[redacted]

From: [redacted]
Sent: 03 July 2023 19:59
To: [redacted]
[redacted]
Subject: RE: Complaint 611/2022/KR

Sensitivity: [redacted]

[redacted]

Ms. Ombudsman,
Dear Ms. O'Reilly,

Thank you for having shared the reply of the EIB President on the raised concerns and your invitation to comment.

I should like to observe from the outset that the applicable ECC's 2016 Operating Rules are publicly available here: Ethics and Compliance Committee - Operating Rules (eib.org). However, even after the most recent adaptation, the ECC remains a purely internal committee, without input from neutral external experts, and its conclusions are not public. It could be helpful the ECC is transparent in its conclusions, and publishes them, so that the public may take note of them.

Given that the "confidential" and "internal" approach followed by the EIB and the ECC comes at a cost of transparency, I should also like to set out from the outset that much of what the President writes is not verifiable by EIB Staff Members, such as myself, let alone by the Public.

My comments or observations are therefore limited in scope and – without wanting to come across as a qualified expert –chiefly cover some procedural aspects that I believe can be easily discerned by an diligent civil servant acting in good faith. My comments can probably well be summarised with either of the following three quotes from the Latin poet **Publius Syris: «***le mal caché est le plus grave***»**, **«** *Le courage du soldat dépend de la prudence du général***»**, and **«*les yeux sont inutiles quand l'esprit est aveugle* ».** Allow me to explain.

Reply Q1 a)

"The mitigating measures recommended in the ECC decision dated 28 May 2018 and signed by the ECC Chair, were deemed to be applicable *"until a formal decision on the appointment of the CEO of CDP is made"*

Relative to the set of ECC recommendations from 2018, the President argues that this recommendation must be understood as limited in time, and ended when CDP did not nominate the former VP as its CEO on 27 July 2018. From what I understand, the ECC decision did not limit its mitigation measures by inscribing a specified end-date for its recommendation. The logic of the President cannot be followed therefore. Admittedly whilst the non-nomination took away the grounds of the mitigating measures, a resurrection of the same grounds would imply that the mitigating measures would have to be complied with again as a minimum and mutatis mutandis. In other words, where the former VP would re-apply for the same job at CDP the earlier recommendations and requirements held – unless the ECC would have stated differently in a new request of the former VP addressed to it.

It is to be noted that the former VP and the ECC were bound by the "Ethics and Compliance Committee - Operating Rules (eib.org)" (link embedded), which holds that (my emphasis):

7.1. Any ethical matter concerning members of the Board of Directors or of the Management Committee shall be submitted confidentially and in writing to the ECC Secretariat

And under point 4 "Referral to the ECC"

ECC opinions will be formulated and its decisions shall be taken upon request from:
- the Chairman of the Board of Governors;
- any member of the ECC;
- any member of the Board of Directors, the Management Committee or the Audit Committee;
- any former member of the Board of Directors or of the Management Committee during its cooling-off period on own potential conflict of interest matters;
- the Secretary General;
- the Chief Compliance Officer; and/or - the Inspector General, on fraud related matters.

However, the reply from the President seems to indicate that neither a member of the MC, nor the former VP, nor the Secretary General, nor the Chief Compliance Officer, promptly requested the ECC to statute on the former VP's potential CoI, when he supposedly contacted, in April 2021, the then Group Chief Compliance Officer – of which there appears not to be any written trace. The Chief Compliance Officer allegedly referred to the 2018 recommendations "*as the situation was in substance the same as in 2018"*. No new case before the ECC was thus opened. However, a new Code of Conduct for Members of the Management Committee had come into force. Indeed, in 2018, the former VP was under the Code of Conduct dated 2011 (link); in 2021 he was under the 2019 Code of Conduct to which the President refers in his answer. The legal basis for the ECC to take into consideration had thus changed, so that the Chief Compliance Officer could not, or no longer, pronounce himself on, for, or on behalf of the ECC in as far as its 2018 recommendations were concerned. The Chief Compliance Officer does not have a margin of discretion to substitute himself for the ECC. There appears to have been a "vice d'incompetence", which is, unless I am mistaken, considered as maladministration
…. «*le mal caché est le plus grave».*

"*Finally, according to the 2019 MC Code of Conduct (see Article 4, paragraph 3), the nomination as CEO of a public sector entity as CDP does not require an ECC procedure for activity in the pertinent cooling-off period."*

This part of the reply seems to ignore the obligation ("shall") set out under point 7.1 in the ECC's Operating Rules, to which the Group Chief Compliance Officer, the Secretary General, the members of the MC including the President must give due respect, and that under point 4 of the same Operating Rules, any of them could have requested an opinion of the ECC to re-assure themselves, starting April 2021, if the former VP did not wish to do so (see quotes of the articles above). A duty to report suspicions of non-compliance is enshrined in the Staff Code of Conduct, applicable to the Secretary General and the Chief Compliance Officer. Were they instructed to remain "silent" or was this out of their own volition?
…« Le courage du soldat dépend de la prudence du général»

I note that the former VP ultimately, and last minute, informed the ECC of his nomination. The ECC reminded him of i.a.

"you shall abstain from lobbying activities with EIB governing bodies and staff on matters falling in your portfolio of activities as a member of the MC during your mandate until the end of the cooling-off period."

This merits two observations:
1. The ECC seemed convinced there was a cooling-off period to be respected, contrary to what the President seems to imply, and the earlier position communicated by the Bank to the Ombudsman;
2. The former VP did lobby with Staff to accompany him to CDP – the largest EIB borrower in the Banks and former VP's portfolio, of which he took office as the CEO.

In his reply, the President oddly ignores these points.
…. «*le mal caché est le plus grave».*

"*The former Vice-President did not record a conflict of interest related to this matter, nor is it recorded in the minutes that he recused himself as per the mitigation measures of the 2018 ECC decision."*

This is an admittance on the part of the President, but he does not give any consequences to it.

… «*les yeux sont inutiles quand l'esprit est aveugle* »

From the above it appears justified to concluded that there's been a failure to monitor and follow-up on the compliance by the former VP with his obligations under the Code of Conduct, and with the recommendations of the ECC. Such monitoring and control appears to fall between the cracks in the current framework, which prevents transparency and accountability towards the public.

Reply Q1 b)

"Furthermore, the reference indicated by the Ombudsman concerns a general statement in the Annual Report of E-distribuzione S.p.A. about different lines of financing with CDP and EIB, but never states that CDP was also a lender under the approved EIB operation.
Given the lack of involvement of CDP in this operation, the EIB does not consider this operation as relevant in the context of the Ombudsman's inquiry."

The point was not if, or not, CDP was involved in the operation, but rather to indicate that there was grounds for those approving the loan – including the former VP - to ask questions on a possible conflict of interest of the former VP, and thus to signal this to the ECC for guidance. The President does not meaningfully answer that, at least to my mind, to allow a neutral reader to come to a reassuring conclusion that conclude that there was no a conflict of interest.
…. «*le mal caché est le plus grave*».

"*Taking into account the collegial nature of the EIB MC and the EIF BoD as well as their decision-making rules, in none of the above-mentioned operations was the vote*
of the former VP and Chairman of the EIF BoD determinant (no casting vote prerogative)."

This logic cannot be followed. The members of the MC are well aquinted with the procedure applicable in the Board of Directors, where, at the outset of each meeting, members of that collegial body declare at the outset on what decisions on the financing of projects they would have a conflict of interest with. That's sound administrative practice.
The Code of Conduct (2021 version, but also the previous versions) is unambiguous under point 2.6 (emphasis and note between brackets added by me):

> *For the purposes of this Code, a conflict of interest means a conflict between the official duties of a Member of the Management Committee and their private interests, or interests of their close family members, or personal or professional acquaintances which could improperly influence the performance of their official duties and responsibilities, or could compromise their impartiality, objectivity or independence.*
> *To that end, Members of the Management Committee* [and not: the Management Committee as a collegial body] *shall avoid all situations which may give rise to an actual, potential or apparent personal conflict of interest. If they cannot be avoided, these situations should be adequately and cautiously mitigated*

The 2011 version of the MC CoC, with which the former VP was familiar, had a footnote which read as follows on explaining what a CoI could inter alia entail:

> *Situations of this kind may be many and varied: they include, but are not limited to, negotiating or working with a consultant who is a relative or who employs or might employ a relative; appraising a loan application from a company within which members of the Management Committee enjoy or can avail themselves of significant personal ties or interests*

… «*les yeux sont inutiles quand l'esprit est aveugle* »

EIB Reply Q 1d:

"As noted above, the EIB wishes to clarify the applicability and enforceability of the mitigating measures set out in the 2018 ECC decision as opposed to the informal consultation with the EIB Group CCO in April 2021. Even if the former Vice-President was as a matter of precaution recommended to follow the measures set out in the 2018 ECC decision, the advice of the Group CCO in 2021 did not constitute an opinion of the ECC given in the context of an ECC procedure."

See my reply under **Q1 a)**. The fact that the ECC was not asked to render an opinion in this case by the CCO, Sec Gen, or the President is problematic.
… **«** *Le courage du soldat dépend de la prudence du général***»**

However, I humbly note that the President failed to reply, or at least did not meaningfully reply to the question "*Did the EIB monitor and ensure the former Vice-President's compliance with the mitigation measures*". It is not because there would not be an ECC opinion that monitoring and enforcement of compliance can be simply dodged, at least to my mind. If that were possible, the rules are not sufficiently clear, and the 2021 version referred to does not solve that question in any way: the initiative to seek an ECC opinion is left to the VP and there are no sanctions or accountabilities for not complying.

EIB Reply Q 2:

"As explained in previous exchanges with the Ombudsman, the EIB services are entrusted with negotiations of individual operations. The MC members do not interfere in such discussions."

This appears to be incorrect. Before the services may start with a project appraisal, every proposal is submitted to the MC under a "PIN" (Project information note), where the MC deliberates whether or not this projects meets the objectives and public policy goals that the EIB ought to promote. The members of the MC therefore do interfere – or have an opportunity to do so – in such discussion. No appraisal (desk review, mission, preparation of documents for MC and Board approval) can be initiated before the MC has given a green light.

"The mentioned letter was a simple expression (and reaffirmation) of the EIB's commitment to the project approved by the EIB Board of Directors and a way to find a solution in the case at hand. The said high-level letter aimed to ascertain whether CDP was interested in pursuing the operation in question.*"*

The former VP writes on "a way to find a solution". The signal along the lines "Dear CDP are you interested in receiving money from the EIB – I can find a solution" Is that not interference and already an opening of a negotiation…? Why did the former VP have to sign this, knowing his close ties with CPD, and not, for instance, the President or another member of the MC?

…. «*le mal caché est le plus grave*»*.*

Q3:

As a starting point, the EIB took note of the fact that the information provided in relation to allegations that the former Vice-President had used inside information in his tenure at CDP all came from publicly available sources.

I would have thought that the information being public ought to have prompted an investigation to clear all doubts in the eyes of the pubic. Instead it appears to be an excuse for not investigating, of which I cannot follow the logic. I see that, inter alia, in footnote 3 of the reply, the President relies on a public available source to argue his case before the Ombudsman.
The pertinent question is if, or not, the information available in the public resources sufficed as *prima facie evidence* that should trigger an investigation, or a forwarding for follow-up the national competent authorities or the EU Prosecutor's Office, as the case may be. The President does not reply on what grounds the information was considered not adequate.

Insider information may have been of interest to CDP to decide whether or not it should buy, sell, refinance, or delay trading in EIB financial instruments.
Unless I am mistaken the Insider Information and MAR are of public order an apply regardless of the status of the EIB, so that there is in principle the presumption that prima facie evidence is reported to the competent authorities.
I take note that this did not happen.

… «*les yeux sont inutiles quand l'esprit est aveugle* »

Rest assured, dear Ms. Ombudsman's, of my highest esteem for your and your services dedication and perseverance on this topic. This can only benefit the governance, transparency, and democratic legitimacy of the Institution [redacted], and whose mission, as well as its Good Governance, remains dear to me.

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From: Euro-Ombudsman <EO@ombudsman.europa.eu>
Sent: Friday 30 June 2023 16:19
To: [redacted]
Subject: Complaint 611/2022/KR

Dear Sir,

Please find attached a letter from the European Ombudsman's Office regarding your complaint.

Best regards,

Secretariat

European Ombudsman
Directorate for Administration

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