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President

Ms Emily O'Reilly
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EIB - Corporate
IG/CM/RR/nh

Luxembourg, 25 October 2023

Dear Ms O'Reilly,

I refer to your letter of 17 July 2023 informing me of your decision concerning the complaint 3/2023/OAM.

Although you have concluded that no further inquiries into this complaint were justified, you considered it useful to make a number of suggestions for improvement to the EIB and requested the EIB to inform you of any action taken in relation to your suggestions by 31 October 2023.

The EIB has now prepared its response, which you will find attached in the annex. I hope you find this reply helpful and remain available for any further clarification you may need.

Yours sincerely,



Enclosure: 1

Annex 1 – Actions taken by the EIB in relation to the Ombudsman’s suggestions for improvement in case 3/2023/OAM

As already mentioned in the previous correspondence between the European Investment Bank (EIB) and the European Ombudsman (EO) services, following receipt of the EIB’s decision of 1 December 2022, the complainant decided to lodge a complaint directly with the EO, instead of submitting a complaint to the EIB Group Complaints Mechanism (EIB-CM). The EIB reiterates that articles 5.33 and 6.4¹ of the EIB Group Transparency Policy (EIB-TP), the relevant legal framework for the EIB, explicitly mention the appropriate channels of redress in case of dissatisfaction with the EIB’s decisions taken under the EIB-TP. In addition, the EIB-CM Policy establishes that the appropriate initial channel dedicated to resolving citizens’ concerns within the EIB Group is the EIB-CM. Indeed, the relevant provisions in the EIB’s framework are reflected in the Memorandum of Understanding between the EO and the EIB in Article 2 point IV.

Notwithstanding the above, and in view of the EIB’s loyal cooperation with the EO, the EIB has invested all efforts necessary to provide the EO with the information required as part of this complaint-handling procedure.

Furthermore, with regard to the outcome of this case, the EIB notes that the EO concluded that no further inquiries were justified and that it did not issue any recommendation. The following sections provide the EIB’s response to the three suggestions for improvement made by the EO.

Suggestion n. 1:

The EIB should distinguish between its policy regarding the ‘*proactive*’ publication of information and the handling of ‘*reactive*’ requests for public access to documents and information, which are governed by different rules set out in the EIB Transparency Policy. In particular, when the EIB considers an individual request for public access, it should confine its assessment to the possible application of one or more of the exceptions contained in Section 5 of its Transparency Policy, leaving aside considerations as to whether the requested document will eventually be published proactively.

EIB’s response:

The EIB accepts the suggestion made by the EO but would like to make the following observations.

First, the EIB notes that its rules and practices make a clear distinction between ‘proactive’ publication of information and ‘reactive’ requests for public access to documents and information. The EIB TP dedicates two separate sections to Publication of Information (Section 4 EIB TP), on the one hand, and to Disclosure of information (Section 5 EIB TP), on the other. With regards to project summaries, the EIB TP lays down specific provisions on the time and modalities of publication in the section dedicated to publication of project information (Articles 4.6-4.14).

Second, in her decision (Section 8), the EO takes note that the EIB’s confirmatory decision refusing access to the summary of the project in question invoked the exception for the protection of the commercial interests of a natural or legal person, which forms part of the exceptions contained in Section 5 of the EIB-TP (Article 5.5).

It is worth stressing that the EIB’s confirmatory decision and the underlying *ad hoc* assessment carried out by the EIB exclusively focus on the exceptions justifying the refusal to disclose as per Section 5 of the EIB-TP. This is reflected in the EIB’s statement of reasons which does not include any reference to the fact that the summary was going to be published shortly after. The EIB therefore acted in line with EO’s suggestion.

¹ Article 5.33 EIB TP provides that the remedies available to the applicant in case of a total or partial refusal, following a confirmatory application, are: making a complaint to the Complaints Mechanism or initiating court proceedings against the EIB before the Court of Justice of the European Union. Article 6.4 EIB TP provides that in case of dissatisfaction with the outcome of the complaint lodged with the EIB Complaints Mechanism the requester can make a complaint to the European Ombudsman.

During the meeting with the EO's inquiry team of 28 February 2023, the EIB representatives extensively explained the assessment of the request carried out by the EIB, including substantial aspects evaluated when assessing the applicability of the EIB-TP exceptions, such as the consultations with the promoter, the confidentiality agreement between the EIB and the promoter as well as the assessment made by the EIB on the possible partial disclosure. In this context the EIB representatives mentioned that "[t]he fact that the summary was meant to be published [...] shortly after the confirmatory decision was also taken into account".

This statement does not imply that the EIB's confirmatory decision was determined or even influenced by any other considerations than those pertaining to the assessment of the applicability of the exceptions of the EIB-TP.

The EIB's statement made in the context of the meeting with the EO's inquiry team therefore only intended to explain that, when preparing its reply to the request and after having assessed the exceptions applying to the requested document, the EIB considered whether it was possible to complement the communication to the requester with information on the timing of publication, which was considered to be an information of interest for the requester.

Furthermore, it is also worth recalling that the complainant's initial request was a request for clarification as to why the project could not be found on the EIB website at that time. It therefore seems appropriate that the EIB complements its response to the subsequent confirmatory application with the relevant clarifications on the applicable rules concerning the proactive publication of the project summary.

Suggestion n. 2

The EIB should ensure that it provides detailed reasons when refusing public access to documents, explaining how the disclosure of the requested documents could specifically and actually undermine the interest(s) protected by its Transparency Policy.

The EIB should also reflect in its final decisions whether it examined the existence of an overriding public interest in disclosure, where applicable, and whether partial access was considered.

EIB's response:

The EIB accepts the suggestion made by the EO. Being understood that the EIB is always open to receive suggestions aimed at improving its internal practices, the EIB would like to make the following observations.

Preliminarily, the EIB would like to recall its dual nature as an EU body and a financial institution. In this context, the commercial interests of the clients of the EIB, as well as the commercial sensitivity of the information that the EIB is dealing with, have a particular importance in consideration of the mission of the EIB. This is reflected in the EIB-TP, whose Guiding Principles clarify that the EIB must maintain the confidence and trust of its clients and other relevant third parties and that it must protect information from disclosure when the legitimate interests of the Bank and third parties would be undermined (Article 2.5. TP). Articles 3.7 and 5.3 of the EIB-TP clarify that the EIB must balance the principle of openness, on the one hand, with the particular nature of the EIB including its specific functions as a bank, on the other.

With the above noted, the EIB insists that in the case at stake the EIB did indeed identify a specific and actual risk of undermining a legitimate commercial interest protected by the EIB TP. In fact, it assessed that, since the promoter was a publicly traded company, information relating to the project, which was in addition covered by a confidentiality agreement, was market sensitive and its premature disclosure would have undermined the commercial interest of the promoter. This was further confirmed by the promoter itself.

In any case, it is not clear what further statement of reasons the Bank should have provided, according to the EO, in order to legitimately invoke the exception on the protection of commercial interests. In accordance with the case-law, the provision of a statement of reasons cannot imply that the EIB should

have disclosed the information protected by the exception, as this would have the effect of depriving the exception of its very purpose.

In the case at hand the EIB could not reveal specific information about the promoter (its market capitalisation, the amount of the loan etc.). The EIB took this into account in its evaluation of the elements in question rendering the risk of undermining the protected interest “actual” and non-hypothetical. Revealing this information, however, would have deprived the exception on protection of commercial interests of its very purpose.

Furthermore, the EIB would like to stress that in this particular case the requester had not raised (not even implicitly) any overriding public interest in disclosure. When replying to the requester, the EIB had therefore considered that it was not necessary to address in its statement of reasons this specific aspect. However, when applicable the EIB thoroughly examines whether an overriding public interest in disclosure exists.

Finally, during the inquiry (as proven by the meeting report and the documents inspected by the EO) the EIB did consider, as part of its assessment and when consulting the promoter, whether partial access was possible in the case. The EIB therefore understands the EO’s suggestion as the need, in future confirmatory decisions, to inform requesters that it has considered partial access. The EIB accepts to implement this suggestion.

Suggestion n. 3

When conducting third-party consultations, the EIB should inform the third party concerned, in a clear manner, that the public should be granted the widest possible access to EU documents and that any reasons for refusal should be based on the exceptions provided for in the EIB Transparency Policy, and not on any other considerations.

EIB’s response:

The EIB is keen on taking further initiatives to raise awareness of third parties about the EIB-TP, its principles and requirements.

An initiative which has already been implemented is the publication of a [Guidance note](#) informing EIB current and potential counterparts of the EIB-TP obligations. In addition, EIB contracts standardly include a reference to the EIB-TP, thus making counterparts aware of the transparency obligations of the EIB.

Based on the EO’s suggestion, the EIB is also currently considering making reference to the EIB-TP more prominently when conducting third-party consultations.