

6 September 2016

## Complaint to the European Ombudsman - EIB's Transparency Policy

1. In accordance with the Memorandum of Understanding signed by the European Investment Bank (the EIB) with the European Ombudsman, the latter is entitled to review whether the EIB has provided a consistent and reasonable explanation of its position in relation to a possible instance of maladministration. The EIB Complaint Mechanism (hereinafter; the "EIB-CM") is, thus, the first step of a two-tier procedure (internal and external) for the handling of complaints against possible maladministration by the EIB lodged by individuals, organisations or corporations affected by EIB activities. Complainants who are not satisfied with the outcome of the procedure before the EIB-CM and who do not wish to make use of the possibility of filing a confirmatory complaint procedure, can file a complaint of maladministration against the EIB with the European Ombudsman.
2. ClientEarth, Bankwatch CEE Network and CounterBalance's (the Applicants) complaint to the European Ombudsman is twofold, it first challenges the decision through the EIB-CM to declare inadmissible the original complaint lodged by the Applicants on 16 February (the 'original complaint'), whereby they argued that several provisions of the EIB's new Transparency Policy (TP) did not comply with the relevant international and European legal framework on access to information, namely with the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention), Regulation 1367/2006 (the "Aarhus Regulation")<sup>1</sup> and Regulation 1049/2001<sup>2</sup>. This part of the present complaint seeks to demonstrate, first, that the inadmissibility decision taken by the EIB Group is not consistent with the EIB-CM guiding principles and that it constitutes a clear violation of the EIB-CM rules of procedure.
3. Second, it relies on the arguments put forward in the original complaint to support its claim that some of the provisions of the TP adopted by the EIB in March 2015 constitute an instance of illegality and maladministration. The original complaint is attached in Annex.

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<sup>1</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.

<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.

## 1 Background to the complaint

4. On 16 February 2016, the Applicants lodged the original complaint with the EIB-CM.
5. The EIB acknowledged receipt of the complaint on 1 March 2016. It informed ClientEarth that the complaint had been registered and that the EIB-CM had initiated the revision of the case.
6. In a subsequent letter of 10 June 2016 (the contested decision), the Bank concluded that the allegations made by the Applicants were inadmissible and that the original complaint could not be reviewed through the EIB-CM. In particular, the EIB considered that the arguments put forward were not consistent with certain provisions of the EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (hereinafter, "CMPTRP"), and notably the following:
  - a. *"The EIB Complaints Mechanism evaluates and reports compliance with the EIB Group's policy framework for each admissible complaint"* (Article 3.1 of EIB Guiding Principles).
  - b. *"The EIB Complaints Mechanism is a vital tool of horizontal accountability of the EIB Group vis-à-vis its stakeholders as regards the handling of complaints concerning its activities"* (Article 1.1 Terms of Reference – Mission).
  - c. *"The EIB-CM...conducts appropriate inquiries with a view to assessing whether the EIB Group's policies and procedures have been followed"* (Article 4.2 c) Terms of Reference).
  - d. *"The EIB-CM...recommends possible improvements of existing procedures"* (Article 4.2 g) Terms of Reference – Responsibilities).
7. Nevertheless, the letter provides that *"the EIB's decision to file those allegations as inadmissible does not affect the on-going handling of your allegations regarding the implementation of the EIB Group Transparency Policy, i.e. the EIB's activities which you allege not to be in compliance with the EIB Group's policy framework under point 1.2.2 of your complaint."* The allegations according to which the EIB TP is not in compliance with international and EU law are inadmissible. However, we understand that point 1.2. of the original complaint which addresses the duty to publish all environmental information relevant to the Bank's function on a public register will be dealt with by the EIB-CM.

## 2 Arguments

8. At the outset, it is clear that the EIB's decision does not include any detailed and comprehensive reasoning on how the arguments laid down by ClientEarth do not

comply with the admissibility requirements as established in the relevant legal framework. On the contrary, it is limited to enunciating several provisions and general indications of the EIB-CM Governing Principles and Terms of Reference in order to support its findings, and considers that those provisions would “suggest” that the Applicants’ allegations are inadmissible.

9. The contested decision is, thus, not substantiated with any solid grounds and does not comply with the obligations derived from the right to good administration and in particular with the obligation for the administration to give reasons for its decisions in accordance with Article 41 of the Charter of Fundamental Rights of the EU.
10. We will consider the legal framework applicable to the EIB-CM and demonstrate that it is possible to challenge EIB horizontal and sectoral policies through the EIB-CM.

## 2.1 EIB-CM Guiding principles on admissibility of complaints

### 2.1.1 Admissibility requirements under the Complaints Mechanism Rules of Procedure

11. The EIB-CM’s decision suggests that policies of the EIB cannot be challenged and that only their implementation would fall under the categories of decisions subject to the scrutiny of the EIB-CM. However, none of the provisions of the applicable legal framework for the EIB-CM support such a statement.
12. In order to ensure a better understanding of this question, the admissibility requirements, as laid down in the EIB-CM Rules of Procedure, may be classified as follows: (1) “negative” requirements, which set out the different grounds for inadmissibility of complaints as established in Article 2 and (2) “positive” requirements that must be complied with in order to lodge a complaint through the EIB-CM as laid down in the first paragraph of the same provision.

#### 2.1.1.1 “Negative” requirements

13. First, complaints must not fall under any of the different types of inadmissible complaints established under Article 2 EIB-CM Rules of Procedure. Inadmissible complaints are fundamentally those: concerning allegations of fraud or corruption<sup>3</sup>; lodged by the EIB Group’s staff; regarding the working relations with the EIB Group; concerning international organisations, Community institutions and bodies, national, regional or local authorities; which have already been lodged with other administrative or judicial review mechanism or which have already been settled by the latter; from anonymous parties; with the objective to gain unfair competitive economic advantage; that are excessive, repetitive, clearly frivolous or malicious in nature.
14. The original complaint lodged by the Applicants concerned allegations against the legality of the TP approved by the EIB Board of Directors in 2015, which sets out the

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<sup>3</sup> Article 4 of the Principles of the EIB-CM.

EIB Group's approach to transparency and stakeholder engagement and establishes the general procedural framework for EU citizens to exercise their rights to access to the information held by the EIB. It is therefore clear that the subject matter of our original complaint did not fall under any of the above-stated different types of inadmissible complaints.

### 2.1.1.2 “Positive” requirements

15. Additionally, complaints must satisfy what we have called “positive” requirements. In essence, these requirements are contained in the first paragraph of Article 2 EIB-CM Rules of Procedure, which lays down the right of *“any person or group, including civil society organisations, who allege there may be a case of maladministration within the EIB Group”*, to lodge a complaint before the Complaints Mechanism. The EIB-CM Operating Procedures further states that, *“a complaint is considered admissible if the allegations relate to a decision, action or omission by the EIB”* (Article 4.3). Thus, the two basic elements of both provisions are: 1) a decision, action or omission by the EIB and, 2) an alleged case of maladministration.
16. Maladministration means poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights (Article 1.2 EIB-CM Principles). According to the EIB-CM Operating Procedures, The definition of maladministration includes, but is not limited to, non compliance with existing rules and regulations, or with EIB policies, Standards and Guidelines (Point 4).
17. In the original complaint, we argued that the new EIB TP contained certain provisions that were not consistent with the Aarhus Convention, the Aarhus Regulation and Regulation 1049/2001. Such failure represented an instance of illegality and maladministration.
18. Hence, the malpractice identified by the Applicants pertained to a decision taken by the EIB within the scope of its competences (the adoption of new transparency rules) and the allegations concerned an instance of maladministration (failure to comply with the applicable legislation on access to documents).
19. It follows from the above that, contrary to the EIB-CM's decision, the primary admissibility requirements were wholly fulfilled and the complaint was admissible in accordance with the EIB Rules of Procedure.

### 2.1.2 Breach of the Complaints Mechanism's rules on the handling of complaints

20. In addition to the foregoing considerations, the EIB was in breach of its procedural rules for the handling of complaints.
21. In accordance with Article 7.1 EIB-CM Rules of Procedure, at a preliminary stage, the EIB-CM must ensure that an acknowledgement of receipt is sent to the complainant within 10 working days upon the receipt of its complaint. In order to ascertain whether

an inquiry on the complaint should be launched, the EIB-CM must conduct an admissibility check prior to the registration of the complaint. In accordance with Article 4.3 of the EIB-CM Operating Procedures, the EIB-CM must communicate the outcome of the admissibility check at the same time as acknowledging receipt.

22. Subsequently, after the preliminary admissibility evaluation and the registration of the complaint, complainants are informed (1) that the complaint has been registered, (2) that an inquiry/assessment on the merits of the case has been initiated and (3) about the date by which they may expect a response (40-140 working days).
23. In the present case, an acknowledgment of receipt was sent by the EIB-CM on 1 March 2016. In its letter, the EIB-CM did not contest the admissibility of the complaint and thus, did not rely on any of the grounds for inadmissibility provided in Article 2 of the CM Rules of Procedure, nor did it provide ClientEarth with any arguments on whether the complaint was, at least, partially admissible. On the contrary, the complaint was registered and the EIB-CM informed the applicant about the date by which to expect a response (September 2016). This is a clear indication that the admissibility assessment had been concluded at that point and constitutes an implied recognition of the admissibility of the complaint.
24. What is more, even if the complaint did not comply with the admissibility requirements, the EIB should nonetheless have provided the complainant with advice on which measures could have been taken otherwise, together with any suggestions as to whom ClientEarth may address its concerns<sup>4</sup>. However, the EIB-CM did not provide ClientEarth with any suggestion in this regard.
25. It follows from the above that the EIB-CM has failed to comply with obligations as laid down under the CM rules of procedure.<sup>5</sup>

## 2.2 The Complaints Mechanism competences

26. The EIB-CM concluded that the review of the Bank's TP fell outside the remit of the EIB-CM. According to the contested decision, the EIB-CM's responsibilities are limited to assessing whether the EIB policies and internal procedures have been followed and implemented, not whether they are compliant themselves with higher rules and laws.
27. This conclusion is, however, based on unfounded assumptions that deliberately seek to narrow the scope of the EIB-CM mandate.

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<sup>4</sup> Pursuant to Article 7 of the CM Rules of Procedure « In case of partial or total inadmissibility of the complaint, the EIB Complaints Mechanism Division will endeavour to provide, if possible, the complainant with an advice on which measures could be taken and /or to which institution/body/her/his concerns may be addressed . »

<sup>5</sup> In compliance with the EIB-CM Operating Procedures, "if a complaint is inadmissible, the complaints are informed of the reasons of inadmissibility and provided with suggestions as to whom they may address their concerns".



28. First, Article 3.1 EIB-CM Principles provides that “*the EIB Complaints Mechanism evaluates and reports compliance with the EIB Group’s policy framework for each admissible complaint*”. This provision establishes the mandate of the EIB-CM. It stems from that provision that the scope of the evaluation and reporting carried out by the EIB-CM is quite broad as the EIB Group’s policy framework against which compliance must be assessed encompasses EU and international law.
29. Furthermore, Article 3.1 does not specify the type of decisions the compliance with which the EIB-CM evaluates and reports on, and no other provisions state that policies cannot be challenged. Accordingly, this provision does not prevent the EIB-CM from assessing whether EIB decisions and policies are consistent with the law. On the contrary, Article 3.1 covers decisions adopted by the EIB, including the Bank’s policies.
30. This is in line with the EIB-CM procedural rules for complaints regarding governance aspects of operations financed by the Bank, which establishes that [the EIB-CM] should “assess potential indications that EIB policies could have failed to provide an adequate level of protection and safeguard” (Article 5.4).
31. It follows that the EIB-CM should be competent to carry out investigations on whether EIB transparency policy ensures the necessary standard of protection of the right to access to information as established under the relevant EU and international law.
32. Second, Article 1.1 Terms of Reference – Mission provides that “the EIB Complaints Mechanism is a vital tool of horizontal accountability of the EIB Group vis-à-vis its stakeholders as regards the handling of complaints concerning its activities”.
33. The CM would not fulfil its mission in accordance with Article 1.1 Terms of Reference and the above-referred Article 3.1 Principles, if it was only responsible for handling complaints alleging maladministration stemming from bad implementation of the policies in the adoption of the Bank’s decisions and handling of projects without being able to proceed to the evaluation of the legality of the policies that govern the challenged decisions.
34. The fact that the EIB policies and procedures have been followed does not necessarily imply that the rights of EU citizens are respected. If the policies governing the activity of the Bank are in breach with the relevant legal framework, *a fortiori* the decisions implementing these policies are also in violation of the law.
35. Hence, the decision to reject such complaints as inadmissible deprives the public of any meaningful remedy against a whole bulk of EIB’s decisions.
36. The distinction between the two types of decisions, between policies on the one hand and the implementing decisions and handling of the projects on the other, does not therefore have any sound legal grounds in the EIB-CM rules.
37. Third, the fact that Article 4.2 c) Terms of Reference, relied on by the EIB-CM’s decision, provides that the EIB-CM “conducts appropriate inquiries with a view to assessing whether the EIB Group’s policies and procedures have been followed” does not mean that its competence is limited to conducting such inquiries only. This

provision needs to be read in conjunction with the other provisions mentioned above which allow the EIB-CM to assess other type of decisions.

38. Finally, Article 4.2 g) Terms of Reference – Responsibilities, which states that “The CM (...) recommends possible improvements of existing procedures” should be interpreted as recommending possible improvements of EIB policies. The EIB TP governs the way the Bank deals with requests for access to documents, the exceptions the EIB may invoke to refuse such access, the time-limits applicable and the procedure to challenge decisions of refusal. It therefore enshrines procedures for the purpose of Article 4.2 g).
39. As a consequence, the provisions relied on by the EIB-CM in its Decision of 10 June actually demonstrate that evaluating the legality and good administration in the adoption of policies falls under the competence of the EIB-CM. We would also like to draw the attention of the European Ombudsman to the fact that the EIB-CM has consistently declared at several public meetings such as public consultations and meetings with civil society stakeholders, to which ClientEarth and Bankwatch along with other NGOs and other representatives from civil society attended, that the EIB-CM was actually competent to handle complaints challenging any type of decisions adopted by the Bank (except the ones specifically excluded from the admissibility requirements laid down in the EIB-CM Rules of Procedure), including the Bank’s policies. Therefore, it is difficult to understand why and how the EIB-CM backtracked in relation to our original complaint and contradicted these commitments it made in public. Despite the fact that it is not possible to evidence those statements as there is no written statements available, the Applicants deems it necessary to bring this matter to the attention of the Ombudsman.
40. Following the above considerations, it seems important to note that the objective of EIB-CM investigations is, in accordance to their Operating Procedures, to allow the EIB-CM to form an independent and reasoned opinion on the issues raised by complainants. The Complaints Mechanism governing principles indeed particularly emphasise the independent status of the CM.
41. The EIB-CM Guiding principles state that “The EIB Complaints Mechanism shall be independent of the services, which are responsible for the activities challenged by the complainant” (Article 2.2). The independence of the EIB Complaints Mechanism is further reinforced in its Statute, which provides that “the EIB-CM is independent from operational activities and thus ensures that each complaint is dealt with by the highest standards of objectiveness whilst safeguarding the interest of all the internal and external stakeholders of the EIB Group” (Article 2.1 Terms of Reference).
42. Moreover, the EIB Complaints Mechanism has to be transparent in its operations and outputs (Article 2.1 – Guiding principles).
43. In line with Article 2.1 EIB-CM Statute in order to ensure that complaints are dealt with to the necessary standard of objectiveness, the EIB-CM must effectively be independent from other EIB services. Its independent status constitutes the best safeguard for its credibility and its capacity to carry out its functions and must not be undermined in any way.

44. We therefore ask the European Ombudsman to inquire into the discussions that took place internally at the EIB between the adoption of the decision to register the original complaint, which implied that it was admissible, and the 10 June Decision rejecting the original complaint as inadmissible.

### 3. Concluding remarks

45. The contested decision is not consistent with the EIB-CM guiding principles and constitutes both a violation of the EIB-CM rules of procedure and an instance of maladministration.
46. The EIB Complaint Mechanism should be deemed competent to proceed to the examination of the adequacy and legality of the EIB's policies.
47. We will not re-argue the case made to the EIB-CM on the legality of the EIB TP and instead attach the original complaint in Annex. The EIB's Transparency Policy represents the first port of call for EU citizens trying to exercise their fundamental right to access the information held by the Bank. It should therefore contain clear and accurate information that can be relied on by EU citizens. This is not the case at present. Among other things, the TP provides for exceptions to the right of access that do not exist in law and contain confusing information on citizens' rights of redress that may result in them forgoing their right to access the courts.
48. Such failures represent an instance of illegality and maladministration. We urge the European Ombudsman to remind the Bank of its obligations under the Aarhus Convention, the Aarhus Regulation and Regulation 1049/2001 and to make detailed recommendations as to how the TP can be rectified so that it provides a truly useful tool to EU citizens seeking access to information and that ensures the Bank is accountable.