the information contained in the minutes, as communicated to the applicants in its reply.

3.2 On the basis of the EO’s Proposal, and in line with the scope of the EO’s enquiry (see § 1.1), the EIB has reviewed the information contained in the minutes and has decided to partially disclose them.

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<sup>5</sup> “Access to information/documents containing opinions for internal use as part of deliberations and preliminary consultations within the Bank or with Member States/other stakeholders shall be refused even after the decision has been taken if disclosure of the information/document would seriously undermine the Bank’s decision-making process.”



**Annex 2 - Redacted MC minutes of weeks 4 – 8 December 2017, 20 March 2018, 9 – 13 April 2018, and 9 – 13 July 2018, in parts that concern the Curtis Biomass project**

**MANAGEMENT COMMITTEE**

Minutes of the week from 4 to 8 December 2017

WEEK :

2017/12/04

2017/12/05

2017/12/06

2017/12/07

2017/12/08

[...]

**TACIT APPROVAL ON PINS AND AFS  
In the week from 4 to 8 December 2017**

Authorisation of appraisals of the following operations with a view to possible financing:

(2017/12/04) PIN CURTIS BIOMASS POWER GENERATION PLANT (Spain)

[...]

**MANAGEMENT COMMITTEE**

Minutes of the meeting of 20 March 2018

WEEK:

2018/03/20

[...]

**2.1.3. CURTIS BIOMASS POWER GENERATION PLANT Project (EFSI)**

[...]

Financing of the construction of a 50 MWe electricity only biomass plant, which would use 100% forestry residues in wood chip form, sourced from the region in a 100 km radius around the plant (Spain)

Promoter : Greenalia, S.A.

Borrower / : Special Purpose Vehicle (SPV)

Final Beneficiary

Guarantor / : Acceptable commercial banks

Intermediary

Max. amount : EUR 60m

Term : up to 17 years [...]

Interest rate : rate applicable at date of signature of contract or at financial close

[...]

CA Agenda Cat.: Investment loan

The Management Committee discussed the proposal in the presence of representatives of CS/PERS, OCCO, OPS, PJ, RM, JU and SG.

[...]



## MANAGEMENT COMMITTEE

Minutes of the week from 9 to 13 April 2018

WEEK:

2018/04/09

2018/04/10

2018/04/11

2018/04/12

2018/04/13

[...]

During the week from 9 to 13 April 2018, the Management Committee approved the following proposals by tacit procedure:

- (2018/04/10) CURTIS BIOMASS POWER GENERATION PLANT (Spain) (20170647) – (20170647) Presentation to the Board of Directors: approval of the related slides and authorisation of the submission of the presentation to the Board of Directors at its meeting on 2018/04/12

[...]

## MANAGEMENT COMMITTEE

Minutes of the week from 9 to 13 July 2018

WEEK :

2018/07/09

2018/07/10

2018/07/11

2018/07/12

2018/07/13

[...]

During the week from 9 to 13 July 2018, the Management Committee approved the following proposals by tacit procedure:

[...]

- (2018/07/13) CURTIS BIOMASS POWER GENERATION PLANT - Final Loan Proposal: approval of the final terms and conditions of the proposed loan totalling up to EUR 60m to the Curtis Biomass Power Generation Plant

[...]