

A Joint CSO Submission on the Draft Revised Version of the EIB

Transparency Policy

March 2021



Introduction

This paper is submitted in the framework of the public consultation organised by the EIB for the revision of its transparency policy.

This is a collective submission by the undersigned CSOs, which all are familiar with the work of monitoring International Financial Institutions (IFIs) and EU transparency, on the EIB's Draft Revised Version of its Transparency Policy (hereafter draft TP).

We very much welcome the undertaking by the EIB to review its Transparency Policy (TP). The six years of implementation experience since the TP was last revised means that it makes sense to review and improve the Policy at this point. Our comments draw on the experiences of civil society organisations with the existing TP and its use.

Transparency is a prerequisite for good governance and can help to better achieve lending goals, reduce corruption, identify potential social, environmental and economic benefits, and avoid adverse impacts on communities and sensitive ecosystems. A free, two-way flow of information provides the foundation for healthy policy development, decision-making and project delivery.

Transparency is also a prerequisite for public accountability. This has been brought into sharp focus by the EU General Court judgement of 27 January 2021. The Court confirms that environmental NGOs have the right to request an internal review of the EIB's financing decisions, if there are concerns that they may violate EU law or the EIB's internal rules meant to ensure environmental protection. To fulfil this monitoring role, NGOs must be informed about the rationale of the EIB's decisions at the time they are taken.

As a body of the European Union, the EIB is required to abide by its transparency standards and principles. These principles are set forth in the EU treaties – of which the EIB Statute is an integral part – and clearly state that the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible and shall elaborate in their own procedures specific provisions regarding access to the EIB's documents. As a result, the EIB adopted a Transparency Policy, which was last renewed in March 2015.

The draft TP describes that: *“improving the transparency of its institutions and bodies is a key European Union policy aimed at bringing them closer to the publics they serve, as well as highlighting their relevance in contributing to Europe's social and economic cohesion and sustainable development and the promotion of the objectives of the Union's external cooperation.”*

Indeed, increased transparency is needed, especially for the people affected by the projects the EIB finances, as well as for societies globally, who should be given the information to understand the cost and benefits of the EIB operations that are relevant to them.

Yet 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.

When compared with other international financial institutions, the EIB's transparency commitments fall short under the current draft policy. The transparency of EIB operations at project level – especially its active dissemination of information – and among its governing bodies remains limited. This lack of progress on transparency is visible in the Aid Transparency Index, an independent measure of aid transparency for the world's major development agencies, produced by Publish What You Fund. In 2020, the EIB only scored “fair” (58/100 points).

Before addressing our substantive concerns with the draft TP, we would like to convey a major concern in relation to the consultation process. We believe that a second period for making comments should be added. This will allow stakeholders a chance to respond to the Bank's comments on their original contributions, as well to verify the extent to which their comments were addressed in a second draft. Our recommendation therefore would be to build in a second period for making comments.

The draft TP does not bring any real improvement in the transparency of the EIB which would bring it closer to people. On the contrary, it further deteriorates transparency conditions, particularly in the area of information/documents dissemination and access to information for project-impacted people. We notice that crucial structural issues have been left unresolved in the new policy, or turn from the alleged goal of openness towards the direction of confidentiality instead.

In addition, the draft TP does not improve transparency of the bank's governing bodies and rather further obfuscates the process of decision-making at the bank.

Therefore, we call for the revised policy to:

- On one hand, secure those main principles and provisions in the existing policy which already support its good practice of operation.
- On the other hand, achieve targeted improvements in areas where the EIB does not live up to its commitment to transparency. Below are listed the key areas for improvement in the draft TP. We urge the EIB staff, and its shareholders, to integrate these proposals in a revised draft of the policy, before it is proposed for the Board's approval.

This echoes the positions of the European Parliament which, in its resolution of 10 July 2020 on the financial activities of the EIB (2019/2126(INI)), stated that it: “Calls on the EIB to review its transparency policy in 2020 with a view to the timely publication of more ample information on all its financing activities, so as to ensure that its transparency policy is compliant with its social, climate and environmental commitments”; “Calls on the EIB to further enhance transparency and access to information, especially regarding the contracting and subcontracting system, the results of internal investigations and the selection, monitoring and evaluation of its activities and programmes”.

1. The right of access to documents

The EIB Transparency Policy should elevate the recognition of a right to access to information. The right to information held by public bodies is a fundamental human right, set out in Article 19 of the UN Universal Declaration of Human Rights:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

The UN Special Rapporteur on Freedom of Opinion and Expression has said that the right to information also applies to international bodies, including international financial institutions.¹ This right applies regardless of which part of the organisational structure of the EIB group holds the information (such as the Boards of Directors and Governors, Management Committee or the bank’s financial facilities and bodies such as compliance review bodies). It is, therefore, key that in renewing its TP, the EIB seeks to give full effect to this human right.

The TP has to take into account and fully comply with the EU legislative framework on transparency and public disclosure. In the EU, the right of access to information is set in Article 15 of the Treaty on the Functioning of the European Union (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”.

In addition, the European Charter of Fundamental Rights states that *“Any citizen of the Union [...] has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium”.*

The right of access to information as a human right is a basic and universal value inherent to democracy and the rule of law on which the European Union is based. It is a prerequisite for public participation in decision-making.

In 2005 the European Community ratified the UNECE [Aarhus Convention](#) on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters requiring EU institutions to ensure disclosure and access to environmental information, “early and effective” involvement of the public in plans, programmes and policies relating to the environment and access to justice in environmental matters. The Convention was transposed in the Aarhus Regulation No. 1367/2006 to allow for better public scrutiny of EU acts affecting the environment.

¹ Report of the Special Rapporteur of the Human Rights Council on the promotion and protection of the right to freedom of opinion and expression, A/72/350, 18 August 2017.

The Aarhus Regulation guarantees the right of public access to environmental information received or produced by Community institutions or bodies and held by them, and sets out the basic terms and conditions of, and practical arrangements for, the exercise of that right.

The EIB Transparency Policy has to take into account and fully comply with the EU legislative framework on transparency and public disclosure. Access to information as a fundamental right should be recognised among the guiding principles of the EIB's Transparency Policy.

The draft TP doesn't explicitly list this right among the Guiding Principles of the TP.

Therefore we propose to amend the Article 2.1 as following:

2.1 This Policy is guided by the public right of access to documents, openness and the highest possible level of transparency. (...).

2. Exceptions to disclosure

One of the most important tests of the strength or weakness of a right to information framework is the breadth and scope of its exceptions. Exceptions should be narrowly crafted, and interpreted in a manner which facilitates the principle of maximum access.

The Global Transparency Initiative's (GTI) Transparency Charter for International Financial Institutions offers a strong vision for what exceptions to access to information should be: "*The regime of exceptions should be based on the principle that access to information may be refused only where the international financial institution can demonstrate (i) that disclosure would cause serious harm to one of a set of clearly and narrowly defined, and broadly accepted, interests, which are specifically listed; and (ii) that the harm to this interest outweighs the public interest in disclosure.*" It goes further by stating that exceptions should: a) protect only legitimate interests; b) be engaged only where release of the information would cause harm to one or more legitimate interests; c) be subject to a public interest override whereby information covered by an exception should still be disclosed if the public interest in disclosure outweighs the likely harm that would result.

The UN Special Rapporteur for Freedom of Opinion and Expression has noted in his 2017 report on the transparency of international organisations that "*the requirement of necessity, which implies proportionality, means that the policies of intergovernmental organizations should permit non-disclosure only when disclosure would indeed cause likely harm to a legitimate interest*".

The TP should fully comply with the applicable EU legislation, namely Regulation No. 1049/2001 and Regulation No. 1367/2006 when drawing up a list of exceptions to disclosure.

Therefore, we are concerned since the draft TP contains exceptions which are broader in scope than the exceptions to disclosure contained in these Regulations.

First, while Article 5.3 is framed as a mere introduction, it appears to establish exceptions that go beyond those contained in Article 5.4-5.7. First, it refers to “[n]ational regulations and banking sector standards covering business contracts and market activity” as applicable to the EIB. This seems to suggest that the Bank can rely on national law or banking standards to withhold information on other grounds than those contained in Article 5.4-5.7.

Second, the draft TP refers to the “*the need to protect its legitimate interests and the legitimate interests of its clients, and thus the confidentiality of the relationship between the EIB and its clients and other counterparts. In particular, under this Policy the EIB cannot disclose information in violation of European Union law such as the Market Abuse Regulation.*”

This wording suggests that the EIB may withhold information on the basis of other considerations than the grounds of refusal clearly enumerated in Article 5.4-5.7. Clearly, the EIB can withhold information where disclosure would violate one of the grounds in Article 5.4-5.7 and therefore run counter to the Bank’s or its client’s legitimate interests. However, Article 5.3 appears to suggest that the Bank should think of its interest first and then apply the grounds of refusal in a manner that concords with these interests. This runs counter to the presumption of disclosure, which implies that all information that is not covered by one of the grounds of refusal shall be disclosed, regardless whether that is in the interest of the EIB (or its clients) or not.

These exceptions are therefore not legitimate. They are also not among the applicable exceptions listed in the Regulation No. 1049/2001 and the Regulation No. 1367/2006.

Therefore we propose to amend the Article 5.3 as following:

5.3 While the EIB is committed to a policy of presumption of disclosure and transparency, it also has a duty to respect confidentiality in compliance with European laws, the obligation not to disclose information of the kind covered by the obligation of professional secrecy in accordance with Article 339 TFEU, as well as legislation to protect personal data. ~~National regulations and banking sector standards covering business contracts and market activity may also apply to the EIB.~~ There are therefore certain limits on the disclosure of information/documents.

In applying the exceptions to disclosure the EIB, ~~shall, in line with article [updated cross references] above, have due regard for its specific role and activities, and the need to protect its legitimate interests and the legitimate interests of its clients, and thus the confidentiality of the relationship between the EIB and its clients and other relevant counterparts. In particular, under this Policy the EIB cannot disclose information in violation of European Union law such as the Market Abuse Regulation.~~

Third, the TP wrongly transposes a provision regarding consultations with third parties. In cases where a document comes from a third party, an institution should consult the party concerned with a view to assessing whether any exceptions apply and not whether the information/document is confidential. The third party must be obliged to provide justifications that substantiate the application of one or more of the exceptions. The draft TP allows the third party to simply claim confidentiality of information or documents in cases when none of the exceptions would apply. This form of “veto” power does also not comply with the Aarhus Convention.

Therefore we propose to amend the Article 5.10 as following:

5.10 As regards third-party information/documents the EIB shall consult with the third party(ies) ~~on whether the information/document is confidential according to this Policy~~ **with a view to assessing whether an exception in paragraphs 5.4-5.7 is applicable**, unless it is clear that it shall or shall not be disclosed.

Fourth, The proposed changes to Article 5.11 extend the possibility for Member States to request that certain documents they submit to the EIB not be published to the EU institutions, bodies and agencies. This provision is intended to ensure that Member States will continue to provide information to the EIB in situations where they are not legally required to do so. For this reason, it is also reflected in Art. 4(5) Regulation 1049/2001. Recital 10 of the Regulation refers to Declaration No 35 to the Treaty of Amsterdam, which safeguards this specific right for the Member States. On the other hand, Regulation 1049/2001 does not include a similar veto right for the EU Institutions, bodies and agencies. Since the EIB is an EU body itself, such a provision essentially introduces a possibility for EU bodies to exempt certain documents exchanged between them from the information disclosure regime. This is a clear violation of the presumption of disclosure and undermines the underlying objective of the EU access to information regime. Art. 5.11 should therefore be maintained in its current form.

Therefore we propose to amend the Article 5.11 as following:

5.11 A Member State ~~or an EU institution, body or agency~~ may request the EIB not to disclose information/documents originating from a Member State without ~~its~~ **its** ~~their~~ prior agreement, setting out the reasons for ~~its~~ **its** ~~their~~ objection by reference to the exceptions referred to in the present Policy.

Fifth, the draft TP in Article 5.12 introduces a new exception to disclosure of project appraisal and monitoring information/documents based on the other IFIs and bilateral European development finance institutions non-consent to disclosure. This Article, as it introduces a new exception to disclosure, should entirely be deleted. All project appraisal and monitoring information/documents

related to the EIB's financed projects should be subject to the same disclosure regime irrespective of the Bank's agreement with other IFIs or European development finance institutions. Otherwise the TP would lead to unequal access to the same type of information and documents depending on the disclosure regimes of these institutions. Other IFIs and development finance institutions will be consulted based on Article 5.10, as amended. However, as all other third parties, they may not have a veto but only put forward their view that can be considered by the EIB itself when deciding whether to disclose this information or not.

Article 5.12 of the draft TP should be deleted.

Sixth, the draft TP in Article 5.5 introduces a long list of examples illustrating common cases of commercial interests. We are deeply concerned about the inclusion of this list, as the term "commercial interest" is already referenced in the text, and the EIB is already heavily using this argument to refuse disclosing documents and information, in its current implementation of the TP. Hence, we would rather call on the EIB to put more emphasis on establishing a long non-exhaustive list of what "overriding public interest" means rather than further expanding the scope of what it considers as undermining the protection of commercial interests.

Therefore we propose to amend the Article 5.5 as following:

5.5 Access to information/documents shall also be refused where disclosure would undermine the protection of commercial interests of a natural or legal person.
~~Business, financial, proprietary or other non-public information/documents created or received by the EIB; o Information/documents relating to negotiations, legal documentation and related correspondence; o Information/documents covered by a confidentiality agreement¹⁰ or in relation to which a third party has legitimate expectations that they would not be disclosed.~~

Seventh, the exception in Article 5.6 is of great concern as it introduces an extensive presumption that "*disclosure of information/documents related to inspections, investigations and audits shall be presumed to undermine the protection of the purpose of the inspections, investigations and audits. Requests for disclosure of information/documents relating to finalized investigations will be assessed in light of all the relevant circumstances of each case.*" This is profoundly illegitimate and such presumptions are not in accordance with EU access to information and documents legislation, policies or the case-law of the Court of Justice of the European Union.

Furthermore, this provision is also disregarding the European Ombudsman's conclusion in Decision case 1316/2016/TN, when it encouraged the EIB to "*reflect the wording of Article 4.2 third indent of Regulation 1049/2001 in its Transparency Policy and remove the presumption of non-disclosure related to information and documents collected and generated during inspections, investigations and audits*".

It also runs counter to the claims that the TP is founded on a presumption in favour of disclosure. Specifically, the effect of creating a presumption of harm largely undoes the very benefits of having a harm test. Instead of requiring officials to consider, on a case-by-case basis, whether specific harm would result from disclosure of certain information before access can be denied, it allows them to assume that such harm would result. As a result, in practice this reversal of the presumption in favour of disclosure will effectively place the onus on the requester to show that disclosure will not lead to negative results--an impossible task.

The proposed amendments ostensibly aim to avoid a case-by-case analysis of protection of all legitimate interests through public disclosure by introducing an overall presumption of secrecy. Hence, we call on the EIB to live up to its commitment to transparency and ensure that the presumption of disclosure remains the most prominent principle in the renewed TP.

Further in Article 5.6, the draft TP indicates that “*without prejudice to the above or any provisions of this Policy, the EIB may consider providing a summary of the findings of the evaluation*”. We consider this provision as insufficient to compensate for the presumption of confidentiality placed upon evaluations.

Therefore we propose to amend the Article 5.6 as following:

5.6 Access to information/documents shall also be refused where disclosure would undermine the protection of:

- intellectual property;
- court proceedings and legal advice;
- the purpose of inspections, investigations and audits.

~~Disclosure of information/ and documents collected and generated during related to inspections, investigations and audits shall be presumed to undermine the protection of the purpose of the inspections, investigation sand audits even after these have been closed, or the relevant act has become definitive and the follow up action has been taken.~~

~~Requests for disclosure of information/documents relating to finalised investigations will be assessed in light of all the relevant circumstances of each case.~~

Without prejudice to the above or any provisions of this Policy, the EIB **should systematically and proactively** ~~may consider providing~~ provide a meaningful summary of the findings of the evaluation on its website.

Eighth, Article 5.14, which the amendments do not propose to change, provides for an overall maximum time limit of 30 years for most exceptions. In the modern era, this is a rather long period and

some national governments have reduced their overall limits for exceptions to 20 years or less, despite the fact that they often hold highly sensitive information.

Therefore we propose to amend the Article 5.14 as following:

5.14 The exceptions will only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of **20** years. After **20** years, a document becomes subject to review for public archiving. In the case of documents covered by the exceptions relating to the protection of personal data or commercial interests of a natural or legal person including intellectual property, the exceptions may, if necessary, continue to apply after this period. In general, information shall only be held by the EIB until the end of the retention requirements has been reached.

Eighth, requests for access to documents should be handled by the EIB within a reasonable timeframe and at all times in accordance with the provisions of Regulation 1049/2001, which sets out the rules of managing requests for access to documents, including for the EIB. As provided under Regulation 1049/2001, the deadline for handling such requests is 15 days starting from the registration of the request, with a potential extension of another 15 additional days solely in exceptional situations.

Footnote no. 14 which is inserted in relation to Article 5.21 of the draft TP provides that: “[a] longer, reasonable time frame may for example be necessary: (i) when the request or the information/documents sought are in languages other than the EIB working languages (English and French); (ii) to complete the consultation of third parties; (iii) when the request concerns a large volume of information/documents or historical information/documents. The EIB will inform the applicant about the delay and the reasons thereof”.

The provisions of this footnote allow EIB to extend the deadline for responding beyond the already established maximum timeframe provided under Regulation 1049/2001. This is certainly breaching the provisions of Regulation 1049/2001, as well as creating privileged treatment of the EIB over all other EU institutions and agencies which must respect the general applicable deadlines of Regulation 1049/2001.

In its decision on case 1316/2016/TN, the European Ombudsman recommended that the Bank amend this footnote because it was misleading to the public (para. 69). However, the footnote as amended is equally confusing for the public. It still does not become clear that the maximum time to reply to access to information cases is 30 working days, nor is it clear that the reasons for an extension by 15 working days are only the complexity, availability and amount of information request, as clearly set out in Arts 5.22 and 5.23.

As it is formulated in the draft TP, footnote no. 14 appears to derogate from Articles 5.22 and 5.23, creating a new derogation beyond what is permitted by the Aarhus Convention or what would apply to the EU Institutions based on Regulation 1049/2001.

As a result, it is necessary that footnote no 14 inserted in relation to Article 5.21 be completely eliminated.

For the same above-mentioned reasons, Article 5.23 should provide that the EIB must mandatorily answer within 30 days, and not solely endeavour to provide a reply within this timeframe.

Therefore we propose to amend the Article 5.23 as following:

5.23 The EIB shall, however, ~~endeavour to~~ provide a reply to such complex requests no later than 30 working days following receipt.

3. Transparency of governing bodies

In favour of 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 draft TP should include provisions ensuring better transparency of EIB’s decision-making process at all levels.

Information should be actively disseminated in order to facilitate informed participation in decision-making in a timely fashion. This is especially important for individuals and groups that may be affected by the results of the decisions made by the Bank.

We positively acknowledge that “*willingness to listen and engage*” is one of the principles of the EIB TP which is then specified in Articles 2.6-2.8. We however notice that this principle has not materialized in the respective TP Articles which would give the interested stakeholders the real possibility to engage and participate.

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.

Agenda of meetings of the EIB governing bodies

Enhanced transparency rules for EIB governing bodies should replace the current overly broad exceptions relating to these bodies. More information about governing body meetings should be available to the public in a timely manner, specifically the agendas for Management Committee and Board of Directors meetings should be made public well in advance of the meetings, generally at the same time as they are established. This is already practiced by other IFIs, for example the EBRD publishes a schedule of forthcoming Board of Directors’ discussions updated on a monthly basis (see the EBRD Access to Information Directive, Article 1.2.1). The EBRD and the World Bank publish the minutes of the Board meetings as soon as they are approved.

Publishing agendas merely four days in advance of the Board of Directors meetings, as it is practiced by the EIB, is not enough for civil society to organise for meaningful and constructive

participation. We recommend that the agendas are disclosed as soon as they are shared with the members of the governing bodies and they should be regularly updated.

The Management Committee is the highest executive body at the EIB (the World Bank has Executive Directors), elected by the Board of Governors. It should also be subject to a minimum level of transparency. Disclosure of agendas and decisions of the Management Committee's meetings, would allow for more transparency in the decision-making process at the EIB.

Minutes and decisions of governing bodies' meetings

The EIB should continue to publish minutes from the Board of Directors and the Board of Governors with the objective of making them more meaningful. The bank should also start publishing the agendas and minutes of the Management Committee, as this highest executive body is also elected by the Board of Governors.

The minutes of the Board of Directors meetings are not published in a timely manner, and they are basically just summaries of decisions taken, not real minutes. The publication of the minutes of a meeting 3 months after the fact becomes a rather futile exercise. The public must be informed in due time of the decisions taken by a central governing body of the Bank. To ensure this, the minutes of the Board meeting should be approved prior to the next meeting, for instance by circulating them electronically among the members.

Also, the minutes that are finally published give no insights into the decision-making process actually undertaken by the Bank, in particular as regards the positions defended by specific board members and how the decision was taken (e.g. by unanimity, following a vote, etc).

In its 2019 Annual Report, the European Parliament stressed "*the need to publish the content of the meetings of all the EIB's governing bodies systematically, and asks for more transparency concerning the meetings of the Management Committee and their outcomes*" (para. 77). The European Parliament's Committee on Budgets in its recent opinion (2020/2124(INI)) drew attention to this aspect as well, calling on the EIB to amend its current practice regarding the transparency of the governing bodies' meetings and of their outcomes (para. 14 of the Opinion). The EIB should implement these requested changes in its Transparency Policy.

Therefore we propose to amend the Article 4.1 as following:

4.1 (...)

In particular, the EIB publishes the ~~agendas and minutes of the meetings of the Board of Directors~~ **following information** as soon as possible ~~after~~ they are finalised:

- **agendas of the Board of Governors meetings;**
- **agreements and decisions reached by the Board of Governors and statements of the Governors made at the Annual Meeting;**
- **a schedule of meetings and agendas of the Board of Directors as soon as they are agreed upon;**
- **detailed minutes of the Board of Directors**
- **agendas of the Management Committee meetings;**
- **minutes of the Management Committee.**

The minutes of the Board of Directors meeting shall be finalized within a month of the meeting and reflect the results of votes and explanations of votes by members of the Board of Directors, as well as their statements relating to the adoption of the plans or programs relating to the environment and institutional documents of public interest.

4. Transparency of project cycle and timely disclosure

Transparency of decision-making processes at the EIB calls for enhanced and timely disclosure of information related to this decision-making.

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.

We ask for the Policy to include a commitment by the Bank to ensure that it holds information relevant to its operations and activities, even if this information is normally created or held by another actor, such as a contractor, financial intermediary or final beneficiary. This could be achieved through inserting transparency and/or access to information clauses in contracts, so as to require third parties to provide key information to the Bank, either automatically or upon request. This would include access to key documents held by borrowers or direct service providers created or obtained pursuant to a contract with the Bank. The European Parliament's Committee on Budgets also indicates that this represents a necessary step that should be taken by the EIB in order to ensure that third parties have also the obligation to gather relevant environmental information and pass it on to the EIB for publication (para. 15 of Opinion 2020/2124(INI)).

When the EIB's role in supporting EU development policies is being increasingly discussed, it also has the legal and moral duty to give adequate consideration to the human rights context of the projects it finances and policies it adopts. For example as a cornerstone of EU development finance, the EIB should pay close attention to the EU's international affairs documents. Recently, in the context of the EU-Egypt relations, the European Parliament's resolution 2020/2912(RSP) called for "*a profound*

and comprehensive review of the EU's relations with Egypt; considers that the human rights situation in Egypt requires a serious revision of the Commission's budget support operations and requires the restriction of EU aid to primarily supporting democratic actors and civil society; calls for more transparency on all forms of financial support or training provided by the EU, the European Bank for Reconstruction and Development and the European Investment Bank to Egypt."

Disclosure of information and engagement of the project affected people rest not only with the EIB's clients. This is also an obligation of the EIB as a public institution of the EU. The Transparency Policy should ensure that stakeholders have the access to information and can effectively participate in the EIB's decision-making as required by the Article 15 TFEU. The draft Policy only assumes civil society participation in preparations of the EIB's policies while project specific decisions are being made by the bank on a daily basis. The EIB draft Transparency Policy prevents meaningful civil society participation.

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.

This is also one of the reasons why access to information on request is not always sufficient. The procedure simply takes too long to obtain information in time.

The draft TP does not ensure that all relevant environmental and social information/documents will be disclosed publicly and disseminated in a timely manner ensuring that the principle of openness will be observed.

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. For example:

- The EBRD publishes Project Summary Documents (equivalent to the EIB's ESDS), and among others the expected transition impact, the EBRD's additionality, information on grant financing and technical assistance, at least 30 or 60 calendar days (for private and state projects respectively) before scheduled Board approval. In the case of a project subject to environmental assessment, the ESIA is also published by the EBRD at least 60 and 120 calendar days (for private and state projects respectively) before scheduled Board approval. The EBRD publishes ESIA's and other environmental and social documents for the purpose of public

disclosure and consultation, irrespectively of its client's obligation to conduct public consultations.

- The IFC publishes at pre-approval stage among others: the summary of its review findings and recommendations, the Environmental and Social Review Summary (ESRS), guidance on how and where information about the proposed project can be obtained locally; Summary of Investment Information (SII) including among others information about the shareholders of the project or investee company, the projected date for a decision on the investment by IFC's Board of Directors, the expected development impact of the project or investment, IFC's categorization of the project or investment for environmental and social purposes and the rationale for such categorization. Where applicable the IFC discloses a summary of the process outlining how it determined "Broad Community Support" prior to consideration of the investment by IFC's Board of Directors.

The draft TP does not improve the timely publication of project related information, but instead further deteriorates the existing provisions. The draft TP commits only to disclosure **of the Project Summary**, which is a very brief description of the project, providing very limited information as to the project's scope and impacts. A Project Summary, for example, does not include environmental and social information collected by the bank at the project appraisal stage. The draft TP leaves it entirely to the EIB's discretion to decide which project information/documents will be held by the EIB, if and when they will be published. The draft TP does not include a list regarding the minimum content of information which must be published for all projects.

The Policy does not establish **an obligation that the EIB's environmental and social appraisal information/documents or other relevant documents collected by the EIB during the project appraisal, are published by the EIB 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 EIB TP should present clear requirements regarding the timely publication of project related environmental and social documents/information, as well regarding the minimum content of information which should be published within the Project Summary and Environmental and Social Data Sheet. Therefore the TP should include an amended "non-exhaustive" list of EIB's environmental and social documents/information (held by the bank), some of which should be part of the mandatory list of minimum content of information, that will be subject to routine disclosure in a timely manner indicating when in the project cycle the publication will take place. The EIB can easily follow good standards existing at other IFIs, for example at the EBRD.

For direct loans, it is crucial that the EIB pro-actively discloses the following in a timely manner and, in any event, before a loan is approved by its Board of Directors:

- The **Appraisal report** containing the Carbon Footprint Assessments of projects where relevant, as well as the Additionality Impact Measurement forms (which used to be the 3 Pillar Assessment

and Result measurement framework sheets), and the Overall Environmental and Social Assessment Form. This was also requested by the European Parliament's Committee of Budgets in its recent opinion on the upcoming Annual Report (para. 14 of Opinion 2020/2124(INI));

- The **proposal from the Management Committee to the Board of Directors**;
- The **opinion (and the underlying rationale) of the European Commission** on the project (under the so-called Article 19 procedure, the EC provides an opinion on every project before it goes to the Board of Directors), **and of the Member State** where the project is located. This was also requested by the European Parliament's Committee of Budgets in its recent opinion (para. 14 of Opinion 2020/2124(INI));
- Information on the proposed date of the Board meeting during which the project may be approved;
- Contact information for EIB project leads and clients;
- Information on the beneficial ownership of EIB clients. This demand has been inter alia formulated by the European Parliament in its resolution of 10 July 2020 on control of the financial activities of the EIB (2019/2127(INI)): *"Invites the EIB to disclose details on the beneficial ownership of its customers on its website with a view to increasing the visibility of its operations and helping prevent cases of corruption and conflicts of interest"*. This was again reiterated by the European Parliament's Committee of Budgets in its recent resolution (para. 15 of Resolution 2020/2124(INI)): *"calls on the EIB to regularly publish the allocation list of final beneficiaries of intermediary finance operations for those projects that have a significant effect on the environment"*.

Therefore we propose to amend the Articles 4.7, 4.8 and 4.10 as following:

4.7 The EIB shall publish project summaries **and Environmental and Social Data Sheets** of all projects ~~at least 3 weeks~~ before the project is considered for approval by the EIB's Board of Directors. ~~However, a limited number of projects summaries are not published before Board approval and, in some cases, not before loan signature in order to protect justified interests based on the exceptions to disclosure laid down in this Policy. The EIB cannot publish project-related information if the publication of such specific information would violate European Union law such as the Market Abuse Regulation.~~ The ESDS shall be disclosed in accordance with the timelines set out below:

- 60 calendar days prior to consideration of the Project by the Board of Directors for projects likely to have significant effects on the environment, human health and well-being and which may have an impact on human rights, which may be subject to an assessment according to the EU EIA Directive 2011/92/EU
- 30 calendar days for other projects.

Project summaries and Environmental and Social Data Sheets are also published in a language of a country where a project is located.

In addition to the client disclosure obligations, the EIB shall publish Environmental Impact Assessments or Environmental and Social Impact Assessments for public disclosure and consultations at least 60 calendar days prior to consideration of the Project by the Board of Directors.

4.8 Project summaries generally include the name of the project, the project promoter or financial intermediary (for intermediated loans), the location of the project, the sector it represents, a project description, its objective(s), its environmental and, if relevant, social aspects, procurement data, proposed EIB finance, the total project cost, and the status of the project, noting whether it is “under appraisal”, “approved” or “signed”. When applicable, links are provided to environmental information as early as possible in the project cycle. Project summaries must mandatorily include the name of the project, the project promoter or financial intermediary (for intermediated loans), the location of the project, the sector it represents, a project description, its objective(s), its environmental and social impacts, procurement data, proposed EIB finance, the total project cost, and the status of the project, noting whether it is “under appraisal”, “approved” or “signed” and information on the proposed date of the Board meeting during which the project may be approved, contact information for both EIB project leads and clients, the opinion (and the underlying rationale) of the European Commission issued under the so-called Article 19 procedure and of the State where project is located, information on the beneficial ownership of EIB client.

4.10 If applicable, Project summaries provide links to environmental as social information/documents held in the Public Register including:

- Appraisal report containing the Carbon Footprint Assessments of projects where relevant,
- Additionality Impact Measurement Sheet,
- Overall Environmental and Social Assessment Form,
- The proposal from the Management Committee to the Board of Directors,
- Other environmental and social documents, such as Environmental and Social Management/Action Plans, Stakeholders Engagement Plans, Indigenous Peoples Development Plan,
- EIB project environmental and social monitoring reports, and similar reports provided by the project promoters,
- Project Completion Reports.

5. Disclosure of environmental and social information from project monitoring and completion

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.

This is also good practice among other IFIs. For example the IFC's Access to Information Policy stipulates that after the project approval third-party monitoring reports, where required by IFC in accordance with the Performance Standards, are made publicly available (see Article 41 d.)

Finally, the EIB should proactively disclose **project completion reports** for all projects it financed. Under its previous External Lending Mandate (ELM), the EIB was bound to publish such reports and already proved able to do so. Hence, a continuation of this practice should be set in stone under its TP.

Therefore we propose to amend the Article 4.10 as proposed above.

6. Disclosure of project related environmental and social documents by promoters

Disclosure of project related information to the impacted groups and individuals and other interested stakeholders is a primary responsibility of the project promoter and is a prerequisite for informed and meaningful public participation in decision-making.

Provisions related to Stakeholder Engagement are part of the EIB's Environmental and Social Standards. However, the TP should include clear provisions in terms of project related information and documents disclosure to ensure the minimum level of transparency that is required for enabling meaningful public participation and stakeholders engagement.

The Aarhus Convention and its Implementation Guide should be reference documents for the EIB to draw up the TP provisions for ensuring a transparent way in which project related environmental and social information is available to the public and that environmental information is effectively accessible.

The draft TP does not establish **any requirements or obligations** for the project promoter/borrower in terms of making project related information and documents effectively available to the public. Therefore it is not guaranteed by the draft TP that the public which may be impacted by the projects financed by the EIB will be able to meaningfully participate in decision-making on projects and will have effective access to environmental information.

The TP should impose a direct obligation on the EIB to require project promoters, borrowers or relevant authority to provide information to communities affected by EIB projects, and in a manner and

format which is accessible to them and in a language known to them. Complete and timely information should be made available at the local level and key information should be produced in an accessible language and form.

Outrageously, the draft TP proposes to withdraw an obligation for promoters to make Environmental Impact Assessment (EIA) and related documents publicly available (compare Article 4.9 of the current EIB TP with Article 4.10 of the draft TP). Instead the draft TP proposes that the EIB will only **encourage** the promoters, borrowers and other competent parties to disclose EIA related documents and other environmental and social information (this is for instance the case in Articles 7.6, 7.7 and 8.3 of the draft TP). The EIB must require such practices via its contractual relation, and not leave it to the discretion of the project promoter or financial intermediary. Public disclosure requirements should be made part of binding language in all contracts, partnership agreements and legally binding documents between the EIB and others, and a commitment to include such language should be set out in the TP.

Information for affected people should not only be provided through the website; the Bank and project promoters, borrowers or relevant authority should also be required to put in place other communication means which are suitable for affected communities which may not have access to electricity, let alone the Internet.

In order to comply with the provisions of the Aarhus Convention, the EIB TP must specify that:

- Promoters, borrowers or relevant authorities must make Environmental Impact Assessments, Environmental and Social Impact Assessments, Environmental and Social Management/Action Plans, Stakeholders Engagement Plans, Indigenous Peoples Development Plan and other project related environmental and social information effectively available to the public in a language understandable by the project impacted people.
- Promoters, borrowers or relevant authorities must make these documents and information effectively accessible and available before decisions on activities which may impact them are made, in order to allow for the interested public to participate in the decision-making.
- A mechanism for early public notice should be established. This should require the Bank to indicate how and when it and the borrower will notify a community that a project or program expected to affect them is under preparation and require that such communications form an integral part of publicly available project documents.
- Promoters, borrowers or relevant authorities must be obliged by the EIB TP to inform the public concerned about the availability of project related environmental and social information/documents, and must inform the public about the way in which they will be disseminated and made accessible to the public.

Therefore we propose to amend the Article 7.7 as following:

7.7 The primary responsibility for information and engagement with local stakeholders on a project basis rests with the project promoter and/or borrower. ~~The EIB supports their efforts in accordance with the EIB Environmental and Social Standards.~~ The EIB works closely with its clients to provide sufficient information about the environmental and social risks and impacts arising from projects and to engage with stakeholders in a meaningful, effective, inclusive and culturally appropriate manner consistent with the Environmental and Social Standards. The EIB commits itself to include in its contracts provisions which require that its clients:

- Where relevant, make Environmental Impact Assessments, Environmental and Social Impact Assessments, Environmental and Social Management/Action Plans, Stakeholders Engagement Plans, Indigenous Peoples Development Plans and other project related environmental and social information effectively accessible to the public in a language understandable by the project impacted people before decisions on activities are made, in order to allow for the interested public to participate in the decision-making.
- Notify project impacted people and interested public that a project or program expected to affect them is under preparation and inform them as to when and how they can take part in public consultations organized by the relevant local authorities. They shall also inform the public concerned about the availability of project related environmental and social information/documents, and must inform the public about the way in which they will be disseminated and made accessible to the public.

7. Transparency in lending through financial intermediaries

In order to finance SMEs and mid-caps, the EIB uses so-called financial intermediaries – mostly through credit lines to commercial banks, or through taking equity into investment funds. But the intermediation of these operations brings a serious transparency challenge: for the time being, it is close to impossible to know who are the final beneficiaries of this type of lending.

The common wisdom is that this is small-volume financing for small businesses that have little potential to cause social or environmental harm. But in the rare cases where it has been possible to track the financing, this has proven to be wishful thinking. International financial institutions are starting to realise the risks posed by financial intermediary investments and the EIB is falling behind its peers. Positively, the EIB's Environmental, Climate and Social Guidelines on Hydropower established that the EIB will require FIs to answer certain questions for all potential investments in hydropower projects before providing finance in order to determine further appraisal procedure.

The draft policy does not bring any improvement in transparency, compared to the existing policy. Therefore, we consider that this process is so far a missed opportunity, and urge the EIB to further address this issue.

Article 4.9 covering this matter in the draft TP is very weak, and would not address the previously mentioned issue, as it simply states that “*Information on any intermediated financing of the EIB is published on the Project List on the EIB’s website. In addition, and to the extent possible, the EIB releases, on request, aggregate data on intermediated loan financing, including country and sector breakdowns*”.

With its “case by case, on request” approach, the draft TP leaves the EIB far behind its peers. The IFC and EBRD have both committed to improve disclosure of financial intermediary loans in higher-risk sectors, while the Asian Infrastructure Investment Bank (AIIB) is currently considering doing so.

Moreover, in its 2019 Annual Report, the European Parliament called on the EIB to ensure that intermediated loans “*be subject to the same transparency requirements as other types of loan*” (para. 81). This has recently been reiterated by the European Parliament’s Committee on Budgets in its Opinion on the 2020 Annual Report (para. 15 of Resolution 2020/2124(INI)).

A first step to ensure the same level of transparency would be to publish regularly updated allocation lists of final beneficiaries and environmental information received by financial intermediaries. This needs to happen before the sub-project is signed, in order to allow any concerns to be raised at a stage when issues can still be resolved.

The Bank should also review its template contracts to ensure that there are clear obligations on financial intermediaries to publish environmental information in the future or to communicate the information set out below to the EIB, so that the Bank can publish it.

Therefore we propose to amend the Article 4.9 as following:

4.9 Information on any intermediated financing of the EIB is published on the Project List on the EIB’s website. **The EIB moreover publishes:**

- **the name of the final beneficiary, the amount received and the type of project;**
- **Environmental Impact Assessments (EIAs) and Environmental and Social Impact Assessments (ESIAs) related to final beneficiaries;**
- **Declaration Forms for Sites of Natural Conservation (forms A and B);**
- **fiches submitted by the intermediary of mid-cap loans,**
- **environmental management capacity of promoters and/or fund managers,**
- **environmental and risk management capacity of the intermediary for global loan operations,**
- **environmental information contained in reports from Bank monitoring missions, assessments,**

- **reviews and reports commissioned by the EIB with third parties regarding the environmental aspects of the Bank’s projects,**
- **environmental information contained in project evaluation reports,**
- **documents received by the Bank from the promoter under para. 40 of the EIB Statement of Environmental and Social Principles and Standards**
- **environmental information collected for final allocations for funds of EUR 25-50 million.**

In addition, and to the extent possible, the EIB releases, on request, aggregate data on intermediated loan financing, including country and sector breakdowns.

8. Provisions for Complaints and Appeals

The draft TP provides misleading information regarding the possibility of a complaint to the European Ombudsman. Thus, Article 6.4 should be changed in order to clarify the availability of this appeal procedure also in case of dissatisfaction with the EIB decision on confirmatory application.

Therefore we propose to amend the Articles 5.32 and 6.4 as following:

5.32 In the event of a total or partial refusal following a confirmatory application, the EIB shall inform the applicant of the remedies open to him or her, namely making a complaint to the Complaints Mechanism, **making a complaint to the European Ombudsman** or initiating court proceedings against the EIB before the Court of Justice of the European Union.

6.4 In case of dissatisfaction with the outcome of a complaint lodged at the EIB Complaints Mechanism **or with the EIB decision on a confirmatory application under Article 5.31**, EU citizens or any natural or legal person residing or having its registered office in an EU Member State can, in accordance with article 228 TFEU and regardless of a direct concern in the alleged maladministration, make a complaint to the European Ombudsman. (...)

The European Parliament’s Committee on Budgets in its recent resolution (para. 17 of Opinion 2020/2124(INI)) also concluded that “*the added value of European Ombudsman investigations which can lead to more effective and transparent administration; calls in this regard on the EIB to implement recommendations of the European Ombudsman in good time; recalls that EIB funds are public money and should always be subject to public scrutiny and accountability*”. The European Ombudsman’s competence should thus be integrated in the draft TP in a clear manner.

9. The Promotion of Freedom of Information

International financial institutions should devote adequate resources and energy to ensuring effective implementation of their access to information policies, and to building a culture of openness.

Given the importance of transparency and access to information, the EIB should commit to the active promotion of these important values. As part of this, the EIB should devote adequate human and financial resources to ensuring effective implementation of the Policy and to building a culture of openness within the organisation.

- senior management making statements and taking other actions that make it clear that access to information is an organisational priority;
- providing targeted training on access to information to staff and building access to information elements into other training activities;
- incorporating access to information into corporate incentive structures and appraisal systems;
- educating the general public and particularly communities in project affected areas, about their right to access information and how it may be exercised; this could be implemented through closer coordination with EU Delegations.

Conclusion

We hope that you find the comments and recommendations in this submission useful and constructive and we urge you to take them into consideration as you move forward with the revision of the Transparency Policy. It is in our common interest to ensure that the new policy is in line with everyone's human right to access information.

LIST OF SIGNATORIES

Abnaa Al Nazheen Organization, Iraq
 Alliance of Associations Polish Green Network, Poland
 Arab Watch Regional Coalition
 Article 19, UK
 Association Démocratique des Femmes du Maroc, Morocco
 Association Jeunes pour Jeunes, Morocco
 Association Tunisienne pour le Droit au Développement, Tunisia
 Balkani Wildlife Society, Bulgaria
 Balkanka Association Sofia, Bulgaria
 CAN Europe, Belgium
 CEE Bankwatch Network, Czech Republic
 Centar za zivotnu sredinu, Bosnia and Herzegovina
 Center for Introduction of New Environmentally Safe Technologies, Kazakhstan
 Citizens Network Watchdog, Poland
 Client Earth, Belgium
 Counter Balance, Belgium
 Crude Accountability, US

Ecoaction, Ukraine
Ecoclub, Ukraine
EcoLur Informational, Armenia
Eco-team, Montenegro
Ekomed Social Unity, Republic of Azerbaijan
Environmental Paper Network - Finance Working Group
Espace de Solidarité et de Coopération de l'Oriental, Morocco
Estonian Green Movement, Estonia
Eurodad, Belgium
European Environmental Bureau
FIDH / International Federation for Human Rights
Gegen Stroemung – Institut für Ökologie und Aktions-Ethnologie, Germany
Greenpeace
International Accountability Project, US
International Partnership for Human Rights (IPHR), Belgium
L'Association Tunisienne de Gouvernance Locale, Tunisia
Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP), Nepal
Le Centre de Développement de la Région du Tensift, Morocco
Les Amis de la Terre, France
Open State Foundantion, the Netherlands
Organic Agriculture Association, Albania
Phenix Center for Economics & Informatics Studies, Jordan
Pracownia na Rzecz Wszystkich Istot, Poland
Re:Common, Italy
Re-course, the Netherlands
Rivers without Boundaries International Coalition, Russian Federation
Studies and Economic Media Center, Yemen
Suzanne Nada, Human Rights Lawyer, Egypt
The Good Lobby, Belgium
Uzbek Forum for Human Rights, Uzbekistan
Wedyan Association for Society Development, Yemen
Wild Europe, UK
Women and Children's Affairs Organization, Iraq
Yemen Organization for Promoting Integrity, Yemen
Yemeni Observatory for Human Rights, Yemen
ZERO - Association for the Sustainability of the Earth System, Portugal