



## Annex I: Input from the European Ombudsman

### A Primary Law

Article 3.5 of the EIB's draft revised Transparency Policy refers to Article 15 of the Treaty on the Functioning of the European Union (TFEU). The paragraph is closely based on the wording of Article 15 TFEU, but is not a direct quotation. The changes to the actual wording of the Article, though small, make it more difficult for the reader to understand than the Article itself. (For example, the replacement of "this paragraph" by "that paragraph" in line 12). Article 3.6 refers to the Charter of Fundamental Rights of the European Union and Article 3.7 to Regulation 1049/2001 on public access to documents. The relationship between these three paragraphs is unclear.

Article 15 TFEU was introduced by the Lisbon Treaty. A key difference from the corresponding provision contained in the former EC Treaty is that Article 15 applies to all EU institutions, bodies, offices and agencies, rather than just the European Parliament, Council and Commission.

We believe it would be useful and appropriate for the EIB to explain its understanding of the relationship between its Transparency Policy and the EIB's legal obligations in a non-technical and user-friendly way. We therefore suggest the following replacement for Articles 3.5- 3.7:

*"3.5 This Policy is consistent with the legal obligations of the EIB in respect of the principle of openness and the right of public access to documents. Paragraphs 3.6 - 3.8 below set out, in a non-technical way, the EIB's understanding of the relationship between the Policy and our legal obligations.*

*3.6 The principle of openness is enshrined in Article 1 of the Treaty on European Union (TEU), which states that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. Openness also contributes to strengthening the principles of democracy and respect for fundamental rights, in line with Article 6 TEU. Article 15(1) of the Treaty on the Functioning of the European Union (TFEU) requires Union institutions, bodies, offices and agencies, including the EIB, to conduct their work as openly as possible in order to promote good governance and ensure the participation of civil society.*

*3.7 Article 15(3) TFEU provides for the right of public access to documents. This is a fundamental right, recognised by Article 42 of the Charter of Fundamental Rights of the European Union. General principles and limits governing this right are to be determined by the European Parliament and the Council of the European Union through legislation. The legislation currently in force is Regulation (EC) N° 1049/2001<sup>2</sup>.*

*3.8 Article 15 (3) also states that such legislation applies to the EIB only when exercising its administrative tasks. The EIB understands that the intention of this provision is that the EIB itself should determine, in a way consistent with the principles of openness, good governance and participation, how the general principles and limits governing the right of public access should apply in relation to its specific*

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<sup>2</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.



*functions as a bank. The EIB does this through the Policy and specifically through the application of the exceptions to access set out in Article 5 below”.*

The above explanation would, we believe, demonstrate that the Bank is not seeking to use Article 15 (3) TFEU to "roll back" transparency as some civil society critics have alleged.

In light of the above, Article 5.1 of the draft revised Transparency Policy (entitled 'Presumption of disclosure') could be simplified to read:

*"All information and documents held by the Bank are subject to disclosure upon request, unless there is a compelling reason for non-disclosure (see "Exceptions" below).*

As well as dispelling public suspicion that the Bank is trying to "roll back" transparency, simplifying the text in this way would make it unnecessary for the Bank to define the scope of the EIB's administrative tasks. Any such definition would be fraught with problems, legal and practical, and would be likely to give rise to a lengthy series of disputes, in each of which the EIB would appear to be seeking to narrow the scope of the general principle of transparency.

## **B Exceptions to public access**

Section A above suggests that the EIB should protect its special functions as a bank through the application of the exceptions to public access.

To give effect to this approach, the starting point should be the exceptions defined in Article 4 of Regulation 1049/2001, as modified by Article 6(1) of the Aarhus Regulation<sup>3</sup> in relation to environmental information.

Insofar as the Bank considers that its special functions require additional exceptions, or different exceptions from those for which Regulation 1049/2001 already provides, these should be clearly identified and explained. With one exception, however, we are not convinced that additional<sup>4</sup> or different<sup>5</sup> exceptions are necessary. The sole exception is the provision for protection of "the environment, such as breeding sites of rare species". Our understanding is that this additional exception, originally proposed by the Commission in its 2008 proposal for the revision of Regulation 1049/2001, is uncontroversial and fills a generally recognised gap. As you are no doubt aware, many other aspects of the Commission's 2008 proposals proved highly controversial politically and the legislative process remains deadlocked.

A simple and effective approach could be to deal with the matter by including, at the end of Article 5, a provision along the following lines:

*In applying these exceptions due regard shall be had to the Bank's role as a lending institution and the need to protect the confidentiality of its relationships with its clients.*

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<sup>3</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264, p. 13.

<sup>4</sup> For example, the proposed exception in relation to the protection of selection procedures.

<sup>5</sup> For example, the proposed rewording of the exception laid down in the third indent of Article 4(2) of Regulation 1049/2001 in relation to the protection of the purpose of inspections, investigations and audits.



## **C Procedure**

The current Transparency Policy provides that, in the event of a total or partial refusal of a request for information, the applicant may on a voluntary basis, make a confirmatory application (paragraphs 5.26, 5.32). Alternatively, the applicant may lodge a complaint according to the 'Provisions for Appeal'. The latter section of the Policy refers to the possibility to lodge a complaint with the EIB Complaints Mechanism.

The added-value of the voluntary confirmatory application procedure is not immediately clear. In our view, it would be more straightforward for the EIB Complaints Mechanism to deal with confirmatory applications. Furthermore, making a confirmatory application should be a necessary procedural step before making a possible further complaint to the European Ombudsman.

Such a procedure would be in conformity with principles of good administration, in that the confirmatory application would not be dealt with by the same administrative entity that dealt with the initial request. It would also align the procedure as regards complaints about refusal of access to documents with the general procedure foreseen under the Memorandum of Understanding between the EIB and the Ombudsman. We therefore suggest that the Policy be revised accordingly.

## **D Proactive disclosure**

To be transparent, a public authority must (i) be proactive, taking the initiative to communicate effectively with citizens and (ii) react properly when citizens themselves take the initiative by asking for information or a document that is not already in the public domain.

The Ombudsman recently had occasion (in OI/3/2013/MHZ) to examine the Bank's practice in relation to the proactive disclosure of environmental information. In her further remark in this case, the Ombudsman considered that it may be useful for the EIB to adopt and publish a publication scheme setting out the type of environmental information it intends to record in its recently launched Public Register.

In substance, Section 4 of the Transparency Policy contains key elements of a publication scheme. As regards environmental information in particular, the drafting of this section could be strengthened to take account of the recently published Aarhus Convention Implementation guidelines and the Maastricht recommendations on promoting effective public participation in environmental matters.