

## CEE Bankwatch Network contribution to the European Ombudsman consultation on transparency and participation in EU decision making related to the environment

### Transparency

**1. Please describe any difficulties you have faced in searching for and obtaining information or documents related to (decision making on) the environment held by EU institutions.**

**Modernisation Fund** (The Modernisation Fund is a programme from the European Union to support 10 Member States to meet 2030 energy targets by helping to modernise energy systems and improve energy efficiency<sup>1</sup>): there are consistent issues with transparency within the Modernisation Fund. Beneficiary countries are not publishing their indicative project lists nor are consistently publishing their strategies for the fund. The EIB, which is responsible for, among others, an assessment of the expected emission reductions, is also not more forthcoming with information.

**European Investment Bank** - the bank does not publish environmental and social appraisal information/documents or other relevant documents collected by the EIB during the project appraisal, before the project is presented to the Board of Directors for approval. This practice, in fact, effectively prevents civil society participation and breaches the Article 15 of the TFEU, which states that *"in order to promote good governance and ensure the participation of civil society, the European institutions, bodies, offices and agencies shall conduct their work as openly as possible"*.

The obligation of the Bank to collect, organize and actively disseminate environmental information is protected under EU law both by way of the Aarhus Convention and the Aarhus Regulation No 1367/2006 in conjunction with Regulation 1049/2001/EC. These obligations are of particular importance in the context of the EIB, which decides on massive financing proposals with often significant environmental impacts in a complex decision-making procedure that is often hard to follow by affected members of the public and civil society. Disclosure of information and engagement of the project affected people

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<sup>1</sup> <https://modernisationfund.eu/>

rest not only with the EIB's clients. Access to information is naturally time sensitive. Many types of information are only relevant for a certain period, in particular if they relate to a specific decision-making procedure, such as the EIB's financing operations.

Timely disclosure of environmental and social information, allowing civil society to participate (as required by the TFEU), related to the Bank's decision-making is a common practice among EIB's peer institutions. The EU Bank should be a front runner in terms of transparency practices. Instead, the EIB lags behind other IFIs who actively disseminate environmental and social information well in advance of the project approval in order to facilitate a real and effective participation of affected communities and civil society in decision-making. Specifically, disclosure of project related information at pre-approval stage by the EIB is almost non-existent, while other IFIs, such as the EBRD, IFC and the World Bank, publish project environmental and social documents significantly in advance of project approval in order to give the public and impacted people an opportunity to express opinion directly to them.

During the project monitoring phase, the EIB should proactively disclose its own monitoring reports, and similar reports by the project promoters. Other monitoring documents should at least be listed in the EIB public register - for disclosure upon request.

### **Western Balkan Investment Framework**

EU grants for infrastructure provided under the Western Balkan Investment Framework have a strong potential to impact the environment as they include motorways, waste management facilities and energy infrastructure. Yet the WBIF does not disclose which projects have been proposed by governments for financing until after grants are approved. It is not clear whether this has always been the case or just in the last year or two since the introduction of the Economic and Investment Plan flagship projects. As an example, in November the WBIF website published information that at the 34th WBIF Project Financiers' Group Meeting on 11 November,

*'12 INV grant applications for a total grant consideration of €390 million were screened and assessed positively. Half of these flagship investments address renewable energy generation, in response to the current energy crisis. Five TA grant applications for a total grant consideration of €10.4 million were also screened and assessed positively.'*

But there was no information on what the projects are. On 25 November we sent an e-mail asking WBIF for more information but as of 15 December have not yet received an answer. Meanwhile the projects were approved on 5 December. By chance we found [information](#) about the projects which have been approved online but it is not clear how to navigate to this information from the WBIF website so we would never have found it without specifically searching for it.

This means that affected people and environmental NGOs are usually not aware of which projects are being considered until it is too late to prevent grants being approved or conditions being attached to them.

It is not clear why the projects are not disclosed in advance. Most of them are promoted by state-owned companies so there cannot be any discussion about impact on the share value of clients etc.

### **5th PCI list information and Connecting Europe Facility (CEF) project funding**

The Commission has refused access to information concerning the sustainability assessment of the gas projects that were included in the 5th PCI list, and has rejected our confirmatory application, in the same case, citing protection of the decision-making process and the lack of overriding public interest.<sup>2</sup> It took more than 3 months for the Commission to deliberate on our confirmatory application. Our confirmatory application was filed in February 2022, and the initial time limit to respond was extended 3 times.

The Commission has refused access to the list of 24 project proposals that applied for funding under the CEF Energy 2022 call and has rejected our confirmatory application, citing the protection of commercial interests and the lack of overriding public interest.

We consider that the Commission in both of these cases has interpreted the grounds on which access can be refused too widely, especially having in mind that requested information should be considered as environmental information and that the issue of public funding for energy projects is an issue of particular public interest that deserves increased transparency and public scrutiny.

### **Access to information concerning gas projects in REPowerEU and Western Balkans**

The Commission has failed yet to disclose information concerning our four access to information requests, submitted from April to June 2022, requesting information about the Commission's meetings held in preparation of the REPowerEU plan<sup>3</sup> and the Western

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<sup>2</sup> Commission Decision C(2022)

3292 as adopted by the European Commission on 15.5.2022., available at [https://www.asktheeu.org/en/request/10409/response/37296/attach/6/C%202022%203292%201%20EN%20ACT%20part1%20v2%201.pdf?cookie\\_passthrough=1](https://www.asktheeu.org/en/request/10409/response/37296/attach/6/C%202022%203292%201%20EN%20ACT%20part1%20v2%201.pdf?cookie_passthrough=1)

<sup>3</sup> BW requests dated 19 April 2022 and 4 May 2022 concerning "Correspondence and meetings with Commission concerning REPowerEU", available at Correspondence and meetings with Commission concerning REPowerEU, [https://www.asktheeu.org/en/request/correspondence\\_and\\_meetings\\_with\\_6#incoming-41587](https://www.asktheeu.org/en/request/correspondence_and_meetings_with_6#incoming-41587)

Balkans gas projects<sup>4</sup>. The initial time limit to disclose information was extended several times for each of these requests. We haven't yet received any information concerning these 4 requests.

**2. In your view, is the environmental information that the EU makes public up-to-date and accurate? If not, please give examples.**

The [infringement database](#) is not very frequently updated, at least for environmental infringements, and does not really allow one to understand what stage a procedure is at. It also does not contain any information about complaints which have been submitted but have not yet resulted in infringement cases.

**3. The EU Aarhus Regulation obliges the EU institutions to set up public databases for the proactive and systemic dissemination of certain environmental information.<sup>[1]</sup> What, in your view, should the EU institutions do to make these databases as comprehensive and user-friendly as possible? The kind of information that the EU institutions should include within their scope is set out in Article 4 of the Aarhus Regulation. What specific information needs to be provided to meet this requirement? Should the EU institutions choose to go beyond this legal requirement? In what way?**

**European Investment Bank** - the EIB's Public Register contains only the documents which the bank publishes while it does not contain any reference to documents containing environmental information which EIB discloses on request, for example: monitoring reports, project carbon footprint calculations, environmental analyses commissioned by the EIB itself for particular projects.

**4. In some inquiries concerning public access to documents, the Ombudsman found that the EU institution concerned did not recognise that 'environmental information' was at stake and, thus, did not apply the higher transparency standards required by the EU Aarhus Regulation.<sup>[2]</sup> Have you come across this issue? If so, please provide relevant examples.**

**Recovery and resilience facility**

We have experienced problems with access to documents through our monitoring of the Recovery and Resilience Facility (RRF) and current REPower chapters of the recovery

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<sup>4</sup> BW requests both dated 20 June 2022 concerning "Correspondence and meetings with DG ENER concerning gas projects in Western Balkans", available at: [https://www.asktheeu.org/en/request/correspondence\\_and\\_meetings\\_with\\_7#outgoing-22963](https://www.asktheeu.org/en/request/correspondence_and_meetings_with_7#outgoing-22963), [https://www.asktheeu.org/en/request/correspondence\\_and\\_meetings\\_with\\_8#incoming-41355](https://www.asktheeu.org/en/request/correspondence_and_meetings_with_8#incoming-41355)

plans. As opposed to EU funds under shared management, the RRF is a very centralised instrument, in which most decisions are taken behind closed doors by the Member States in dialogue with the European Commission, and external stakeholders have little or no way of making their voice heard and engaging in the process. When external stakeholders are occasionally included, NGOs are appointed through chaotic processes and often represent a tiny fraction of all stakeholders involved in the established committees.

Although there are many accessible documents that allow the public to follow the implementation (council implementing decisions, operational arrangements, preliminary EC assessment of milestones/targets fulfillment) these do not provide systematic, detailed and harmonised information on the actual implementation of specific measures (what project is funded, following what process, the project developers/final beneficiaries, specific budget, location, purpose...). This is partly down to the design of the funding stream, which provides Member States with greater discretion as long as they meet the required milestones and targets.

This is made worse by other problematic elements of the RRF regulation, namely the failure to include a provision for mandatory monitoring committees and Strategic Environmental Assessments, a requirement under shared management funds.

**5. The European Commission has implementing powers (under the so-called ‘comitology’ procedure) that it also uses to adopt decisions that relate to the environment, such as approving active substances in pesticides.<sup>[3]</sup> The Commission submitted a proposal to amend the ‘comitology’ regulation in 2017, including by making public EU Member States representatives’ votes in the Appeal Committee. However, the legislative process on this proposal has since stalled.<sup>[4]</sup> Meanwhile, the Commission said it is reflecting on how to ensure further transparency in comitology procedures.<sup>[5]</sup> How do you think the Commission can improve the transparency of comitology procedures, specifically concerning environmental decision-making?**

**6. In your view, are the personal and/or professional interests of external experts that the Commission consults in relation to environmental proposals, legislative or otherwise, sufficiently transparent? Please provide reasons for your view.**

## **Taxonomy**

In the case of the sustainable development taxonomy, the Commission opened a public call and appointed a Technical Expert Group which included a reasonable range of experts, including from civil society, which later became the [Platform on Sustainable](#)

[Finance](#). The problem in this case was not so much the composition of the group as the fact that the Commission in many sectors ignored the group's scientifically-grounded recommendations and gave into pressure from Member States and industry groups. This happened e.g. with bioenergy in the [first delegated act on sustainable activities for climate change adaptation and mitigation objectives](#). But what happened later was even more shocking as the Commission undermined any credibility the taxonomy may have had by issuing a [second Delegated Act including nuclear and gas](#). The Commission's interference in the process and lack of commitment to scientifically grounded criteria finally [prompted civil society groups to withdraw](#) from the Platform in September 2022.

**7. Please raise any further issues you have observed in the transparency of decision making relating to the environment.**

## Participation

**8. What could the Commission improve regarding the involvement of civil society in the preparation and implementation of the policies with an impact on the environment, for example in 'Civil Dialogue Groups' in the context of the EU's Common Agricultural Policy, or 'Domestic Advisory Groups' in the context of the implementation of Free Trade Agreements?**

The Commission organises many meetings with CSOs and offers opportunities to share views on the potential environmental impact of EU policies. The issue seems to be of concern for some Directorate Generals in which some EU officials are tasked with taking care of environmental compliance. Those people are usually the most open to meet CSO representatives but are however too few and do not necessarily have the means to fully check this compliance.

This can be seen in the context of the Recovery and Resilience Facility, which is overseen with the EC Secretariat General by a dedicated Task Force. The relatively low number of staff and the need to quickly go through multiple documents to evaluate the national recovery plans' progress and making sure their implementation is in line with the RRF regulation and environmental standards makes it doubtful that a thorough assessment can be done. Hence they tend to rely on CSOs to provide input from the ground. Moreover, there is a tendency from the Commission to convene meetings with external stakeholders and in particular NGOs in order to show good will but without substantially changing its course of action when it comes to environmental compliance. Those meetings, sometimes with dedicated expert groups, act as tick in the box exercises and mostly provide an opportunity for the EC to present its initiatives rather than actually exchanging on the improvements needed. The input provided by NGOs is rarely reflected in EU policy making.

**9. Under the EU Aarhus Regulation, EU institutions are required to provide early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment and to take the outcome of the public participation into account. [6] Are you aware of issues in this regard, such as instances where EU institutions did not adequately adhere to this obligation? If so, please provide relevant examples.**

**Taxonomy:** The Second Delegated Act for the sustainable finance taxonomy is an example of an occasion where the Commission did not conduct any public consultation. Consultations were carried out at an earlier stage based on proposals that omitted gas and nuclear, then the Commission, bending to pressure from the Member States, came up with a second delegated act proposal which contained the most controversial aspects - gas and nuclear - but was not subject to public consultation at all.

#### **REPowerEU proposals - Renewable Energy Directive and Emergency Regulation on renewables permitting**

Other examples where the Commission did not ensure adequate public consultation opportunities include amendments to the Renewable Energy Directive (RED IV) and the emergency regulation on renewables permitting under the REPowerEU initiative, expected to be approved soon. For more information on these, see the next question.

**10. What should the Commission do to ensure an adequate level of public participation as regards the measures to be adopted in the context of REPowerEU[7] and the Nature Protection Package[8]?**

#### **REPowerEU - Renewable Energy Directive IV and emergency renewables permitting regulation**

Unfortunately for REPowerEU it is already quite late. Two pieces of legislation on renewables permitting are already at a very advanced stage, and both have been developed with an appalling disregard for transparency, public participation and evidence-based decision-making.

The first is the [set of amendments proposed to the Renewable Energy Directive](#) in May 2022, often referred to as RED IV, to distinguish it from the proposals being discussed in parallel that were tabled in July 2021 as part of the Fit for 55 Package. RED IV contains numerous clauses which will, if adopted – which looks highly likely – create exemptions from well-established environmental legislation specifically for renewable energy projects. For example, so-called ‘go-to’ areas will be established, in which renewable energy projects will not need to undergo environmental impact assessment (EIA) processes. Apart from direct threats to the environment from e.g. hydropower plants or wind farms,



this undermines the Aarhus Convention, as the EIA process is one of the few opportunities the public has to participate in project-level decision-making. Moreover, it is unnecessary, because the EIA Directive has been refined over decades and is already flexible enough to ensure that low-impact projects do not need an EIA. This situation also creates a worrying precedent as other sectors may start to argue that they should also be exempt from EIAs.

Another one of the many issues with this legislation, also with negative impacts on the environment and on public participation, is a clause presuming all renewable energy projects to be of overriding public interest. Under the Habitats Directive, Birds Directive and Water Framework Directive, projects with serious negative impacts on Natura 2000 protected areas or rivers with good water quality are as a rule not allowed to be built. But again the legislation is flexible and lays out the process by which it can be decided to build them after all if there are no alternatives. What this new proposal does is to render the decision-making process largely meaningless, as it is determined in advance that all renewables projects are of overriding public interest.

Therefore, if it is established that no alternatives exist – which it often is, irrespective of the truth – the project can go ahead. Because harmless projects can anyway be built in Natura 2000 sites, this proposal \*only\* benefits renewable projects with a significant negative impact. Yet the public's only existing tools to prevent such projects going ahead are being seriously weakened.

We expect this will increase public opposition to the most controversial renewables projects with impacts on protected areas or pristine rivers, because it will increase the impression that the projects are being pushed through irrespective of local opinion.

But the most painful part is that it's unlikely to make a major difference to the EU's overall renewable energy capacity. Existing EU law is already flexible on this issue and allows many projects to be built despite having significant impacts, so just a few most damaging projects will benefit from this change.

No impact assessment was carried out on this proposal. Nor was a proper public consultation held. In its proposal, the Commission cited [a consultation held between January and April 2022 on renewables permitting and corporate power purchase agreements](#). However this consultation was never intended to inform the Renewable Energy Directive; rather it was a general consultation aimed at informing planned Commission guidance. It did not consult the public on whether long-standing environmental rules should be weakened and circumvented.

A public consultation specifically on the RED IV proposals was organised only \*after\* the Commission had presented its proposal, rendering it practically useless. Moreover, the



deadline for inputs was during the summer and the European Parliament Environment Committee's deadline for amendments was 8 September, so due to holidays there was practically no time to acquaint members of the ENVI committee with the outcomes of the consultation.

A similar provision to the one above on overriding public interest is due to be adopted by the Council this month as part of an [emergency regulation on renewables permitting](#), due to be in force for 18 months. The Regulation is being adopted under Article 122 of the TFEU, which we consider a serious misuse of this article. Article 122 allows the EU to take emergency action, particularly to overcome energy supply difficulties. But the text goes far beyond economic measures with severe and disproportionate effects on key environmental laws. And some of the measures – particularly on overriding public interest – are not only of marginal importance for the overall energy supply, but they will anyway not have an impact on time to tackle the current energy crisis. Even if a damaging renewable project – say a hydropower plant or a wind farm in an area important for birds – is declared to be of overriding public interest now, the chances of it being built in the next year or so are almost zero.

With the emergency regulation most likely adopted this year and the RED IV due to be adopted early next year, much will depend on relevant actors' willingness to take legal action and to draw attention to deficiencies that become obvious during implementation. We expect that having a parallel rule set for renewables while the existing environmental law is still in place will lead to significant legal uncertainty and hopefully reveal the need to reverse these decisions.

#### **11. Please raise any further issues you have observed in the way the EU institutions facilitate public participation in decision making relating to the environment.**

##### **European Commission public consultations - general issue**

The Commission often organizes public consultations, and Bankwatch regularly contributes to them. However, it is hard to escape the feeling that these have very little impact on actual decision-making. First, they often take the form of questionnaires, often with questions that are phrased in a leading manner, so one is often not able to find an agreeable option at all.

Second, it is usually not clear how the input is taken into account during decision-making. Consultation inputs are published at the end, for example with some statistical information on the participants and an unwieldy excel sheet of inputs, but there is often no analysis or feedback on inputs provided.

##### **European Investment Bank public consultations- general issue**

The EIB does not meet the EU's commitment to transparent and participatory decision-making and the value of information coming from stakeholders affected by or interested in its actions. The decision-making process at the EIB is currently untransparent as to when and how decisions are made at the bank, which prevents real participation of civil society. EIB does not recognise its decision-making as relating to the environment. This approach should be challenged. The EIB decides on massive financing proposals with often significant environmental impacts in a complex decision-making procedure that is often hard to follow by affected members of the public and civil society. This decision-making may not be considered merely as related to financial plans because the EIB has specific obligations in terms of conducting its own environmental and social analysis, reviewing projects' compliance with the EU environmental law and with its environmental and social standards. In many cases, specific environmental and social conditionalities are attached to loan agreements. Engagement of the project affected people and EU citizens should not only rest with the EIB's clients. This should also be an obligation of the EIB as a public institution of the EU. Stakeholders should have the access to information and should be able to effectively participate in the EIB's decision-making as required by the Article 15 TFEU.