



Amnesty International comments on the European Investment Bank (EIB)
Transparency, Public Disclosure and Complaints Mechanism Policies

July 2009

Amnesty International comments on the European Investment Bank (EIB) Transparency, Public Disclosure and Complaints Mechanism Policies

24 July 2009

On 18 May 2009 the European Investment Bank (EIB) launched a public consultation to review its transparency policy, public disclosure policy and complaints mechanism policy. This briefing paper is Amnesty International's submission to the EIB consultation on these three policies.

1. Introduction

Amnesty International welcomes the EIB launch of the 2009 public consultation on its revised transparency policy, public disclosure policy and complaints mechanism policy.

The review offers an important opportunity to ensure that EIB principles and policies explicitly recognise the founding principle of the European Union (EU) to respect human rights.¹ Since the EIB plays an increasingly important role in the implementation of EU aid, its principles and operations should reflect and be fully consistent with the EU's commitment to place human rights at the core of sustainable development.²

The review of these policies present an opportunity for the EIB to demonstrate leadership in promoting a culture of respect for human rights through policies of maximum disclosure, transparency, and a genuine possibility for those whose human rights may be negatively affected by EIB funded projects to seek remedy and redress.

Access to information is crucial to effectively ensure respect for human rights, vital to the **full and meaningful participation** of people and communities in decision-making processes that are likely to affect their rights, and also an element to enable those people and communities **to hold governments and other actors accountable** for any negative impact on their rights.

¹ "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States", Article 6 Consolidated Treaty of the European Union.

² The "European Consensus"(document 2006/C46/01) that defines the framework of common principles within which the EU and its Member States will each implement their development policies in a spirit of complementarity, places human rights at the core of the strategies for sustainable development. It also affirms that "the EIB is playing an increasingly important role in the implementation of Community aid, through investments in private and public enterprises in developing countries" (point 119).

General remarks

Amnesty International welcomes the fact that these policies under review are formally placed “within a framework established at an EU level covering human rights, democracy, and rule of law in countries and regions in which the Bank operates”.³ This framework requires accountability principles and mechanisms. As stated in the EIB policies,⁴ the EIB is ultimately accountable to the citizens of the EU and shareholders; however, the EIB’s accountability must also extend to those persons whose rights are likely to be affected by projects supported by the EIB, including non-EU citizens that may be affected by the EIB’s operations outside the EU.

Considering the inter-connected nature of the three policies as well as the similar institutional and policy framework that they share, it might be advisable for the EIB to merge them in a single policy document, to ensure clarity, coherence and simplification.

2. Background: Access to information is vital for upholding human rights

Access to information is crucial to effectively ensure respect for human rights, and has been enshrined in Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights. Its importance has also been recognized by the UN Committee on Economic, Social and Cultural Rights in relation to the rights to health⁵ and water,⁶ among others, as well as by other international bodies.

Participation

The right of people to participate in decisions which may affect their rights is grounded in international human rights law and standards. Access to comprehensive, accurate and timely information is a necessary requirement for genuine and meaningful consultation, and to ensure that people whose human rights may be affected by EIB activities are able to participate meaningfully in decision-making processes. Among the most critical pieces of information that people need are: information on the potential impact of projects, policies or programmes; information on the actors involved; information on the contractual relationship between companies and governments; information on existing standards and safeguard policies and procedures that apply in any context; information on the consultation, grievance and redress mechanisms available to communities; and information on how revenues derived from given activities will be used by the government for poverty alleviation measures.

³ EIB Public Disclosure Policy, May 2009, paragraph 19; EIB Transparency Policy, May 2009, paragraph 5; and by reference to its Statute and EU Treaties, EIB Complaints Mechanism Policy, May 2009, paragraph 6.

⁴ EIB Transparency Policy, May 2009, paragraphs 2, and 25-26; EIB Public Disclosure Policy, May 2009, paragraphs 17-18; and EIB Complaints Mechanism Policy, May 2009, point 5.3.

⁵ UN Committee on Economic, Social and Cultural Rights General Comment 14 on *The right to the highest attainable standard of health (art. 12)*, August 2000, E/C.12/2000/4, paragraph 3.

⁶ UN Committee on Economic, Social and Cultural Rights General Comment 15 on *The right to water (arts. 11 and 12)*, January 2003, E/C.12/2002/11, paragraphs 12, 48, and 56.

The EIB's revised policies must acknowledge and address the barriers faced by many communities and individuals in accessing information. Groups that are often marginalised – for example on the basis of gender, age or ethnicity – and people living in poverty all face particular obstacles in accessing information. The EIB must include a clear plan for ensuring that all affected stakeholders have the necessary information and are fully included in decision-making processes that have a potential impact on their human rights.

Often communities are not aware of - and have no information on - the activities being considered by the EIB, and decisions in the early stages of project identification and design are made without the knowledge of, or consultation with, affected stakeholders. Access to information throughout the cycle of projects and programmes – including in the earliest proposal and planning phase – is vital so that affected people are able to fully assess how such plans may affect their lives and to participate by addressing concerns raised by the proposed activity and in the consideration of possible alternatives. This includes having access to timely and comprehensive information even before project approvals, as a pre-requisite for meaningful consultation processes in the scoping, planning, implementation and monitoring phases of a given activity.

Information on sector-wide policies which are considered by the EIB is also crucial for stakeholders to ascertain, and act on, how given policies might have an impact on them. Often this information is not readily available to national parliaments and to civil society, and decisions on policy choices are taken without an open and transparent debate on their impact on people's lives, or on possible alternatives.

Prevention of human rights abuses/violations

Access to timely, comprehensive and accurate information is essential to enable individuals and communities to claim, defend and protect their rights. In its research, Amnesty International has found that failure to ensure that communities have timely access to relevant information has contributed to serious problems, including - but not limited to - loss of livelihoods, abuses of Indigenous Peoples' rights to their traditional lands, forced evictions, and harm to the health of individuals and communities. In the context of industrial or infrastructure projects and extractive industries, for example, Amnesty International has found that communities often do not know how these projects will affect their lives, lands, livelihoods and health. For example, failure to make public the potential level of toxicity or the health implications of pollution resulting from waste disposal (which may be harmful to health or damaging to water or soil), may mean that affected communities are unaware of health and environmental risks they may face, and are therefore not able to demand appropriate measures to prevent – or take measures to remedy - any negative impact on their health and livelihood.

Lack of access to information can also increase the risk of - or exacerbate - conflicts within and between communities, private actors and the state. Lack of information and transparency can breed distrust and suspicion, and can be a catalyst for wider human rights problems, particularly when community tensions are met with forcible responses by public and private security forces. For example, in the Niger Delta failure by companies to be transparent on how they allocate

community contracts and other payments to the community has fuelled inter- and intra-community conflicts. In Mexico, Amnesty International has documented that the failure to provide accurate, comprehensive and accessible information on the building of the La Parota hydroelectric dam in Guerrero State, including potential displacement, relocation and compensation, has contributed to divisions and conflict within local communities, leading to violence between the authorities and opponents of the project.

Accountability

Information is a necessary pre-requisite for people to be able to hold their governments and other actors to account. Access to information is also important for ensuring redress and remedy for human rights abuses. For example, in the extractives sector, access to information has a significant impact on communities' ability to seek justice for harm caused by mining, oil and other extractive projects and to demonstrate the causal connections between extractive operations, the content and disposal of various related waste products, and their impact on water, land and on human health.

In order to ensure effective accountability of states, access to timely, accurate and comprehensive information is also necessary to enable parliaments, UN treaty monitoring bodies, national human rights institutions and other actors to perform their roles in monitoring, debating and scrutinising the impact of policies and projects on people and communities.

3. EIB's Transparency and Public Disclosure Policies

Amnesty International welcomes the EIB transparency policy as an umbrella document to the public disclosure policy and the complaints mechanism policy and as an integral part of the EIB corporate responsibility policies.

Amnesty International has the following comments on:

a) Access to information must be recognised as essential for the protection of human rights

Following the background analysis provided above under chapter 2 of the present submission, Amnesty International recommends an explicit recognition of the importance of timely access to information and of "openness and transparency"⁷ for the protection of human rights.

Recommendation: Explicitly include the essential role that access to information plays in the reduction of risk of human rights violations.

⁷ EIB Public Disclosure Policy, paragraph 17.

b) The role of the EIB in ensuring that its principles of transparency and disclosure are upheld by its clients

The EIB recognises the rights, interests and responsibilities of stakeholders to achieve sustainable outcomes, endeavouring to promote transparency with its clients.⁸ The EIB states that it does not object to its clients making information available on their relationship with the EIB.⁹ However, in order to meaningfully uphold the principle of transparency, the EIB has a responsibility to use its leverage towards its clients (project promoters, borrowers or any other competent party) so that they fully adhere to the same best practice standards of transparency and disclosure that the EIB states in the policies under review.

Recommendation: EIB requires its clients to adhere to its transparency and disclosure policies. As a concrete measure, the EIB could introduce (quantitative and qualitative) indicators to measure the progress in transparency of its clients.

Noting the – as yet – lacking section on Extractives Industries in the EIB transparency policy,¹⁰ and welcoming the EIB support to the Extractive Industries Transparency Initiative (EITI), Amnesty International recommends:

Recommendation: Include a specific reference to the Extractive Industries Transparency Initiative (EITI) in the EIB transparency policy.

As a means to increase transparency and disclosure of information, the creation of a public database, providing information on EIB clients and projects, would be a step in the right direction.

Recommendation: Provide a public database which will include information on clients and their role in EIB projects.

c) Principles for disclosure

Amnesty International welcomes the principle of presumption of disclosure and other related principles.¹¹ However, information not only needs to be *available* but also *accessible* in formats that can be easily understood by people likely to be affected by EIB's operations, and the information must be of a *quality* that provides timely, accurate and comprehensive information which enables affected stakeholders to understand the likely impact of activities supported by the EIB..

Recommendation: Include accessibility and quality of information as essential principles for the disclosure policy.

⁸ EIB Transparency Policy, paragraph 29.

⁹ EIB Public Disclosure Policy, paragraph 30-31.

¹⁰ Which is expected to be included under the chapter "Promoting Transparency", paragraphs 92-95.

¹¹ EIB Transparency Policy, paragraphs 65-67; EIB Public Disclosure Policy, paragraphs 21-23.

Amnesty International welcomes the EIB's commitment to a language regime that responds to public needs.¹² In order to be accessible to affected communities, information will often need to be translated into languages other than EU languages. While the EIB cannot be expected to translate all documents into all relevant languages, the revised transparency and public disclosure policies should include more specific provisions for relevant operational and policy documents to be translated - when necessary - into relevant languages. Such translations could be crucial when the lack of translation into the relevant language would result in affected communities not being able to access the information they need in order to understand the possible impact on their lives of the EIB's activities.

Recommendation: Include a specific procedure for translation into relevant languages (including non-EU languages) of relevant documentation on EIB operations outside the EU where non-translation would affect access to information.

d) Restrictions on disclosure

Amnesty International welcomes the underlying presumption of openness and disclosure of information on the EIB's operational and institutional activities, in the absence of compelling reasons for confidentiality¹³. However, the proposed restrictions or constraints¹⁴ do not strike the right balance between the presumption of disclosure and the legitimate need to protect some confidential information. For example:

- Refusal of disclosure on the grounds of public interest¹⁵ is defined in very broad terms which are open to far-reaching interpretation and abuse, undermining the principles of disclosure and transparency. Refusal of disclosure needs to be explained and justified also in light of the interests of the people affected by the EIB's operations¹⁶. It is also essential to establish the time period during which the restrictions on disclosure are applicable and from when the information could be accessible.

Recommendations:

- **Ensure that the restrictions to its disclosure policy are limited, clearly defined and narrowly-drawn.**
- **Publicly disclose a list of the documents that fall under the restrictions categories.**
- **Decisions not to disclose information should always be subjected to a *harm test* that takes into account whether non-disclosure could cause harm to the interests of affected communities.**

¹² EIB Transparency Policy, paragraph 67 and EIB Public Disclosure Policy, paragraph 23.

¹³ EIB Transparency Policy, paragraph 22; EIB Public Disclosure Policy, paragraphs 14-22.

¹⁴ EIB Transparency Policy, paragraphs 70-73; EIB Public Disclosure Policy, paragraphs 24-38.

¹⁵ EIB Transparency Policy, paragraph 71; EIB Public Disclosure Policy, paragraph 25.

¹⁶ EIB Public Disclosure Policy, paragraph 97.

- **Following decisions not to disclose information, provide written reasons that demonstrate that disclosure would cause harm to clearly and narrowly-defined legitimate interests; written reasons that demonstrate that non-disclosure will not undermine (or does not have the potential to undermine) the human rights of stakeholders likely to be affected by the EIB's operations; and a written statement specifying the time period during which the restriction on disclosure is applicable and from what date the information could be disclosed.**

- Overriding public interest in disclosure¹⁷ should also exist where the information requested is necessary for the protection of human rights (in addition to information relating to environmental concerns), and for people to be able to know and understand the possible impact of EIB's operations on their lives. Given that the criteria applied for refusal should be interpreted in a restrictive way, risk of human rights violations should also be included as ground that serves public interest and therefore merits disclosure.

Recommendation: Include protection of human rights as an overriding public interest in disclosure, and include risk of human rights violations as a ground that merits disclosure.

- Refusal of disclosure on the grounds of integrity of the EIB's decision-making process¹⁸ provides a rather broad scope for the EIB to refuse to disclose of information. In the interest of accountability, the presumption of disclosure with limited and narrowly-defined restrictions should also apply to information on the deliberations and proceedings of the EIB. Denying access to information that would enable stakeholders to raise concerns in a timely way and to debate proposals with their representatives within the EIB undermines the EIB's commitment to transparency and its accountability.

Recommendation: As general criteria, all EIB documents pertaining to deliberations and proceedings of projects should be disclosed unless they legitimately fall under the category of information subject to non-disclosure

- Disclosure of third-party documents¹⁹ should also comply with the principle of presumption of disclosure. Allowing states and business partners to impose a veto on documents provided to the EIB will undermine the EIB' stated intention of transparency. The EIB and its clients should adhere to the same best practice standards of presumption of disclosure and well-defined, limited constraints. Framework Agreements²⁰ with partner countries should also comply with the principle of disclosure and therefore, be systematically disclosed.

Recommendation: As general criteria, all third-party documents should be disclosed unless they are justified to fall under the restrictions category. All third- parties should be made aware of this criteria.

¹⁷ EIB Transparency Policy, paragraph 72; EIB Public Disclosure Policy, paragraphs 26 and 29.

¹⁸ EIB Transparency Policy, paragraph 73; EIB Public Disclosure Policy, paragraph 27-28.

¹⁹ EIB Public Disclosure Policy, paragraph 36.

²⁰ EIB Public Disclosure Policy, paragraph 53.

e) Stakeholder involvement – proactive engagement

The EIB acknowledges that engaging with stakeholders is part of its commitment to transparency and accountability.²¹ However, Amnesty International is concerned about the apparent contradiction between the EIB's general commitment towards transparency and stakeholder engagement, and the delegation of responsibilities to the client or project promoter²².

Furthermore, in order to uphold its commitments towards stakeholder engagement, the EIB should give due consideration to adopting a more proactive approach to engaging affected stakeholders. Such engagement would require addressing the barriers to accessing information that many people and communities face, and the need to provide information in ways that are easily accessible to people likely to be affected by the EIB's operations. Using the EIB's external website as the primary vehicle for disclosing information does not take into account the reality of many marginalised communities and individuals, especially those living in remote or rural areas and who do not have access to the Internet.

The EIB must ensure that information is not only *available*, but also *accessible* in formats that can be easily understood by people likely to be affected by its operations. This includes requesting governments and other third parties to also proactively disseminate relevant information in non-written and other formats.

As a first step, proactive measures should be prioritised in high risk projects²³. To this end, the EIB should define more specifically what it understands as "high risk potential".

Recommendations:

- **Clarify and recognise the EIB's own responsibilities towards stakeholder engagement regarding access to information for, and consultation with, local stakeholders throughout the project cycle.**
- **Develop a concrete plan to ensure a proactive approach to the dissemination and maximum accessibility of information to all relevant stakeholders, including in other formats beyond electronic and print media.**
 - ✓ For example, the EIB could require its clients to set up temporary information desks and staff them at relevant sites in the country where the project is taking place, with people who speak relevant language and who are familiar with the communities that need to be provided with access to information.
- **Prioritise proactive measures towards stakeholder engagement in high risk projects, as a first step.**

²¹ EIB Transparency Policy, paragraphs 75-84.

²² EIB Transparency Policy, paragraph 82.

²³ EIB Transparency Policy, paragraph 84.

- **Expand the list of documents that EIB’s clients – both states and contractors – are required to publish and disseminate.**
- **Publish a list of the relevant stakeholders and the documents available and a short explanation of what they are with dates of disclosure regarding each project.**
- **Establish guidelines for EIB’s clients on how to maximise accessibility of information on the EIB’s activities for affected stakeholders and mechanisms to ensure that these guidelines are adhered to.**

Finally, with regard to engaging stakeholders, an advisory committee could be set up to provide advice to decisions regarding EIB projects. Such a committee should be constituted of relevant external experts, including persons drawn from a pool of civil society organizations.

Recommendation: Consider setting up an advisory committee constituted of external experts, including persons from the relevant civil society organizations.

f) Timing for handling requests for information

The proposed measures for the processing²⁴ of requests for information that sets out a mechanism and a timeframe for receipt, acknowledgment and replies is welcomed. However, there are disparities in the reference period (e.g. working days or calendar days, number of days) given in the Transparency, Public disclosure and Complaints mechanism policies, and this needs to be streamlined, so that all three policies provide for the same timeframes.

Amnesty International is concerned with how the processing of requests for information fits into the overall cycle of decision-making of a project supported by the EIB. For example, it is unclear if the period between the publication of the project summary²⁵ on the website and the final decision and signature of the project leaves sufficient time to respond to potential requests for information and to respond and incorporate concerns by the people likely to be affected by the EIB’s decision.

Recommendation: Ensure that the timeframe for handling of information requests is compatible with commitments towards access to information within the overall decision-making process and cycles of the EIB.

4. EIB Complaints Mechanism Policy

In order to ensure EIB’s accountability, as it has committed to, an effective complaint or appeal mechanism is vital to ensure that any decision of the EIB with a negative impact on the rights of

²⁴ EIB Transparency Policy, paragraphs 58-63; EIB Public Disclosure Policy, paragraphs 90-102; EIB Complaints Mechanism Policy, point 11.5.2.

²⁵ EIB Public Disclosure Policy, paragraph 71-75.

the people can be addressed and eventually rectified. An effective complaint process requires an impartial mechanism, independent from the EIB's operational management. In this light, the EIB's complaints mechanism proposed in the draft policy is welcome.

Amnesty International has the following comments on:

a) Subject of the complaint

On the subject of complaint, Amnesty International welcomes that the definition of the concept of maladministration includes situations when the EIB Group violates human rights.²⁶ However, this definition needs to be incorporated in a consistent form in the description of the admissibility²⁷ of a complaint, by including the admissibility of any person or group with an interest in the human rights impacts of the EIB Group's activities. The chapter on the subject²⁸ of the complaint should also incorporate specifically the human rights impact.

Recommendation: Ensure that the appropriate human rights concerns are incorporated throughout the Complaints Mechanism Policy, where relevant.

b) Complaints mechanisms

In regards to the independent internal mechanism²⁹ (the EIB Complaints Office), it is noted that it delivers recommendations of appropriate corrective actions, both for concrete cases and for systemic problems of existing EIB's policies and/or procedures, and involves the senior management with the authority to proceed with the actions.

In regards to the external independent mechanism (the European Ombudsman), its recent development through the Memorandum of Understanding (MoU) signed by the EIB and the European Ombudsman is welcome. This MoU commits the European Ombudsman to use the "own-initiative power to open an inquiry" into complaints lodged by non-citizens and non-residents of the EU. However, the reality remains that for this group of people the only possible appeal is through a voluntary mechanism.

Amnesty International is concerned about the lack of clarity in the effectiveness of the complaints mechanisms policy in modifying EIB decisions and redressing its negative impact on affected communities. The absence of stated obligation from the EIB to implement recommended actions resulting from admissible complaints puts in question the effectiveness of the proposed complaints mechanism. This concern extends to both the corrective actions coming from the internal mechanism and the (non-binding) recommendations of the European Ombudsman as the external mechanism.

Recommendation: Ensure the mandatory implementation of corrective actions resulting from admissible complaints, both from the internal and external mechanisms.

²⁶ EIB Complaints Mechanism Policy, point 2.2.

²⁷ EIB Complaints Mechanism Policy, point 11.2.1.

²⁸ EIB Complaints Mechanism Policy, point 11.4

²⁹ EIB Complaints Mechanism Policy, points 7.1-7.5 and 8.1-8.5