Counter Balance Challenging Public Investment Banks

CEE bankwatch network

ClientEarth

9 December 2021

Complaint no.:1252/2020/PB

Case title: Refusal of the European Investment Bank to grant public access to the minutes of Management Committee meetings

Comments on the EIB's reply to the Ombudsman's solution proposal, dated 27 October 2021

1. We would first like to express our sincere thanks for the Ombudsman's handling of our complaint as well as for this opportunity to comment on the EIB's reply.

2. While we appreciate that the EIB has partially disclosed the minutes, we disagree with the rationale for some of the redactions and do not believe that the EIB has adequately implemented the Ombudsman's Solution Proposal.

3. Following a preliminary point on the scope of the request, the comments below are structured in accordance with the EIB's Solution response. Unless otherwise indicated, the paragraph references below are to the EIB's reply to the Ombudsman's solution proposal.

Preliminary point: Scope of the request

4. In its cover letter, the EIB states that it has decided to partially disclose the minutes "in parts that concern the Curtis Biomass project". No justification is given as to why the EIB has redacted the information not related to this project.

5. The original request pertained to: "The minutes and agendas of all meetings of the Management Committee at which the Curtis Biomass power generation plant has been considered." The request was not delimited to those aspects of the minutes of the meetings that concern the Curtis Biomass project but to the documents as a whole – this was also clarified in para. 5 of the Confirmatory Application (see Annex 1).

Comments on the EIB's claims in its Solution Response

1. General remarks

6. First, we welcome that the EIB acknowledges that no general presumption of confidentiality pertains to any of the documents held by the EIB (para. 1.5). We fully agree with this statement.

7. We disagree, however, that the EIB provided a sufficient statement of reasons to justify non-disclosure. This also appears evident based on the explanations of the Ombudsman in its solution proposal. Particularly concerning is the EIB's reference to the "special qualification of the requester" (para. 1.5). The fact that a large part of ClientEarth's staff is legally trained does not exonerate the EIB from its legal obligations, including under Art. 296 TFEU, to provide a sufficient statement of reasons.

8. We would emphasise in that regard that the duty to state reasons is of particular importance in the context of the access to information requests due to the fact that the applicant will not know the exact content of the information to which access is refused, thus requiring specific explanations that permit the applicant to understand whether the application of the exception was justified.[1]

2.1 Personal data protection

9. As regards the exception pertaining to personal data, we can confirm that we do not object to the redaction of the three names as described in the Ombudsman's solution proposal. We also confirm that we did not challenge the application of the personal data objection, to the extent that it was only applied to redact such names.

10. However, the EIB fails to recognise that its refusal decision was vitiated by a defect to the extent that it did not explain what kind of information it had redacted based on the personal data exception. The Ombudsman was therefore correct to state that the rationale on this point was "brief and lack[ed] contextualisation" and this amounts, contrary to what the EIB claims, to a legal error, including a violation of Art. 296 TFEU (para. 2.1.1).

[1] For the requirements as to the justification in access to information refusals, see the attached Confirmatory Application (Annex 1), especially pages 5-6.

2.2. Commercial interests

11. In its Solution Proposal, the Ombudsman essentially explained that it was unclear which information the EIB considered to be commercially sensitive and that it appeared that the Bank had applied the exception too broadly. The EIB's Response does not provide much clarity on these points but merely responds with general considerations.

12. Concretely, the EIB only states that certain information in the sub-section titled "Modulation" in the Management Committee meeting minutes of 20 March 2018 were redacted on the basis of this exception (para. 2.2.3). However, it does not explain whether and, if yes, why any other parts of the Management Committee Minutes were withheld on the basis of this exception.

13. Having read the Response and seen the parts of the Minutes the EIB disclosed, we are convinced that very few other elements of the Minutes, if any, could ever be considered commercially sensitive. With a view to future information requests, it would be very helpful to have a clear finding from the Ombudsman as to whether all aspects of the withheld information are to be considered commercially sensitive.

14. Moreover, the elements of the Minutes that the EIB finally decided to disclose are very evidently not commercially sensitive, nor would they have been at the time when the information was requested. With a view to improving transparency in the future, it would therefore be very helpful to have a confirmation from the Ombudsman that the kind of information that has finally been disclosed is not, and could not have been at the time of the request, commercially sensitive information.

2.3 Protection of decision-making process

15. The EIB's replies to the Ombudsman's explanations as regards the decision-making procedure are particularly concerning. As mentioned above, it is positive that the EIB does not seek to establish a *de facto* general presumption of confidentiality (see para. 2.3.2.). However, in the absence of such a general presumption, the generic explanation provided does not justify even partial non-disclosure of the requested information.

16. In order to withhold a document from disclosure, it is insufficient that the document forms part of the internal decision-making procedure. It is instead necessary that disclosure of the specific information would undermine an ongoing or closed decision-making procedure.[2] Contrary to what the EIB claims, the Ombudsman's observations that the very limited information included in the Minutes does not amount to a "dynamic account" of the discussions (para. 2.3.1) is an important consideration to establish whether the decision-making procedure could in fact be undermined. Equally, it is very relevant that the decision-making procedure was already closed. While, as the EIB seems to argue (para. 2.3.3), there can be documents that still warrant non-disclosure after a decision-making procedure is closed, this requires a particular justification, as most documents will no longer be sensitive once a decision has been taken.

17. Thus, the EIB's comments do not effectively respond to the Ombudsman's considerations, nor do they explain how non-disclosure of <u>any</u> parts of the Minutes, either now or at the time of the request, could have been justified on the basis of that exception.

Conclusion

18. In conclusion, the EIB's Response demonstrates a very problematic understanding of the applicable transparency rules and, accordingly, the partial disclosure is more narrow than legally justifiable.

19. The access request to which this complaint relates was submitted on 22 August 2018, i.e. more than 3 years ago. Evidently, access to the information concerned has lost much of its value at this stage. It becomes therefore even more important to consider the future implications and how the EIB will deal with similar access requests for Minutes of the Management Committee. We cannot go through 3-year-appeal-process each time we want to access this kind of information.

20. For one, this is the reason why the present complaint interrelates with the parallel complaint concerning active dissemination (complaint nos. 1065/2020 and 1251/2020). We believe that the present complaint illustrates well how the EIB's treatment of access requests prevents this mechanism from being an adequate procedure to obtain information related to ongoing decision-making procedures or even to information shorty after a decision-making procedure is closed. We hope that the Ombudsman will take this "case example" into account in resolving these parallel complaints.

[2] For the Court's case law as regards withholding documents that relate to an ongoing or closed decision-making procedure, see the attached Confirmatory Application (Annex 1), especially pages 7-8.

21. Second, it is evident from the considerations set out above that the present partial disclosure does not concord with the Solution Proposal of the Ombudsman. With a view to future access requests, some further guidance from the Ombudsman as to which aspects of the Management Committee Minutes that were the subject of the present request could be considered to fall under any of the exceptions from disclosure (see also para. 13 above) would be very beneficial. This exercise at hand of the present Minutes would be very helpful to help guide the EIB's services in their future handling of such access requests.

22. In light of all the foregoing, we consider that the EIB has not adequately implemented the Solution Proposal of the Ombudsman. The EIB should disclose all parts of the Management Minutes that are not covered by a clearly defined exception to access, in line with the Ombudsman's Solution Proposal.

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Our reference EIB3-10/07/18

12 September 2018

Dear Sir/Madam,

Subject: Confirmatory application for reconsideration of the EIB's decision of 22 August 2018, to partially refuse access to documents related to the CURTIS BIOMASS POWER GENERATION PLANT Project (ES)

1. In conformity with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereafter "the Regulation")[1], as also reflected in Article 5(31) of the EIB Group Transparency Policy (hereafter "EIB-TP"), ClientEarth hereby submits a confirmatory application regarding the EIB's decision by email of 22 August 2018 to partially refuse access ClientEarth's access to documents request of 10 July 2018 (hereafter "the decision").

2. ClientEarth's original request pertained to two specific categories of information (hereafter, "the Requested Documents"):

   (1) The minutes and agendas of all meetings of the Management Committee at which the Curtis Biomass power generation plant has been considered;

   (2) All documents provided to the Management Committee in respect of the Curtis Biomass power generation project.

3. ClientEarth requests a reconsideration of the decision for the following reasons.

Preliminary point: Scope of the request

4. As a preliminary point, the decision states:

[1] As applied by Article 3 of Regulation1367/2006.

"*We understand from your requests and the additional clarifications you have provided in our exchanges about our proposal for a fair solution that your requests concerns the environmental information contained in the requested documents.*"

5. The decision then goes on to adopt an unduly narrow definition of environmental information, which will be discussed in the following sections. However, as a preliminary point, ClientEarth would like to emphasize that nothing in its request nor in the additional clarification suggests that the request is limited to the environmental information contained in the Requested Documents. ClientEarth submits that in fact all information contained in the Requested Documents happens to be environmental information. This is, however, a separate issue from the scope of the request which clearly pertains to the documents listed in paragraph 2 above **in their entirety**.

6. Similarly, nothing in the clarifications provided by ClientEarth would suggest such a limitation. The only clarifications as to the scope of the request provided were included in our email of 24 July 2018, which states*: "I can clarify that the documents we seek are those provided to the Management Committee in connection with the business described in each set of minutes"* and, similarly, in our email of 27 July 2018, which states: "*For the avoidance of doubt, we are only seeking documents which were provided to the Management Committee to inform the discussions recorded in the Minutes*." No further clarification or limitation of the request has been provided, let alone has a statement been made that the request only concerns certain information contained in the Requested Documents.

7. Accordingly, the request relates to the Requested Documents as set out in paragraph 2 above and not to only any parts of these documents.

Unjustified implicit refusal of access to minutes and agendas of the meetings of the Management Committee under article 7(1) of the Regulation (category 1 of the Requested Documents)

8. With regard to the requested minutes and agendas of the meetings of the Management Committee, the decision states:

"As regards your request to receive copy of the agendas and minutes of Management Committee (MC) meetings, we would like to inform you that the MC discussed this financing operation at a meeting on 20 March 2018. The information contained in the agenda of this meeting in relation to this financing operation essentially consists of the name of the operation itself and the proposed loan amount. The minutes of the meeting provide a short description of the financing operation and record the MC approval, together with comments on the pricing and other financial aspects. This document does not contain any environmental information and therefore falls outside of the scope of your request. The MC also considered this financing operation in other instances, without the financing operation being on the agenda. In these cases, the minutes simply provide the name of the project and record the MC's approval. They do not contain any environmental information and therefore fall outside of the scope of your request."

9. The definition of environmental information in Article 2(1)(d) of Regulation 1367/2006 is intentionally broad. Environmental information is defined as "any information in written, visual, aural, electronic or any other material form on" inter alia “measures (including administrative measures)" […] and activities affecting or likely to affect the elements and factors referred to in [Articles 2(1)(d)(i) and 2(1)(d)(ii)] […]”.The administrative measure of providing a loan to finance an electricity only biomass plant will result in an activity affecting or likely to affect the factors listed in Article 2(1)(d)(i), for example air and atmosphere, water, soil, land, landscape and natural sites, and Article 2(1)(d)(ii), for example energy. Accordingly, any information on the decision to approve the loan (i.e. the administrative measure) or the resulting activity (i.e. the biomass plant) constitutes environmental information.

10. It is in this regard immaterial whether the information concerns the "technical, economic and financial of the financing operation" or other aspects. As the chapeau of Article 2(d) makes clear, environmental information encompasses any information on such administrative measures. Moreover, Article 2(1)(d)(v) specifically includes "cost-benefit analyses and assumptions used within the framework of the measures and activities referred to in [Article 2(1)(d)(iii)]".

11. Accordingly, both the agenda and minutes of the meeting on 20 March 2018 and the minutes of the other meetings at which the financing operation was considered constitute environmental information and should have been treated accordingly. Moreover, as set out in paras. 5-6 above, the request is in any event not limited to certain information contained in the Requested Documents but pertains to the Requested Documents in their entirety. It is therefore equally inadequate to provide a summary of some of the information contained in the Requested Documents.

12. Accordingly by withholding the information because it allegedly did not constitute environmental information and fell outside the scope of our request and by instead only providing a summary of parts of the documents requested, the decision constitutes an implied partial refusal to the Requested Documents and is accordingly vitiated by a "manifest error of assessment."[2] As clarified by the CJEU, "*[s]uch an implied refusal implies, by definition, an absolute lack of reasoning*" and therefore also a failure to comply with Article 296 TFEU.[3]

Unjustified refusal to the documents provided to the Management Committee under Article 4 of the Regulation and failure to provide reasons under Article 296 TFEU (category 2 of the Requested Documents)

Unjustified implicit refusal and manifest error of assessment

[2] Compare Case T-344/08 EnBW Energie C Commission, paras. 37 and 171. While the judgement was overruled, the ECJ maintained this aspect of the General Court's judgement on appeal - see Case C 365/12 P Commission v EnBW Energie, para. 137.
[3] Case T-300/10 Internationaler Hilfsfond eV, para. 186.

13. With regard to the documents provided to the Management Committee, the decision states:

"As regards your request to receive copy of the documents provided to the MC and informing the discussions in respect to this financing operation recorded in meeting minutes, the only environmental information not already included in the ESDS or in the Proposal from the Management Committee to the Board of Directors is the EIB's environmental/social rating of the project and a remark that the project will enhance the sustainability of land management through long-term programmes to preserve and enrich the natural resources in the surrounding areas, which in turn increases economic value in a geographic area threatened by adverse demographic trends. As mentioned above, following your clarifications, information other than environmental information falls outside the scope of your request.

Furthermore, and without prejudice of the above, the Bank considers that the "Proposal from the Management Committee to the Board of Directors", together with the EFSI scoreboard, which have been disclosed to you, constitute a meaningful summary of the information contained in these documents."

14. The decision thereby again adopts an unduly restrictive definition of environmental information. The broad definition of environmental information has been set out in paras. 9-10 above. Based on this definition any document prepared to inform the discussion of the project constitutes environmental information and should have been treated accordingly. Moreover, as set out in paras. 5-6 above, the question of which information is environmental is in any event independent of the scope of the request.

15. Moreover, the Requested Documents specifically referred to documents provided to the Management Committee. To provide a summary of some of the points raised in these documents in no way responds to the request, be it in the decision itself or by providing other documents such as the "Proposal from the Management Committee to the Board of Directors" or the EFSI scoreboard. Again, the decision thereby misconstrues the scope of the request.

16. Accordingly by withholding the information because it allegedly did not constitute environmental information and allegedly fell outside the scope of our request and by instead only providing a summary of parts of the documents requested, the decision constitutes an unjustified implicit refusal to access the Requested Documents and is vitiated by an manifest error of assessment.[4]

Failure to state reasons (Article 296 TFEU) and failure to establish applicability of any of the exemptions under Article 4 of the Regulation

17. The decision then refers to three separate exemptions to disclosure. However, in applying the exemptions, the decision merely refers to "the documents" without specifying which documents have in fact been considered for disclosure. In the absence of any clarification

[4] Compare Case T-344/08 EnBW Energie C Commission, paras. 37 and 171 (footnote 2 above).

as to what information the exemptions are applied to, it is impossible that the decision would fulfil the requirement to *"disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review*."[5]

18. The decision is accordingly invalid for failing to provide reasons because it does not specify which documents that discuss the project have been provided to the Management Committee. It is relevant in this regard to note that in the email of 26 July 2018, sent by Mr. Sterlin Balenciaga in the name of the Bank, it is stated that some of the Requested Documents in the three requests of ClientEarth *"have a general scope",* such as *"all the documents provided to the Management Committee",* and accordingly *"require the Bank to identify the relevant documents which should be considered for disclosure".* This indicates that the Bank is aware of its duty to identify relevant documents pertaining to the request. However, the results of this assessment have not been shared in the decision, nor are these results reflected in the reasoning on the exceptions.

19. It is therefore also impossible to establish that specific exemptions to disclosure apply to the documents as this would require reference to specific features of the identified documents. To recall once again the consistent case law of the Court, "*in order to justify refusal of access to a document, it is not sufficient, in principle, for that document to fall within an activity or an interest, mentioned in Article 4 of Regulation No 1049/2001. The institution concerned must also supply explanations as to how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article*."[6] As the Court consistently held, it is *"for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the requested document does in fact fall within the sphere covered by the exception relied on and, second, whether the need of protection relating to that exception is genuine*."[7]

20. The justification provided for the exemptions are instead generally phrased statements, which fail to substantiate the harm that could arise from disclosure of these specific documents. This form of whole-sale exemption of complete categories of documents contradicts the requirement that exceptions to disclosure must be interpreted narrowly and stand in stark contrast to the consistent case law of the Court, that exemptions to disclosure must be justified based on the content of the document in question and not based on considerations that could apply with respect to any document of a similar nature.[8]

21. The decision is therefore invalid for failing to give adequate reasons for non-disclosure and for failure to establish the applicability of any exceptions to disclosure under Article 4 of the Regulation.

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[5] See for instance, Case T-611/15 Edeka v Commission, para. 31.
[6] Case T-189/14, Deza v ECHA, para. 54 and case law cited therein.
[7] Case T-796/14, Philip Morris Ltd v Commission, para. 31.
[8] Compare Case T‑392/07 Guido Strack v European Commission, para 242.

22. Without prejudice to the foregoing, some further points should be made with regard to the specific exemptions invoked:

Applicability of Article 4(2), first indent, of the Regulation (commercial interests) not established

23. As regards the exception in Article 4.2, first indent, of the Regulation (Article 5.5 of the EIB-TP), the Court has further established that it "*is not possible to regard all information concerning a company and its business relations as requiring the protection which must be guaranteed to commercial interests under the first indent of Article 4(2) of Regulation No 1049/2001"*.[9] The Court held that consequently "*it must be shown that the documents at issue contain elements which may, if disclosed, seriously undermine the commercial interests of a legal person.*"[10]

24. The decision submits that disclosure of the documents would make public "details of EIB financing terms and loan features; information on other lenders' involvement in the financing operation; assessments of the promoter's financial situation and projections of the revenues from the plant; information about supply chains and associated contractual agreements; information about operation and maintenance contracts." This establishes at best that the information concerns a "company and its business relations" but based on the Court's case law this is entirely insufficient to justify application of the exception. Instead the decision would have needed to establish how disclosure of these parts could "seriously undermine the commercial interests of a legal person". By generally exempting whole sections and pages of the Requested Document, without clarifying what this redacted information pertains to, it is not at all clear what exact interests could be undermined and in what way. The decision does not provide any explanation as to which elements contained in the specific redacted parts of the documents would seriously undermine the commercial interests of a legal person. The decision is therefore also on this basis invalid.

25. The above conclusions are not changed by the alleged applicability of a confidentiality agreement. Recital 15 of Regulation 1367/2006 states:

"The term 'commercial interests' covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity."

26. The Regulation thereby recognizes that confidentiality agreements are a tool to protect commercial interests of third parties. However, the correct reading of this exception cannot be that the EIB can unilaterally declare what constitutes a commercial interest and thereby contract out of its legal disclosure obligations. Such a reading would have the absurd effect of permitting the Bank to declare any kind of information as commercial and would accordingly limit the disclosure obligations under the Regulation to those cases in which an overriding public interest in disclosure exist. Such an effect would run directly counter

[9] Case T-380/04 Terezakis v Commission, para. 93 and Case T-437/08 CDC Hydrogene Peroxide, para. 44.
[10] Case T-189/14, Deza v ECHA, para. 56 and MasterCard, paras. 82-84.

to the explicit disclosure obligation under Article 7 in conjunction with Article 4 of the Regulation.

27. This is also confirmed by the fact that this clarification is only contained in the recital of Regulation 1367/2006, i.e. it does not have the legal force to modify the legal obligations contained in the operative provisions of the Regulation but only serves as a guide to interpret these operative provisions. Such an interpretation must at all times respect the explicit wording of the operative provisions of Regulation 1367/2006 and be in line with the Regulation's overarching objective set out in Article 1, which is inter alia "to achieve its widest possible systematic availability and dissemination." To interpret the Regulation based on this recital in a way that would allow the EIB to circumvent the disclosure obligations neither respects the explicit wording of the Regulation's operative provisions nor the objective of the Regulation.

28. It should also be noted that in reply to a recent Ombudsman investigation, the EIB stated with regard to the footnote to Article 5.5 of the Bank's Transparency Policy, which includes a similarly phrased reference to confidentiality agreements, that the footnote only serves to provide an example of cases which are common in banking. The Bank thereby acknowledged that such a reference cannot modify the obligations incumbent on the Bank.[11]

29. Accordingly, whether or not any information is covered by a non-disclosure agreement, the EIB is required to substantiate with regard to any specific type of information that its disclosure would undermine the protection of commercial interests.

30. Accordingly, even if the reasons provided would have been connected to non-disclosure of a specified document (see para. 21 above), the decision would have been invalid for failing to provide adequate reasons as required by Article 296 TFEU and for failing to adequately justify non-disclosure under Article 4(2), first indent, of the Regulation.

Applicability of Article 4(3) of the Regulation (internal use) not established

31. As regards the exemption from disclosure of information prepared for the internal use of the institution, the Court has held that "the mere reference to a risk of negative repercussions linked to access to internal documents and the possibility that interested parties may influence the procedure do not suffice to prove that disclosure of those documents would seriously undermine the decision-making process of the institution concerned."[12] The decision's reference to the need for "*internal exchange of information and opinions within a 'space to think' in which the individuals and Services involved trust they can communicate freely"* does not go beyond such a "mere reference to a risk of negative repercussions.

[11] Ombudsman Decision in case 1316/2016/TN on alleged shortcomings in the European Investment Bank's Transparency Policy, para. 50, available at: https://www.ombudsman.europa.eu/en/decision/en/95520.
[12] Case C-60/15 P Saint-Gobain Glass v Commission, para. 83.

32. Moreover, this argument is very much analogous to that raised by the Commission in Case *Editions Odile*. As the General Court noted, the argument of the Commission in that case was based on "*the importance of the Commission's being in a position to adopt its decisions without any disruption and free from external pressure and of its departments being able to express their points of view freely, so that they can guide the Commission in taking decisions*."13 According to the assessment of the Court, this statement was entirely insufficient to justify non-disclosure: "*It must be observed that those justifications are made in a general and abstract fashion, without being supported by any detailed argument based on the content of the documents in question. The same considerations could apply with respect to any document of a similar nature. They are therefore insufficient to justify the refusal of access to the documents requested in the present case, without imperilling the principle of strict interpretation of the exceptions laid down in Article 4 of Regulation No 1049/2001* […]."14

33. Accordingly, even if the reasons provided would have been connected to non-disclosure of a specified document (see para. 21 above), the decision would have been invalid for failing to provide adequate reasons as required by Article 296 TFEU and for failing to adequately justify non-disclosure under Article 4(3) of the Regulation.

Applicability of Article 4(2), second indent, of the Regulation (legal advice) not established

34. In *Sweden and Turco v Council* the Court has elaborated in some detail on the three-step test an institution must apply to ascertain whether information is exempted from disclosure for constituting legal advice, namely it needs to: (1) determine whether the document constitutes legal advice,[15] (2) "examine whether disclosure of the parts of the documents that have been identified as relating to legal advice 'would undermine the protection' of that advice"[16] and (3) consider wether an overriding public interest in disclosure exists (see next section on this last step).[17]

35. With regard to step (1), the institution cannot simply rely on the fact that the document is headed for instance "legal advice/opinion" but it must ascertain whether any parts of a given document constitutes such advice.[18] The decision fails to fulfil this requirement because it does not establish which parts of any document constitute legal advice and for what reasons.

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[13] Case T-237/05 Éditions Odile Jacob SAS v European Commission, para 142. Note that this case was overruled in Case C-404/10 P *Commission v Éditions Odile Jacob SAS because a presumption of an exception was considered to apply* documents exchanged between the Commission and notifying parties or third parties in the course of merger control proceedings. No such presumption applies in the present case.
[14] Ibid, para 143.
[15] C-39/05 P and C-52/05 P, Sweden and Turco v Council, para. 38.
[16] Ibid, para. 40.
[17] Ibid, para. 44.
[18] Ibid, para. 39.

36. With regard to step (2), the institution must establish that there is a "reasonably foreseeable and not purely hypothetical" risk that the institution's interest to seek legal advice and receive "frank, objective and comprehensive advice" is undermined.[19] The decision also fails to fulfil this requirement because no reference is made to any risk that the EIB would be prevented from receiving "frank, objective and comprehensive advice" due to the disclosure of the Requested Documents.

37. Accordingly, even if the reasons provided would have been connected to non-disclosure of a specified document (see para. 21 above), the decision would have been invalid for failing to provide adequate reasons as required by Article 296 TFEU and for failing to adequately justify non-disclosure under Article 4(2), second indent, of the Regulation.

Failure to consider the overriding public interest under Article 4(2) and 4(3) of the Regulation

38. Without prejudice to the above, there is also a significant public interest in disclosure of the documents, even if the applicability of any of the exceptions under Article 4(2) and 4(3) of the Regulation had been established.

39. Biomass is a controversial renewable energy source, as it can involve considerable negative environmental impacts. Where the biomass feedstock is sourced from, the extent to which the biomass is replenished (i.e. trees replanted) and the distances travelled to bring the biomass to the power plant all determine the extent to which biomass is 'renewable' and its greenhouse gas emissions. Therefore, there is significant public interest in having transparent information available on both the environmental impacts and technical design of the biomass plant. This is particularly relevant given that the subsidisation of the biomass plant is due to its alleged reduction of carbon emissions.

40. This public interest is further amplified in the present case due to the significant level of public investment being proposed and the high levels of risk recognised in the parts of the document entitled "Proposal from the Management Committee to the Board of Directors" which have been disclosed.

41. Thus, even if the applicability of any of the exceptions under Article 4(2) and 4(3) would have been established, the decision would be invalid for failing to disclose the Requested Document despite an overriding public interest in disclosure based on Article 4(2), last sentence, and 4(3) of the Regulation.

Summary

42. The decision is therefore invalid for failing to provide reasons of Article 296 TFEU, failing to justify application of any of exemptions under Article 4 of the Regulation to the documents identified as pertaining to the request and failure to give adequate weight to the overriding public interest in disclosure of the Requested Documents.

[19] Ibid, paras. 42-43.

We look forward to receiving your response promptly and in any event within 15 working days, in accordance with Article 8 of Regulation 1049/2001.

Yours sincerely,

[redacted]

Anna Heslop

[redacted]

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