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# Complaint to the EIB Complaint Mechanism: Access to information on the "Curtis Biomass" project and associated maladministration

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## Complaint to the EIB Complaint Mechanism: Access to information on the "Curtis Biomass" project and associated maladministration

1. This complaint deals with the failure of the EIB's Civil Society Division ("CSD") to respect Regulation 1367/2006<sup>1</sup> (the "Aarhus Regulation"), Regulation 1049/2001,<sup>2</sup> the Convention on access to information, public participation in decision-making and access to justice in environmental matters (the "Aarhus Convention") and the EIB's Transparency Policy ("TP"). ClientEarth considers that the CSD's conduct constitutes maladministration in the sense of section 3 of the EIB Group Complaints Mechanism Policy.
2. Part 1 of this complaint will lay out the facts and details of the request for information made by ClientEarth to the EIB in 2018 concerning the Curtis Biomass Power Generation Plant project ("the project")<sup>3</sup>. Part 2 concerns the EIB's failure to provide the requested information, as set out in more detail in the attached Confirmatory Applications. Part 3 concerns the failure by the Bank's services to comply with the legal deadlines to respond to ClientEarth's Confirmatory Applications. Part 4 concerns some systemic issues to comply with applicable EU law on access to information, which become evident when the treatment of the three requests is considered jointly. Part 5 concerns two further instances of a failure to comply with the principle of good administration. Finally, Part 6 deals with the Commission's failure to actively disseminate relevant environmental information concerning the project.

### 1 Factual background

#### 1.1 First access to information request (EIB1-29/05/18 - Annex 1)<sup>4</sup>

3. On 29 May 2018, ClientEarth sent an email to the EIB requesting the copies of the following categories of information concerning the Curtis Biomass project:
  - a. The minutes of the meeting of the Board of Directors dated 12 April 2018 including any decision of the Board of Directors to approve the decisions taken by the EFSI committee on 9 April 2018;
  - b. All documents provided to the Board of Directors in respect of the project CURTIS BIOMASS POWER GENERATION PLANT Project (ES) discussed at the Board Meeting on 12 April 2018;

<sup>1</sup> Regulation (EC) 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) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament Council and Commission documents

<sup>3</sup> The non-technical summary of this project can be accessed here: See <http://www.eib.org/en/infocentre/registers/register/82180853>

<sup>4</sup> All email exchanges on this request are included in Annex 1(d) to this complaint.

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- c. Appraisal reports from the due diligence process conducted for the CURTIS BIOMASS POWER GENERATION PLANT Project (ES);
  - d. The environmental and social data sheet in respect of the project CURTIS BIOMASS POWER GENERATION PLANT Project (ES);
  - e. The carbon footprint assessment for the CURTIS BIOMASS POWER GENERATION PLANT Project (ES).<sup>5</sup>
4. On 30 May 2018, ClientEarth received an acknowledgement of receipt and confirmation that the request had been forwarded to the relevant EIB department.
  5. On 18 June 2018, ClientEarth sent an email requesting an update on the status of the request, while drawing attention to the 15 working days deadline to reply to an information request.
  6. On 19 June 2018, the CSD responded to the request.<sup>6</sup> It provided one of the requested documents partially redacted,<sup>7</sup> refused access to other information and stated that the requested minutes of the Board of Directors would be published on the EIB website, once the process of redaction had been completed.
  7. On 27 June 2018, ClientEarth reminded the CSD of its legal obligations to reply within 15 working days on request. ClientEarth requested the EIB to accordingly disclose the information or formally refuse access while justifying non-disclosure.
  8. On 29 June 2018, the EIB informed ClientEarth that the minutes of the EIB board meeting had been published on its website. These minutes were partially redacted.
  9. On 10 July 2018, ClientEarth filed a confirmatory application to challenge the partial refusal of its access to documents request.<sup>8</sup>
  10. On 23 July 2018, the CSD wrote to ClientEarth stating that it was seeking "a fair solution regarding the timing and the content of the EIB responses to [ClientEarth's] requests", essentially proposing that the CSD would only reply by late September or early October 2018 and that ClientEarth limit its request. This email related to both this request and two further requests filed by ClientEarth (see sections 1.2 and 1.3 below) but ClientEarth continued to reply separately to ensure that each request was treated separately in accordance with their respective time limits and deadlines.
  11. On 24 July 2018, ClientEarth responded by stating that no such time extension would be in compliance with the applicable law but that it would be willing to further clarify its request if the EIB provided it with a list of documents falling within the scope of its request, in particular one indicating which documents would be "very long" and therefore difficult to redact.

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<sup>5</sup> Annex 1(a) to this complaint.

<sup>6</sup> Annex 1(b) to this complaint.

<sup>7</sup> Annex 1(e) to this complaint.

<sup>8</sup> Annex 1(c) to this complaint.

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12. On 26 July 2018, the CSD replied but did not provide a list of document that would have allowed ClientEarth to further refine its request.
13. On 27 July 2018, ClientEarth replied stating that, in the absence of such a list of documents, it was in no position to further narrow down its request, and that it was therefore expecting a reply to its Confirmatory Application by the legal deadline of 31 July 2018.
14. On 30 July 2018, the CSD wrote to ClientEarth to extend the time limit to handle the request.
15. On 22 August 2018, the CSD wrote to ClientEarth stating that it was, despite the passage of the legal deadline, not in a position to provide a reply yet. The CSD stated that it would provide a response within "the shortest possible period".
16. On 2 October 2018, ClientEarth wrote a reminder to the CSD stating that the legal deadline to reply to the Confirmatory Application had passed by 25 working days.
17. On 3 October 2018, the CSD replied to ClientEarth's email stating that it "expect to provide [ClientEarth] with a response in the following days, and in any case before the end of October."
18. On 19 December 2018, ClientEarth sent a reminder to the CSD indicating that, despite these assurances, it had not yet received a response and that the legal deadline to reply to the confirmatory application had passed by almost 4 months.
19. On 8 January 2019, the CSD replied that the decision-making process was still ongoing.
20. At the time of submission of this complaint (26 March 2019), ClientEarth has received no reply to its Confirmatory Application of 10 July 2018.

## 1.2 Second access to information request (EIB2-04/07/18 - Annex 2)<sup>9</sup>

21. On 4 July 2018, ClientEarth sent an email to the CSD to request access to the following further categories of information concerning the project:
  - a. The Opinion of the Government of the Kingdom of Spain referred to under item 11 (Curtis Biomass power generation plant) in the minutes of the EIB Board Meeting held on 12 April 2018;
  - b. The Opinion of the Commission referred to under item 11 (Curtis Biomass power generation plant) in the minutes of the EIB Board Meeting held on 12 April 2018;
  - c. The Lender's Technical Adviser Due Diligence described in the Proposal from the Management Committee to the Board of Directors, dated 12 April 2018 regarding the Curtis Biomass power generation plant;

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<sup>9</sup> All email exchanges on this request are included in Annex 2(d) to this complaint.

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- d. The Stage II Appraisal of the Curtis Biomass power generation plant;
  - e. The Calculations of ERR described in paragraph 26 and 29 of the Proposal from the Management Committee to the Board of Directors, dated 12 April 2018 regarding the Curtis Biomass power generation plant;
  - f. The calculation of FIRR described in paragraph 29 of the Proposal from the Management Committee to the Board of Directors, dated 12 April 2018 regarding the Curtis Biomass power generation plant;
  - g. The Economic and Financial Appraisal described in paragraph 28 of the Proposal from the Management Committee.<sup>10</sup>
22. On 5 July 2018, the CSD acknowledge receipt of the request.
23. On 23 July 2018, the CSD wrote to ClientEarth stating that it was seeking a "fair solution regarding the timing and the content of the EIB responses to [ClientEarth's] requests" (compare para. 10 above).
24. On 24 July 2018, ClientEarth responded by stating that no such time extension would be in compliance with the applicable law but that it would be willing to further clarify its request if the EIB provided it with a list of documents falling within the scope of its request, in particular one indicating which documents would be "very long" and therefore difficult to redact.
25. On 25 July 2018, the CSD provided access to part of the documents and extended the deadline to reply to the request as to the remainder.
26. On 26 July 2018, the CSD replied to ClientEarth's email of 24 July 2018 but did not provide a list of document that would have allowed ClientEarth to further refine its request.
27. On 27 July 2018, ClientEarth replied stating that, in the absence of such a list of documents, it was in no position to further narrow down its request, and that it was therefore expecting a reply to its Confirmatory Application by the extended legal deadline of 15 August 2018.
28. On 16 August 2018, the CSD provided its response to the request.<sup>11</sup> In its response, the CSD provided further partial access to one document, indicated that it had not completed the assessment of 2 further requested documents (the ERR and FIRR) and rejected access to the remainder of the requested documents. On 22 August 2018, the CSD provided partial access to the ERR and FIRR.
29. On 6 September 2018, ClientEarth filed a confirmatory application contesting the partial refusal of disclosure of its request.<sup>12</sup>

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<sup>10</sup> Annex 2(a).

<sup>11</sup> Annex 2(b).

<sup>12</sup> Annex 2(c).

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30. On 26 September 2018, the CSD wrote to ClientEarth extending the time limit to handle the request by 15 working days.
31. On 18 October 2018, the CSD wrote to ClientEarth stating that it would not be able to reply within the legal deadline but that it would provide its response "within the shortest possible period".
32. On 23 October 2018, ClientEarth wrote to CSD requesting the CSD to indicate more clearly when it could expect to receive a reply.
33. On 24 October 2018, the CSD replied that it was currently not in a position to indicate when a reply would be sent but that it was endeavouring to do "within the shortest possible timeframe."
34. At the time of submission of this complaint (26 March 2019), ClientEarth has received no reply to its Confirmatory Application of 6 September 2018.

### 1.3 Third access to information request (EIB3-10/07/18 - Annex 3)<sup>13</sup>

35. On 10 July 2018, ClientEarth requested access to the following further categories of documents concerning the project:
  - a. The minutes and agendas of all meetings of the Management Committee at which the Curtis Biomass power generation plant has been considered;
  - b. All documents provided to the Management Committee in respect of the Curtis Biomass power generation project.<sup>14</sup>
36. On the same day, the CSD acknowledged receipt of the request.
37. On 23 July 2018, the CSD wrote to ClientEarth stating that it was seeking a "fair solution regarding the timing and the content of the EIB responses to [ClientEarth's] requests" (compare para. 10 above).
38. On 24 July 2018, ClientEarth responded by stating that no such time extension would be in compliance with the applicable law but that it would be willing to further clarify its request if the EIB provided it with a list of documents falling within the scope of its request, in particular one indicating which documents would be "very long" and therefore difficult to redact.
39. On 26 July 2018, the CSD replied but did not provide a list of document that would have allowed ClientEarth to further refine its request.

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<sup>13</sup> All email exchanges on this request are included in Annex 3(d) to this complaint.

<sup>14</sup> Annex 3(a).

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40. On 27 July 2018, ClientEarth replied stating that, in the absence of such a list of documents, it was in no position to further narrow down its request, and that it was therefore expecting a reply to its Confirmatory Application by the legal deadline of 31 July 2018.
41. On 31 July 2018, the CSD wrote to ClientEarth to extend the time limit to handle the request by 15 working days.
42. On 22 August 2018, the CSD replied to the request rejecting it in its entirety.<sup>15</sup>
43. On 12 September 2018, ClientEarth filed a confirmatory application contesting the refusal of its request.<sup>16</sup>
44. On 3 October 2018, the CSD wrote to ClientEarth extending the time limit to handle the request by 15 working days.
45. On 24 October 2018, the CSD wrote to the CSD wrote to ClientEarth stating that it would not be able to reply within the legal deadline but that it would provide its response "within the shortest possible period".
46. At the time of submission of this complaint (26 March 2019), ClientEarth has received no reply to its Confirmatory Application of 12 September 2018.

## 2 Failure to disclose the requested information

47. The reasons why the decisions on all three requests failed to comply with the applicable legal requirements by partially refusing access to the requested information are set out in the three attached Confirmatory Applications (from now on referred to as "CA 1", "CA 2" and "CA 3"),<sup>17</sup> which have never been responded to by the CSD. The lack of reply from the EIB constitutes a negative reply to provide access to the requested information in accordance with Article 8(3) of Regulation 1049/2001 and therefore can be challenged. Given the lack of legal grounds relied on to refuse access, ClientEarth upholds all its claims set out in the Confirmatory Applications on each request.
48. ClientEarth considers that this failure to provide information on request constitutes maladministration. ClientEarth therefore requests the Complaint Mechanism to require the CSD to provide all the requested information touched upon in the Confirmatory Application. Specifically, the Complaint Mechanism should order disclosure of the following information:
  - a. the information contained in the sections entitled "Security" and "Confidential Issues" of the document entitled "Proposal from the Management Committee to the Board of Directors";

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<sup>15</sup> Annex 3(b).

<sup>16</sup> Annex 3(c).

<sup>17</sup> See Annexes 1(c), 2(c) and 3(c) to this complaint.



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- b. the information under points 6, 7, 8, 12, 16 of the minutes of the Meeting of the Board of Directors held on 12 April 2018, the name of one of the borrowers in Annex 1 to the minutes and the entirety of any other Annexes to the minutes;
- c. the redacted information under the headings "Pillar 2" and "Pillar 3", on page 2 of the "EFSI Operation Scoreboard";
- d. any other existing documents provided to the Board of Directors in respect of the project discussed at the Board Meeting on 12 April 2018;
- e. any appraisal reports from the due diligence process conducted for the project;
- f. the carbon footprint assessment for the project;
- g. the "Technical Adviser Due Diligence Report" in its entirety;
- h. any "Stage II Appraisal documents" prepared for the project;
- i. any further documents related to the economic and financial appraisal of the project;
- j. agenda and minutes of the Board of Directors meeting of 20 March 2018 and the minutes of the other meetings at which the financing operation was considered;
- k. any other documents provided to the Management Committee in respect of the Curtis Biomass power generation project.

### **3 Failure to reply to the confirmatory applications within the legal deadlines**

49. According to Article 8(1) of Regulation 1049/2001, confirmatory applications shall be handled "promptly". Confirmatory applications shall be responded to within 15 working days from registration of such an application. Article 8(2) of the same Regulation provides:

"In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given."

50. Even if it were to be considered that instead of Regulation 1049/2001 the EIB's Transparency Policy were to apply to the present request (the reasons why ClientEarth considers this to not be the case are set out in section 4.2 below), the same legal deadlines would have applied to the request.

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51. For the first request the legal deadline for the reply imposed by article 8(2) of Regulation 1049/2001 expired on 22 August 2018, for the second request on 18 October 2018 and for the third request on 24 October 2018. At the time this complaint is submitted (26 March 2019), ClientEarth has not received a response to any of the confirmatory applications.
52. In a complaint before the Ombudsman regarding the TP, ClientEarth had complained that footnote 8 to Article 5.22 of the TP stated that requests for information "may face longer deadlines in a number of cases, such as in cases of request for information relating to third parties."<sup>18</sup> The Ombudsman agreed that this footnote may be misleading to the public and encouraged the EIB to amend this footnote.<sup>19</sup> However, the EIB has not followed this recommendation. The treatment of this request underlines the necessity to be very clear on the fact that the applicable time limits are indeed mandatory.
53. It is relevant in that regard that the CJEU has emphasized that the purpose of the Aarhus Regulation is "inter alia, to promote more effective public participation in the decision-making process, thereby increasing, on the part of the competent bodies, the accountability of decision-making and contributing to public awareness and support for the decisions taken."<sup>20</sup> This objective requires that information is made available in a timely fashion.
54. ClientEarth therefore requests the Complaint Mechanism to clearly instruct the CSD to respect the applicable time limits for access to information requests (15 working days to reply to the request and 15 working days to reply to a confirmatory application) in the future and to ensure that footnote 8 of the TP is amended without further delay.

## 4 Systemic issues in applying the legal framework on access to information

55. Notwithstanding the above, the CSD's treatment of the access to information requests also demonstrate some systemic misapplication of the applicable law which amount to maladministration (see the sub-headings below). ClientEarth therefore also requests that the Complaint Mechanism give specific instructions so as to prevent these legal errors from reoccurring in the future. This could for instance be done with a specific Guideline on how to handle access to environmental information requests.

### 4.1 Mischaracterizations of the scope of the requests

56. In its decisions on the access to information requests EIB2 and EIB3, the CSD stated in the second paragraph:

"We understand from your requests and the additional clarifications you have provided in our exchanges about our proposal for a fair solution that your requests concerns the environmental information contained in the requested documents."

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<sup>18</sup> Ombudsman Decision in case 1316/2016/TN, para. 66.

<sup>19</sup> Ibid, para. 69.

<sup>20</sup> Cases C-673/13 P Commission v Stichting Greenpeace Nederland and PAN Europe, EU:C:2016:889, para. 80, and C-57/16 ClientEarth v Commission, EU:C:2018:660, para. 98 s

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57. Contrary to this statement, ClientEarth had never given any indication in the original request or in the additional clarifications that the request would only concern environmental information. Rather, ClientEarth had indicated in the original request that it considers the clearly defined requested information to constitute environmental information, not that it only requested environmental information. In the additional clarifications, ClientEarth also made very clear that its request was in no way so delimited.<sup>21</sup>
58. ClientEarth requests the Complaint Mechanism to instruct the CSD that it is of utmost importance to identify all relevant information pertaining to a request, rather than to seek to narrow down the request to less than what has been requested by the applicant.

#### 4.2 Failure to apply the correct legal framework

59. Even though the CSD applied an unduly limited interpretation of "environmental information" in their requests (see further below), the CSD did acknowledge that part of the requested information constituted "environmental information". In fact its decisions on requests EIB2 and EIB3<sup>22</sup> were both premised on the (false) assumption that ClientEarth's request exclusively related to environmental information. All other information was considered to lie outside of the scope of the request, which means that the request in its entirety should have been treated under the Aarhus Regulation in conjunction with Regulation 1049/2001. This is because the Aarhus Regulation applies to all requests on environmental information and refers to certain provisions of Regulation 1049/2001, which needs to be applied accordingly.
60. Nonetheless, the CSD insisted in all three replies to the information requests that it was applying the EIB's Transparency Policy (TP). This is despite the fact that ClientEarth had pointed out various times that the correct legal framework to apply would be the Aarhus Regulation in conjunction with Regulation 1049/2001.
61. It is relevant in this regard that in its consideration of the TP, the European Ombudsman specifically considered whether the TP adequately ensures application of the Aarhus Regulation. In its statement to the Ombudsman, the EIB "agreed that it is subject to the Aarhus Regulation and Aarhus Convention. It argued, however, that it was sufficient to set out in Article 5.1.b) that the TP applies "without prejudice" to the right of public access to information or documents held by the EIB which might follow from the Aarhus Convention and the Aarhus Regulation."<sup>23</sup> The European Ombudsman observed "that Article 5.1.b) of the TP acknowledges that the Aarhus Convention and the Aarhus Regulation are applicable to the EIB. The Ombudsman understands the wording of Article 5.1.b) TP as implying that, in case there would be a conflict between the TP and specific access to documents or information rules in the Aarhus Convention and the Aarhus Regulation, the latter would prevail in respect to all EIB activities."<sup>24</sup> This finding was clearly premised on the fact that the CSD would adequately apply the Aarhus Regulation based on Article 5(1)(b) TP. The enclosed decisions<sup>25</sup> and systemic failures identified in this section demonstrate that this is not the case in practice. The TP does therefore not ensure that the Aarhus Regulation prevails and is correctly

<sup>21</sup> For further details on this paragraph, see CA2 and CA3, paras. 4-7.

<sup>22</sup> Annexes 2(b) and 3(b).

<sup>23</sup> Ombudsman decision in case 1316/2016/TN, available at: <https://www.ombudsman.europa.eu/en/decision/en/95520>, para. 34.

<sup>24</sup> *Ibid.*, para. 37.

<sup>25</sup> Annexes 1(b), 2(b) and 3(b).

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implemented. The logical consequence of the Ombudsman's decision is therefore that the TP fails to comply with the EU's obligations under the Aarhus Convention and Aarhus Regulation.

62. ClientEarth therefore requests the Complaint Mechanism to clearly instruct the CSD to apply the Aarhus Regulation, in conjunction with Regulation 1049/2001, to requests relating to environmental information or, as the case may be, to those parts of a requests that relate to environmental information.

#### 4.3 Failure to identify environmental information

63. The CSD falsely characterized large parts of the requested information not as environmental information. The exact legal failures concerning the identification of environmental are set out in the Confirmatory Applications.<sup>26</sup> What is worth repeating here is that the objective of Regulation 1367/2006 to achieve the widest possible systemic availability and dissemination of environmental information must be given due weight.<sup>27</sup> By adopting instead such an unduly narrow interpretation, the CSD also contradicts the EIB's statement in the context of the already mentioned Ombudsman complaint "that the TP takes into account the particular nature of the information and documents related to the environment, as well as the Bank's obligations to comply with the Aarhus Regulation."<sup>28</sup>

64. More specifically, article 2(d)(iii) and (v) of the Aarhus Regulation read together define "environmental information" as "**any** information" on activities affecting or likely to affect elements of the environment or environmental factors and "cost-benefit and other economic analyses and assumptions" used within the framework of these activities. Accordingly, all information on an activity such as the Curtis Biomass plant, which clearly impacts on the environment, amounts to environmental information and this specifically includes underlying economic analyses and assumptions. This does not mean, as seems suggested by the CSD's analysis on the requests, that only information that directly relates to environmental elements or factors are to be considered environmental information. Rather, all information and economic analyses on the activity at stake constitutes environmental information **because** the project impacts on these elements and factors.

65. ClientEarth therefore requests the Complaint Mechanism to clearly instruct the CSD to apply a wide definition of environmental information to access to information requests, in line with the requirements of the Aarhus Regulation as summarized in the preceding paragraph.

#### 4.4 Failure to address part of the request or to rely on any exceptions to disclosure

66. With regard to a number of different categories of information, the CSD failed to rely on any exceptions to disclosure. As the Court has consistently held, disclosure of documents must always constitute the rule and non-disclosure the exception.<sup>29</sup> Moreover, the exceptions from disclosure under Regulation 1049/2001 "must be interpreted and applied strictly" and "it must

<sup>26</sup> See CA1, paras. 12 and 17; CA2, paras. 9-11, 14 and 37-42; CA3, paras. 8-11 and 13-14.

<sup>27</sup> See Article 1 of Regulation 1367/2006. See also Case C-673/13 P Commission v Greenpeace and PAN, para. 52.

<sup>28</sup> Ombudsman decision xx, para. 47.

<sup>29</sup> Case T-194/04 Bavarian Lager v Commission, para. 93.

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be shown that the access in question is likely specifically and actually to undermine the interest protected by the exception, and that the risk of that interest being undermined is reasonably foreseeable and not purely hypothetical.<sup>30</sup> Instead, the three decisions either do not list the information that falls under the requests, provide only summarized information or otherwise fails to rely on any of the exceptions to disclosure.

67. For instance, the CSD identified a document pertaining to the request but then, instead of disclosing the document or justifying non-disclosure over the exceptions, only provided a summary of some of its content.<sup>31</sup> The CSD also referred to documents uploaded on the website which had been, however, partially redacted.<sup>32</sup> At another place, the CSD simply stated that the category of documents related to a process.<sup>33</sup> This is of course immaterial, as ClientEarth had specifically requested all documents related to this process and the CSD had acknowledged that very fact in an email.

68. ClientEarth therefore requests the Complaint Mechanism to clearly instruct the CSD to justify any non-disclosure of information with specific reference to one of the exceptions to disclosure provided in Regulation 1049/2001 and 1367/2006. In particular, the CSD should be instructed that:

- a. where access to a document is requested in its entirety, it cannot refer to a partially redacted document that is available online;
- b. it cannot refuse access to documents because they form part of a larger process and
- c. it must address all aspects of a given information request.

#### 4.5 Misapplication of the exceptions to disclosure and failure to state reasons

69. With regard to some of the requested information, the decisions do invoke certain exceptions. However, invocation of these exceptions is never adequately justified. The CSD only refers to the exceptions without any clarification why the specific exception applies. As set out in more detail in the Confirmatory Applications, the decisions thereby fail to provide for adequate reasons (as required by article 296 TFEU), fail to justify application of the exceptions to disclosure and fail to construe the exceptions narrowly.<sup>34</sup>

70. ClientEarth would like to emphasize that the duty to state reasons is also recognised as a right under Article 41(2)(c) of the Charter of Fundamental Rights of the European Union as well as being an essential component of the right to an effective remedy recognised in Article 47 of the Charter of Fundamental Rights of the European Union. According to settled case law, "the

<sup>30</sup> Case T-189/14, *Deza v ECHA*, para. 52 and case law cited therein.

<sup>31</sup> See for instance, para. 15 of CA3.

<sup>32</sup> See for instance, CA1, paras. 14-18.

<sup>33</sup> See CA2, paras. 60-66.

<sup>34</sup> For a more detailed argument on this, see CA1, paras. 4-10 and 19-21, CA2, paras. 11-17 and 43-52 and CA3, paras. 17-24.

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duty to state reasons [...] is an essential procedural requirement<sup>35</sup> and constitutes an alone-standing basis for the annulment of a measure adopted by an EU institution.<sup>36</sup>

71. ClientEarth therefore requests the Complaint Mechanism to instruct the CSD to narrowly construe all the exceptions to disclosure, apply the CJEU case law requirements set out in the preceding paragraphs and provide adequate reasons in case of non-disclosure that allow the applicant to understand the reasons for non-disclosure in each specific case.

#### 4.6 Error of law in relying on the exception commercial interests

72. The EIB further withheld part of the information in the context of the second and third request on the basis that it was covered by a confidentiality agreement. However, the applicability of a confidentiality agreement cannot exempt the EIB from its legal obligations under the Aarhus Regulation and Regulation 1049/2001.<sup>37</sup>

73. A footnote to Article 5.5 TP states that "commercial interest" covers situations in which the EIB has concluded a confidentiality agreement. In the context of the Ombudsman review of the TP, ClientEarth alleged that this formulation appeared to give the Bank discretion to unilaterally declare environmental information as "commercial" and therefore as exempted from disclosure. The EIB replied that "the footnote to Article 5.5 of the TP only serves to provide an example of cases which are common in banking. The EIB acknowledged that finance contracts may contain environmental information and cannot be withheld from the public. The EIB further stated that it analyses each case individually, in light of the case law of the Court of Justice, to determine whether there are public interests at stake which would override the protection of other legitimate interests."<sup>38</sup> The Ombudsman decided on the basis of this explanation that there was no maladministration. However, the present case demonstrates that this is not the case in practice. The CSD simply referred to the fact that the information was covered by a confidentiality agreement - it did not hesitate to rely on this blanket exception to withhold environmental information without referring to one of the legally recognized exceptions.

74. ClientEarth therefore requests the Complaint Mechanism to clearly instruct the CSD to not rely on confidentiality agreements to withhold environmental information that is not otherwise covered by one of the exceptions recognized in Regulation 1367/2006.

#### 4.7 Failure to consider the overriding public interest in disclosure and emissions into the environment

75. In its response on all three requests, the CSD addressed the question whether an overriding public interest in disclosure of the information existed with almost identical phrasing:

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<sup>35</sup> Case C-535/14 P, para. 37.

<sup>36</sup> See for instance, T-95/94, para. 80 and C-367/95 P, paras. 67-68.

<sup>37</sup> For a more detailed argument on this, see CA2, paras. 18-22 and CA3, paras. 25-29.

<sup>38</sup> Ombudsman decision, para. 50.

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"We have not identified any overriding public interest in the disclosure of any of the information withheld. In particular, this information does not include information on emissions into the environment."<sup>39</sup>

76. This generally phrased statement does not fulfil the obligation of the EIB to justify non-disclosure and state reasons for its decisions as required by article 296 TFEU and articles 41(2)(c) and 47 of the Charter of Fundamental Rights (compare para. 70 above).
77. This is even more so in a situation where there are strong indications that an overriding public interest in fact exists and that part of the information relates to emissions into the environment.<sup>40</sup>
78. ClientEarth therefore requests the Complaint Mechanism to instruct the CSD to give adequate consideration to whether requested information relates to emissions into the environment and whether an overriding public interest in disclosure exists as well as to describe in its decisions which public interest aspects it has considered and how it has come to its final decision.

## 5 Further issues of maladministration in the handling of the information requests

79. ClientEarth submits that there have been two further instances of maladministration in the handling of the present requests. These issues constitute violations of ClientEarth's right to good administration as enshrined in article 41(1) of the Charter of Fundamental Rights.

### 5.1 Misleading information about the timeline

80. With regard to information request EIB2, the CSD stated on 3 October 2018 that it "expect to provide [ClientEarth] with a response in the following days, and in any case before the end of October." Following this statement, ClientEarth received no further correspondence on this request from the CSD. In December, ClientEarth inquired with the CSD as to when it was to expect to receive a reply, specifically referring to the CSD's statement that the information would be provided before the end of October. At this stage, the CSD informed ClientEarth that it could not yet predict when the information would be disclosed.
81. Despite being an obvious violation of the applicable legal time limits (see section 3 above), the lack of compliance with the required deadlines creates legal uncertainty as to the timeline to challenge the replies or lack of replies from the EIB and creates a risk of being inadmissible before the EU General Court, if the applicant wishes to rely on that route.
82. The statement and shifting positions constitutes therefore a clear example of maladministration. Specifically, ClientEarth considers that this statement and its subsequent

<sup>39</sup> This is the exact wording in the decisions on EIB2 and 3 (annexes 2b and 3b). In the decision EIB1, the phrasing differs slightly but substantively the sentences convey the same meaning: "With regard to the employment of these two exceptions, no overriding public interest was found to exist. We also note that none of the information removed from this document relates to the environment."

<sup>40</sup> For a more detailed argument on this, see CA1, paras. 11-12; CA2, paras. 24-35 and 54-58 and CA3, paras. 38-41.

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retraction constituted a violation of its right to have its affairs handled fairly and within a reasonable time by the EIB, as required by article 41(1) of the Charter of Fundamental Rights.

83. ClientEarth therefore calls on the Complaint Mechanism to instruct the CSD that it should respect time limits that it indicates to individual applicants or, at the very least, to keep applicants regularly informed should such estimates change.

## 5.2 Failure to treat the requests separately

84. While the CSD acknowledged receipt of all requests, it did not furnish them with a registration number. While this is not a legal requirement, it would in any event appear to form part of good administration, in order to keep requests separate and treat each in accordance with its own legal deadlines. However, the present case also demonstrates why the lack of such a different treatment can lead to violations of other applicable legal requirements.

85. In the present case, the EIB wrote to ClientEarth with a request for a "fair solution" with regard to all three of its requests at once.<sup>41</sup> ClientEarth does not object to the CSD seeking clarification as to the scope of its request, nor to seeking informally a fair solution. However, all three requests had been filed at different times and had therefore different legal deadlines. In fact, for one of the requests ClientEarth had already filed a Confirmatory Application when it received the clarification request. Despite the fact that, as a matter of good practice, clarification requests should be sent to an applicant as early as possible in the procedure, the request of the EIB was unclear as to what would have happened to the applicable timelines (including for bringing proceedings to the CJEU) if ClientEarth would have agreed to the proposal. There is accordingly an importance in treating information requests separately that goes beyond good administrative practice.

86. ClientEarth therefore requests the Complaint Mechanism to urge the CSD to furnish each access to information request with a registration number and treat it separately to other requests received from the same applicant, including by respecting the time limits applicable to each individual request.

## 6 Failure to proactively disseminate information

### 6.1 Failure to publish environmental information

87. Article 4 of the Aarhus Regulation requires the proactive dissemination of environmental information. The EIB has set up a public register which, according to article 4.12 of the TP, contains environmental and social information held by the Bank "in compliance with the Aarhus Regulation".<sup>42</sup> In this register, the EIB has made available the Non-Technical Summary and the ESDS for this project. No further information has been provided.

<sup>41</sup> See email of xx in annexes 1(d), 2(d) and 3(d).

<sup>42</sup> The Ombudsman has previously considered proactive dissemination of environmental information by the EIB and found no maladministration based on the assumption that the EIB indeed respected the Aarhus Regulation. See Ombudsman Decision 1316/2016/TN, paras. 43-44.



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88. However, some of the information that has not been published on this project and that was requested by ClientEarth appears to be covered by Article 4(2) of Regulation 1367/2006. Article 4(2)(e) and (g) states that the "databases or registers" set up by the institution or body concerned "shall include [...] data or summaries of data derived from monitoring of activities affecting, or likely to affect, the environment" and "environmental impact studies and risk assessments concerning environmental elements, or a reference to the place where such information can be requested or accessed."
89. The ESDS does not provide any of this underlying data or assessments. While it contains a 1.5 page section entitled "Environmental and Social Assessment", this section only summarizes the national assessment and permit process as well as some relevant Spanish and EU legislation. This is in line with the explicit goal of the document as demonstrated by the FAQ section of the Bank's public register, which states that the ESDS "summarise[s] the EIB's environmental and social appraisal of individual projects."<sup>43</sup> The ESDS is therefore only intended as a summary of existing assessments, appraisals and underlying data. However, the Aarhus Regulation clearly envisages that this information itself and not a summary thereof be disseminated.
90. One goal of the access to information requests of ClientEarth was specifically to ascertain the data that had been gathered by the Bank when assessing the suitability of the Biomass project for funding and the environmental and risk assessments carried out to inform that decision. ClientEarth hoped to obtain a clearer picture on these aspects by requesting, for instance, the carbon foot print assessment and any appraisal reports prepared for the due diligence assessment of the project. These or similar documents showing the underlying data and assessments of the EIB should be published proactively by the Bank's services.
91. It is relevant in that regard that in the context of a complaint before the Ombudsman, the EIB "agreed with the complainant that the content of documents related to the Project such as the Value Added Sheet, the Environmental Appraisal Report, the Environmental Assessment Forms -D1/D2 and the environmental conditions included in the Finance contract contain environmental information and should be actively disseminated."<sup>44</sup> Contrary to these requirements, the EIB continues to publish only the ESDS and NTS on its projects within the EU and not the underlying environmental information itself.
92. ClientEarth has raised the failure to actively disseminate environmental information in a previous complaint to the EIB Complaint Mechanism filed on 16 February 2016, which has not been responded to by the Complaint Mechanism to this day.<sup>45</sup> The present requests demonstrate the practical obstacles encountered by civil society in using the public register of the bank and having access to published information. The lack of decision by the Bank on that part of our complaint lodged 3 years ago contributes to keeping a significant degree of opacity in the decision-making process of the Bank.
93. ClientEarth therefore request the Complaint Mechanism to hold that the lack of proactive dissemination of the environmental information held by the Bank with regard to the Curtis

<sup>43</sup> See <http://www.eib.org/en/infocentre/registers/faq/index.htm> , reply to third question.

<sup>44</sup> Decision of the European Ombudsman closing her own-initiative inquiry OI/3/2013 concerning the European Investment Bank, para. 44.

<sup>45</sup> The EIB issued a partial reply on 24 May 2017 (ref. IG/CM/2017-129/RR/nh) but stated that it would still issue a separate decision on point 1.2.2 of the complaint. By the time this complaint is submitted (26 March 2019), ClientEarth has not received this second decision.

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Biomass project constitutes maladministration. ClientEarth further requests the Complaint Mechanism to recommend the competent Bank services to expand dissemination of environmental information on its projects to the actual data and underlying assessments carried out for the project, while ensuring that dissemination takes place prior to project approval.

## 6.2 Failure to inform about information held by the Bank

94. In the present case, ClientEarth's access to information requests sought to obtain the information on which the EIB based itself in its decision to finance the Curtis Biomass project. Achieving this objective was significantly hindered by the fact that there is no publicly available list of documents that have been drawn up with regard to a specific project. Listing the documents pertaining to the projects does not imply that they should all be made directly accessible; the point is to ensure that the public knows what documents exist. This in turn makes the decision-making more transparent, the Bank more accountable and allows the public to know what information it can request. The decision-making process related to access to documents request would be significantly simplified and the Bank services would save considerable time in handling requests.
95. Such a list of documents held by the institution is required by Article 11(1) and (2) of Regulation 1049/2001: *"To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. **References to documents shall be recorded in the register without delay.*** For each documents the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the fate on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4" (emphasis added). Article 12(4) of the Regulation, also provides that "where a direct access is not given through the register, the register shall as far as possible indicate where the document is located". Moreover, Article 5(2)(a) of the Aarhus Convention requires active publication of information including information about the type and scope of environmental information held by public authorities and hence EU institutions. Accordingly, there is a legal requirement on the Bank to at least publish a list of all the documents that it holds that contain environmental information.
96. In the present case, the CSD requested clarification as to the scope of ClientEarth's requests. ClientEarth suggested that the Bank provide a list of the documents falling within its request to allow ClientEarth to further refine its request.<sup>46</sup> The Bank did not reply to this proposal, which could have significantly limited the scope of the request. As a consequence, the CSD has apparently been struggling to clearly identify the scope of ClientEarth's request (see section 4.1 above). This demonstrates how a publicly available list could significantly facilitate the work of the CSD and ensure there is more transparency in the decision-making process of the Bank.
97. The Bank is accordingly not complying with its obligations to inform the public on the available environmental information held by the Bank and to actively disseminate the environmental information that does not fall under the scope of any of the exceptions foreseen by Regulation

<sup>46</sup> Annex 1d, p. 9; Annex 2d, pp. 11-12 and Annex 3d, p. 10.

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1049/2001 and 1367/2006. ClientEarth requests the Complaint Mechanism to recommend that the Bank services include a list of documents that the Bank holds with regard to each projects, even if all of these documents are not actually published in the register.

## 7 Conclusion

98. By failing to provide the requested information and failing to reply to the Confirmatory Applications lodged by ClientEarth the CSD violated the Aarhus Convention, Regulation 1049/2001 and Regulation 1367/2006 for the reasons given in sections 2 and 3 above. The CSD's handling of the three requests also demonstrated certain systemic instances of maladministration in the handling of information requests (section 4 above) and two specific issues of maladministration related to good administrative practice (section 5 above). Moreover, certain of the requested information should have been proactively disseminated based on article 4 of Regulation 1367/2006 (see section 6 above).
99. ClientEarth therefore respectfully requests the Complaint Mechanism to recommend disclosure of the information, give specific instructions to the CSD on how to handle information requests (as set out in sections 3-5) and to ensure that certain information is made available proactively by the Bank services (see section 6 above).
100. As mentioned in paragraph 92 above, ClientEarth is still awaiting a reply to its complaint from 16 February 2016, by now over 3 years after it has been submitted. This delay amounts to a clear violation of ClientEarth right to have its affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union, as required by article 42(1) of the Charter of Fundamental Rights. Given this previous experience, ClientEarth would like to inform the Complaint Mechanism upfront that it will consider forwarding the present complaint to the European Ombudsman, if it does not receive a response to the complaint within the time limits defined in section 1.11 of the EIB Group Complaints Mechanism Procedures.

We look forward to receiving your response.

Yours sincerely,

[www.clientearth.org](http://www.clientearth.org)

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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## List of annexes to this complaint

### Annex 1: Files pertaining to request EIB1-29.05.18:

- 1a: Request for information
- 1b: CSD decision on the request for information
- 1c: Confirmatory Application
- 1d: All email correspondence pertaining to the request
- 1e: Attachments provided by the CSD with its decision on the request

### Annex 2: Files pertaining to request EIB2-04.07.18:

- 2a: Request for information
- 2b: CSD decision on the request for information
- 2c: Confirmatory Application
- 2d: All email correspondence pertaining to the request

### Annex 3: Files pertaining to request EIB3-10.07.18:

- 3a: Request for information
- 3b: CSD decision on the request for information
- 3c: Confirmatory Application
- 3d: All email correspondence pertaining to the request

