European Investment Bank

CM Complaints Mechanism

Curtis Biomass Power Generation Plant

Complaint SG/A/2019/04

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

11 March 2020

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Management Committee
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The EIB Complaints Mechanism

The EIB Complaints Mechanism is intended to provide the public with a tool enabling alternative and pre-emptive resolution of disputes in cases where the public feels that the EIB Group did something wrong, i.e. if members of the public consider that the EIB committed an act of maladministration. When exercising the right to lodge a complaint against the EIB, any member of the public has access to a two-tier procedure, one internal – the Complaints Mechanism Division (EIB-CM) – and one external – the European Ombudsman (EO).

The EO was "created" by the Maastricht Treaty of 1992 as an EU institution to which any EU citizen or entity may appeal to investigate any EU institution or body on the grounds of maladministration. Maladministration means poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Some examples, as set by the European Ombudsman, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal to provide information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group's activities and to project cycle-related policies and other applicable policies of the EIB.

The EIB Complaints Mechanism is intended not only to address non-compliance by the EIB with its policies and procedures but to endeavour to solve the problem(s) raised by complainants such as those regarding the implementation of projects.

For further and more detailed information regarding the EIB Complaints Mechanism please visit our website: http://www.eib.org/about/accountability/complaints/index.htm

TABLE OF CONTENTS

EXECUTIVE SUMMARY

On 26 March 2019 ClientEarth lodged a complaint with the Complaints Mechanism of the European Investment Bank. The complaint concerns three sets of applications for information/documents submitted by the Complainant about the project Curtis Biomass Power Generation Plant.

The EIB-CM performed a compliance review. The EIB-CM recognises the complex nature of the applications, involving assessment by the EIB services of many different documents for the purpose of disclosure.
The allegations and the EIB-CM's conclusions are presented in the table below.

No.	Allegations	Sub-Allegations	Compliance review conclusion
(1)	Failure to disclose the requested information		Grounded
(2)	Failure to reply to the confirmatory applications within the legal deadlines		Grounded
(3)	Systemic issues in applying the legal framework on access to information	(a) Mischaracterisation of the scope of the requests	Not grounded
		(b) Failure to apply the correct legal framework	Not grounded
		(c) Failure to identify environmental information	Not grounded
		(d) Failure to address part of the request or to rely on any exceptions to disclosure	Partially not grounded and partially settled
		(e) Misapplication of the exceptions to disclosure and failure to state reasons	Not grounded
		(f) Error of law in relying on the exception relating to commercial interests	Not grounded
		(g) Failure to consider the overriding public interest in disclosure and emissions into the environment	Not grounded
(4)	Further issues of maladministration in the handling of the information requests	(a) Misleading information about the timeline	Grounded
		(b) Failure to treat the requests separately	Not grounded
(5)	Failure to proactively disseminate information	(a) Failure to publish environmental information	Not grounded
		(b) Failure to inform about information held by the Bank	Not grounded

Based on its inquiry, the EIB-CM found that the majority of the allegations are not grounded.

Following up on the conclusions above, the EIB-CM recommends the following to the Bank:

- In two recent cases[1], the EIB-CM recommended improvements to the EIB's systems and procedures when dealing with applications. In particular, the EIB-CM underlined the need for development of detailed implementation guidelines/arrangements for handling applications in complex cases which could cover issues such as workflow and processes, timelines and responsibilities for the different steps involved, and the need to differentiate certain steps for different categories of documents and types of information. The EIB-CM reiterates its recommendations also with reference to the present case.

- As to the LTA report, the EIB-CM finds that in respect of one instance of non-disclosed information the EIB should revert to the Complainant to confirm whether or not disclosure exceptions specifically apply also to that information.

The EIB-CM will monitor the implementation of its recommendation within 12 months of the date of issue of this report.

[1] SG/A/2019/02 African Lion Mining Fund III https://www.eib.org/en/about/accountability/complaints/cases/african-lion-mining-fund-iii and SG/A/2019/03 Corridor Côtier- Section Nord https://www.eib.org/en/about/accountability/complaints/cases/corridor-cotier-section-nord

CONCLUSIONS REPORT

Complainant: ClientEarth

Date received: 26 March 2019

Confidential: No

Subject of complaint: Access to information about the project Curtis Biomass Power Generation Plant

1. THE COMPLAINT

1.1 On 26 March 2019, ClientEarth (hereinafter "the Complainant") lodged a complaint with the Complaints Mechanism of the European Investment Bank (hereinafter "the EIB-CM"). The complaint concerns three sets of applications for information/documents submitted by the Complainant about the project Curtis Biomass Power Generation Plant. The Complainant alleged that the EIB did not respect Regulation 1367/2006 (the Aarhus Regulation), Regulation 1049/2001, the Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention) and the EIB Group Transparency Policy (TP). The Complainant considered that the EIB's conduct constituted maladministration.

1.2 The Complainant called on the EIB-CM to (i) recommend disclosure of the information, (ii) give specific instructions to the EIB on how to handle information requests, and (iii) ensure that certain information is made available proactively by the EIB.

1.3 The different allegations are outlined in Table 1 below and presented in detail in §§ 1.4-1.19 of the report.

Table 1 - Allegations

No.	Allegations	Sub-Allegations
1	Failure to disclose the requested information	
2	Failure to reply to the confirmatory applications within the legal deadlines	
3	Systemic issues in applying the legal framework on access to information	(a) Mischaracterisation of the scope of the requests
		(b) Failure to apply the correct legal framework
		(c) Failure to identify environmental information
		(d) Failure to address part of the request or to rely on any exceptions to disclosure
		(e) Misapplication of the exceptions to disclosure and failure to state reasons
		(f) Error of law in relying on the exception relating to commercial interests

		g) Failure to consider the overriding public interest in disclosure and emissions into the environment
4	Further issues of maladministration in the handling of the information requests	(a) Misleading information about the timeline
		(b) Failure to treat the requests separately
5	Failure to proactively disseminate information	(a) Failure to publish environmental information
		(b) Failure to inform about information held by the Bank

Failure to disclose the requested information

1.4. The Complainant alleged that the EIB's lack of reply to the confirmatory applications constitutes a negative reply to provide access to the requested information, which could be challenged in accordance with Article 8(3) of Regulation 1049/2001. Given the lack of legal grounds relied on to refuse access, the Complainant also upheld all claims set out in the confirmatory applications. The Complainant considered the failure to provide the requested information to constitute maladministration. The Complainant requested the EIB-CM to order disclosure of the following information:

1) 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";

2) the information under points 6, 7, 8, 12 and 16 of the minutes of the Meeting of the Board of Directors (BoD) 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;

3) the redacted information under the headings "Pillar 2" and "Pillar 3", on page 2 of the "EFSI Operation Scoreboard";

4) any other existing documents provided to the BoD in respect of the project discussed at the Board Meeting on 12 April 2018;

5) any appraisal reports from the due diligence process conducted for the project;

6) the carbon footprint assessment for the project;

7) the "Technical Adviser Due Diligence Report" in its entirety;

8) any "Stage II Appraisal documents" prepared for the project;

9) any further documents related to the economic and financial appraisal of the project;

10) the agenda and minutes of the BoD meeting of 20 March 2018 and the minutes of the other meetings at which the financing operation was considered;

11) any other documents provided to the Management Committee (MC) in respect of the project.

Failure to reply to the confirmatory applications within the deadlines

1.5 The Complainant alleged that the EIB did not comply with Article 8 of Regulation 1049/2001, providing that confirmatory applications are to be handled promptly and responded to within 15 working days, with the possibility of an extension of 15 working days in exceptional cases. The Complainant stressed that, under the TP, the same legal deadlines apply and that the replies to the confirmatory applications should have been provided by 22 August 2018, 18 October 2018 and 24 October 2018 respectively.

1.6 The Complainant referred to the European Ombudsman's (EO) decision in case 1316/2016/TN (EO's Decision) and, in particular, to the fact that the EO had encouraged the EIB to amend footnote 8 to Article 5.22 of the TP as it could be misleading to the public. The Complainant highlighted that the applicable time limits are mandatory. The Complainant also referred to the Aarhus Regulation's requirement that information be made available in a timely fashion.

1.7 The Complainant requested the EIB-CM to instruct the EIB to respect the applicable time limits for access to information in the future and to ensure that footnote 8 of the TP shall be amended "*without further delay*".

Systemic issues in applying the legal framework on access to information

1.8 The Complainant alleged that the EIB's treatment of the relevant access to information requests demonstrates some systemic misapplications of the applicable law, amounting to maladministration. The details of these allegations are presented in §§ 1.9-1.15 below. The Complainant requested the EIB-CM to provide specific instructions, for instance through a guideline on how to handle access to environmental information requests.

Mischaracterisation of the scope of the requests

1.9 The Complainant stated that, in its first application, no indication had been given to the Bank that the request would only concern environmental information, while the Complainant had indicated that the clearly defined requested information constituted environmental information and that its request was in no way so delimited. The Complainant requested the EIB-CM to instruct the EIB 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*".

Failure to apply the correct legal framework

1.10 The Complainant alleged that the EIB did not apply the correct legal framework, since it applied the TP instead of the Aarhus Regulation in conjunction with Regulation 1049/2001. The Complainant pointed out that, according to the EO's Decision, the wording of Article 5.1. b) of the TP implies that, in the event of conflict between the TP and specific access to documents or information rules in the Aarhus Convention and the Aarhus Regulation, the latter would prevail. The Complainant concluded that the EIB's replies to its requests demonstrate that the TP did not ensure that the Aarhus Regulation prevails. The Complainant requested the EIB-CM to instruct the EIB to apply the Aarhus Regulation, in conjunction with Regulation 1049/2001, to requests relating to environmental information or to those parts of requests that relate to environmental information.

Failure to identify environmental information

1.11 The Complainant alleged that the EIB applied an unduly narrow interpretation of environmental information and "*falsely characterized large parts of the requested information not as environmental information*". The Complainant made reference to Article 2(d)(iii) and (v) of the Aarhus Regulation and observed

that "*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 analysis and assumptions*". According to the Complainant, the definition of environmental information does not include only information directly relating to environmental elements or factors. The Complainant requested the EIB-CM to instruct the EIB to apply a wide definition of environmental information, in line with the requirements of the Aarhus Regulation.

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

1.12 The Complainant alleged that the EIB either did not list the information falling under the requests, provided only summarised information or otherwise failed to rely on any of the exceptions to disclosure. The Complainant made reference to case-law of the CJEU and to Regulation 1049/2001. The Complainant put forward several examples from the Bank's replies: a document was identified but the Complainant was provided only with a summary of its content; the Complainant was referred to a partially redacted document on the website or was simply informed that a document related to a process. The Complainant requested the EIB-CM to instruct the EIB to justify any non-disclosure of information with specific reference to one of the exceptions provided in the Regulations. According to the Complainant, the instructions should in particular include the following: (i) where access to a document is requested in its entirety, the EIB cannot refer to a partially redacted document that is available online; (ii) the EIB cannot refuse access to documents because they form part of a larger process and (iii) the EIB must address all aspects of a given information request.

Misapplication of the exceptions to disclosure and failure to state reasons

1.13 The Complainant alleged that, even when the EIB replies invoke certain exceptions, those are never adequately justified. The Complainant highlighted the duty to state reasons and made reference to Article 296 TFEU, Articles 41 and 47 of the Charter of Fundamental Rights of the European Union (European Charter) and case-law of the CJEU. The Complainant requested the EIB-CM to instruct the EIB to narrowly construe all exceptions to disclosure, apply the CJEU case-law requirements and provide adequate reasons for non-disclosure in each specific case.

Error of law in relying on the exception relating to commercial interests

1.14 The Complainant reported that the EIB 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. The Complainant referred to the footnote to Article 5.5 TP stating that 'commercial interests' covers situations in which the EIB has concluded a confidentiality agreement. The Complainant referred to the EO's Decision in the context of which the EIB had replied that "*the footnote to Article 5.5 of the TP only serves to provide an example of cases which are common in banking*" and that the EIB analysed each case individually. According to the Complainant in practice this was not done and a blanket exception was relied on. The Complainant requested the EIB-CM to instruct the EIB not to rely on confidentiality agreements to withhold environmental information that is not otherwise covered by one of the exceptions provided in the Aarhus Regulation.

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

1.15 The Complainant alleged that the statements in the EIB's replies as to the absence of an overriding public interest and that the information withheld does not include information on emissions into the environment do not fulfil the EIB's obligation to state reasons for its decisions as required by Article 296 TFEU and Articles 41(2)(c) and 47 of the European Charter. In the Complainant's view, there were strong indications that an overriding public interest existed and that part of the information related to emissions into the environment. The

Complainant requested the EIB-CM to instruct the EIB 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 which public interest aspects it considered and how it reached its final decision.

Further issues of maladministration in the handling of the information requests

Misleading information about the timeline

1.16 The Complainant considered that, with regard to the second access to information request, the EIB's reply of 3 October 2018 amounts to an instance of maladministration insofar as it stated that the EIB "expect to provide [ClientEarth] with a response in the following days, and in any case before the end of October". When in December 2018 the Complainant enquired about the reply, it was informed that it could not yet be determined when the information would be disclosed. The Complainant takes the view that, aside from breaching the deadlines, such an approach leads to legal uncertainty as to the timeline to challenge the replies or lack of replies from the EIB and creates a risk of inadmissibility of the action before the EU General Court. According to the Complainant, the approach taken by the Bank is a violation of the right to have its affairs handled fairly and within a reasonable time by the EIB as required by Article 41(1) of the European Charter. The Complainant therefore requested the EIB-CM to instruct the EIB to respect the time-limits indicated to applicants, and to keep the applicants regularly informed should such estimates change.

Failure to treat the requests separately

1.17 The Complainant reported that the EIB acknowledged receipt of all requests but it did not furnish them with registration numbers. The Complainant took the view that, even though this is not a legal requirement, it would appear to form part of good administration in order to keep requests separate and treat each in accordance with its own legal deadlines. The Complainant explained that the three requests had been filed at different times and therefore had different deadlines. The Complainant requested the EIB-CM to instruct the EIB accordingly.

Failure to proactively disseminate information

Failure to publish environmental information

1.18 The Complainant alleged that the EIB is not compliant with the Aarhus Regulation insofar as the EIB did not proactively disseminate sufficient environmental information on the project. In this regard, the Complainant alleged that the EIB's decision to solely publish the Environmental and Social Data Sheet (ESDS) and the Non-Technical Summary, without providing any of the underlying data and assessments (i) constitutes a breach of Article 4(2)(e) and (g) of the Aarhus Regulation, and (ii) is not consistent with the EIB's position in the context of the EO's inquiry OI/3/2013, whereby 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". The Complainant stated the failure to actively disseminate environmental information had been raised in a previous complaint filed on 16 February 2016 but which had not yet been responded to. The Complainant called on the EIB-CM to recommend to the EIB to expand dissemination of the environmental information on its projects to the actual data and underlying assessments carried out for the project, ensuring dissemination prior to project approval.

Failure to inform about information held by the Bank

1.19 The Complainant alleged that the EIB's failure to provide a list of documents that have been drawn up with regard to the project is not in conformity with Article 11(1) and (2) of Regulation 1049/2001. In the Complainant's view, since Article 5(2)(a) of the Aarhus Convention requires active publication of information, including the type and the scope of environmental information, the EIB is required to at least publish a list of all the documents it holds which contain environmental information. The Complainant explained that listing the documents does not entail that they should all be made directly accessible; the point is to ensure that the public knows which documents exist. The Complainant alleged that the Bank is not complying with its obligations to inform the public on the available environmental information not falling under the scope of any exceptions provided for by Regulations 1049/2001 and 1367/2006. The Complainant called on the EIB-CM to recommend to the EIB to include a list of documents held with regard to each project, even if they are not actually published on the register.

2. BACKGROUND INFORMATION

2.1 *The Project*

2.1.1 The Curtis Biomass Power Generation Plant concerns the construction of a 50 MW, electricity-only biomass plant in Galicia, Spain. The plant is expected to generate 324 GWh of electricity per year. The plant will use 100% forestry residues in wood chip form, which will be sourced from the region. The project was approved by the EIB Board of Directors (BoD) in April 2018. It is financed by the EIB with a EUR 50 million loan under the Investment Plan for Europe.

2.2 *The Complainant's applications*

2.2.1 The Complainant's applications were preceded by exchanges concerning the Project between the Complainant and the EIB. In particular, on 8 May 2018, the Complainant requested the EIB to indicate when the rationale for decisions taken at the April European Fund for Strategic Investments (EFSI) Board meeting and the ESDS for the Project were expected to be published. The following day, the EIB clarified that the rationale for the decisions would be published on the EIB website, once approved by the Investment Committee (IC), and that the ESDS for projects financed by the EIB are generally published between one and two months after the approval of the operations by the EIB BoD and can be found under the respective project summary sheets.

2.2.2 The exchange of e-mails between the Complainant and the Bank as part of the Complainant's applications is summarised in the table below and presented in detail in §§2.2.3-2.2.51 below.

Table 2: Chronology of the exchanges between the Complainant and the EIB

	Date	Who	Can be consulted in the paragraphs of this Report
1.	08/05/2018	Complainant	§ 2.2.1
2.	09/05/2018	EIB	§ 2.2.1
3.	29/05/2018	Complainant	§ 2.2.3
4.	30/05/2018	EIB	§ 2.2.4
5.	18/06/2018	Complainant	§ 2.2.5
6.	19/06/2018	EIB	§ 2.2.6
7.	27/06/2018	Complainant	§ 2.2.7
8.	29/06/2018	EIB	§ 2.2.8
9.	04/07/2018	Complainant	§ 2.2.24
10.	10/07/2018	Complainant	§§ 2.2.9 and 2.2.39
11.	23/07/2018	EIB	§§ 2.2.10, § 2.2.25 and §2.2.40
12.	24/07/2018	Complainant	§ 2.2.11, § 2.2.26 and § 2.2.41
13.	25/07/2018	EIB	§ 2.2.27
14.	26/07/2018	EIB	§§ 2.2.28 and 2.2.42
15.	27/07/2018	Complainant	§ 2.2.13, §2.2.38 and § 2.2.43
16.	30/07/2018	EIB	§ 2.2.14
17.	31/07/2018	EIB	§ 2.2.44
18.	16/08/2018	EIB	§ 2.2.15, §§ 2.2.29-2.2.30 and § 2.2.45
19.	22/08/2018	EIB	§ 2.2.16, § 2.2.31 and § 2.2.46
20.	03/09/2018	Complainant	§ 2.2.17
21.	04/09/2018	EIB	§ 2.2.18
22.	06/09/2018	Complainant	§ 2.2.32
23.	12/09/2018	Complainant	§ 2.2.47
24.	26/09/2018	EIB	§ 2.2.33
25.	02/10/2018	Complainant	§ 2.2.19 and § 2.2.34
26.	03/10/2018	EIB	§ 2.2.20 and § 2.2.48
27.	18/10/2018	EIB	§ 2.2.35
28.	23/10/2018	Complainant	§ 2.2.36
29.	24/10/2018	EIB	§ 2.2.37 and § 2.2.48
30.	11/12/2018	Complainant	§ 2.2.49
31.	12/12/2018	EIB	§ 2.2.50
32.	19/12/2018	Complainant	§ 2.2.21
33.	08/01/2019	EIB	§ 2.2.22
34.	27/06/2019	EIB	§ 2.2.23, § 2.2.38 and § 2.2.51

CE.1 Application

2.2.3 On 29 May 2018, the Complainant requested the EIB to be provided with copies of the following documents (CE.1 Initial Application):

1) the minutes of the meeting of the BoD dated 12 April 2018, including any decision of the BoD to approve the decisions taken by the EFSI Committee on 9 April 2018;

2) all documents provided to the BoD in respect of the Project discussed at its meeting on 12 April 2018;

3) appraisal reports from the due diligence process conducted for the project;

4) the environmental and social data sheet in respect of the project;

5) the carbon footprint assessment for the project.

The Complainant clarified that its request concerned environmental information, "*made under Article 6 of Regulation (EC) No. 1049/2001, as applied by the Aarhus Regulation*".

2.2.4 On 30 May 2018, the EIB acknowledged receipt of the Complainant's request and confirmed that CE.1 Initial Application had been forwarded to the competent EIB department.

2.2.5 On 18 June 2018, the Complainant requested an update on the status of CE.1 Initial Application and recalled the 15 working days deadline from the registration of the application to grant access to the document requested or to state the reasons for the total or partial refusal, as stipulated by Regulation (EC) No. 1049/2001.

2.2.6 On 19 June 2018, the EIB responded to CE.1 Initial Application by clarifying that it was handled in line with the TP, providing the following clarifications:

1) as to the document referred to in § 2.2.3(1) of this Report, the EIB informed the Complainant that it would be published on the EIB website once "*the information covered by the exceptions for disclosure of the EIB Group Transparency Policy has been duly identified and redacted for publication*";

2) as to the request referred to in § 2.2.3(2), the EIB provided partial disclosure through the Board Report, insofar as exceptions under Article 5.4 b. of the TP (the protection of privacy and the integrity of the individual) and in the first bullet point of Article 5.5 of the TP (the protection of commercial interests of a legal person) applied to the redacted information of the document. With specific regard to the above-mentioned exceptions, the EIB also clarified that no overriding public interest was found to exist and that "*none of the information removed from this document relates to the environment*". Furthermore, the EIB informed the Complainant that the EFSI Scoreboard had been published on the EIB's website;

3) as to the request referred to in § 2.2.3(3) of this Report, the EIB informed the Complainant that other information reflecting the results of the EIB's Project due diligence process was summarised in the Board Report and requested the Complainant to specify any other particular aspects falling under the initial application;

4) as to the request referred to in § 2.2.3(4) and § 2.2.3(5) of this Report, the EIB informed the Complainant of the availability of the ESDS on the EIB website and that the ESDS represents the EIB's environmental and social appraisal of the project, including the EIB's Project carbon footprint assessment.

2.2.7 On 27 June 2019, the Complainant replied to the EIB by recalling the obligation to reply within 15 working days set out under Regulation (EC) No. 1049/2001 in respect of the document referred to in §2.2.3(1) of this Report, not yet published on the EIB's website at the time of the Complainant's reply. The Complainant also requested the EIB to confirm whether it was formally refusing access to the document in question and if so, under which exceptions.

2.2.8 On 29 June 2018, the EIB informed the Complainant that the document referred to in § 2.2.3(1) of this Report had been published on the EIB's website on 28 June 2018.

2.2.9 On 10 July 2018, the Complainant filed a confirmatory application (CE.1 Confirmatory Application) concerning the EIB reply of 19 June 2018. The Complainant reiterated that the information constituted environmental information pursuant to Article 2(1)(d)(iii) of the Aarhus Regulation, given that, in the Complainant's view, "*the administrative measure of providing a loan to finance an electricity only biomass plant shall result in an activity affecting or likely to affect the factors listed in Article 4(2)(d)(i), for example air and*

atmosphere, water, soil, land, landscape and natural sites, and Article 4(2)(d)(ii), for example energy". The Complainant requested the review of the EIB's position for the following main reasons, which, according to the Complainant, were also supported by the case-law of the CJEU:

1) unjustified refusal of access to parts of the "Proposal from the Management Committee to the Board of Directors" under Article 4 of the Aarhus Regulation and failure to state reasons under Article 296 TFEU;

2) unjustified refusal of access to parts of the Minutes of the Meeting of the BoD held on 12 April 2018 and the "EFSI Scoreboard" under Article 4 of the Aarhus Regulation and failure to state reasons under Article 296 TFEU;

3) unjustified implicit refusal of access to documents not identified as being related to the request under Article 7(1) of the Aarhus Regulation and failure to state reasons under Article 296 TFEU.

The Complainant also alleged the existence of an overriding public interest in disclosure, given the significant level of public investment and high levels of risk, together with the circumstance that the information constituted environmental information. With specific reference to the Carbon Footprint Assessment, the Complainant alleged the existence of an overriding public interest in disclosure as the information contained therein pertained to emissions into the environment.

2.2.10 On 23 July 2018, the EIB contacted the Complainant to explore the possibility of finding a fair solution pursuant to Article 5.21 of the TP as to the timing and content of the documents requested under CE.1 Confirmatory Application of 10 July 2018 and two additional applications about the same project (see §§ 2.2.24-2.2.25 and §§ 2.2.39- 2.2.40 below) submitted by the Complainant. The EIB clarified that the reasons behind the fair solution proposal were the very large number of documents requested and the consequent need to launch consultations with external third parties to handle some of them. Therefore, the EIB stated that it may not to be able to process the applications within the deadlines set out in Articles 5.23-5.24 of the TP, also considering that consultations might run longer due to possible absences of third parties during the summer holidays. With a view to adequately processing all of the applications, which appeared to overlap in terms of the documents requested, the EIB suggested extending the deadline to respond and estimated that it would be able to do so by the end of September/beginning of October 2018, while striving to respond earlier, if possible. The EIB also explained that the EIB project appraisal was a process, the outcome of which was documented in the Board Report, which entailed a large number of internal working documents and inputs prepared by the different EIB services concerned and led to the elaboration of the Board Report and the corresponding loan proposal. Therefore, the EIB requested the Complainant to further refine the scope of the request – reiterated in CE.1 Confirmatory Application as "*any report (in whatever form) that were prepared in the context of this appraisal*" – to enable the EIB to focus on a limited number of documents/information and to respond faster and better to the requests.

2.2.11 On 24 July 2018, the Complainant replied to the EIB as follows[2]:

1) the confirmatory application phase is not the right context to request further clarifications, especially if no such questions were raised at the stage of the initial application. Articles 6(2) and 6(3) of Regulation (EC) No. 1049/2001 – entitling the Institutions to ask the applicant to clarify an application that is not sufficiently precise and to propose a fair solution when a very long document or a very large number of documents is requested – do not apply in the context of a confirmatory application. Clarification on the EIB project appraisal had already been provided in CE.1 confirmatory application as "*any reports (in whatever form) that were prepared in the context of this appraisal*". Notwithstanding the above as well as the fact that, in the Complainant's view, the documents requested were not likely to fall within the category of "*very long documents*" or "*very large number*

[2] The main items do not follow the order of the presentation in the original e-mail.

of documents", the Complainant showed its availability to further clarify their application if the EIB provided a list of documents falling within the scope thereof, indicating the "*very long*" documents and providing a list of chapters/sections for them;

2) the requested time extension would not be compliant with the applicable law, since under Article 8(2) of Regulation (EC) No. 1049/2001 (applicable only in exceptional circumstances and provided that detailed reasons are given) the deadline could be subject to a maximum time extension of up to a further 15 working days;

3) the Complainant would continue to treat the three applications separately.

2.2.12 On 26 July 2018, the EIB replied as follows:

1) a confirmatory application provides the EIB with a fresh opportunity to reassess its initial position, with the possible subsequent need to take new steps to fully comply with its obligations under the TP. Therefore, the "*possibility to propose a fair solution within the context of a Confirmatory Application should not be, a priori, excluded*";

2) the three applications submitted by the Complainant had been handled on the basis of the TP and not on the basis of Regulation (EC) No. 1049/2001;

3) the EIB took note of the reiterated clarification and, in the context of the fair solution proposal, suggested to the Complainant a reduction of the scope of its applications to the documents/information regarded to be more necessary for the purpose;

4) the three applications were still being processed and at that stage, the EIB was not in a position to provide the Complainant with a full list of the documents the EIB considered to be covered by the abovementioned applications. Moreover, some parts of the three applications require the EIB to identify the documents falling therein, which – in most cases – contain information to be assessed against the set of exceptions under the TP. As to the documents and/or information more clearly identified in the Complainant's applications at that stage, the EIB highlighted the need to set different levels of (re)assessment as well as to deal with the documents' length;

5) the EIB requested the Complainant to provide a clear answer regarding the fair solution proposal as soon as possible and no later than close of business on 3 August 2018;

6) the EIB would consider the three applications, including CE.1 Confirmatory Application, as an *unicum* as (i) they concern the same Project, (ii) they were submitted almost at the same time, and (iii) they concern documents and information which in some way appear to overlap, in accordance with the case-law of the CJEU.

2.2.13 On 27 July 2018, the Complainant reiterated its view on the inapplicability of a fair solution to confirmatory applications (see §2.2.11 (1)). Furthermore, the Complainant clarified its view not to accept the fair solution proposal insofar as the timeline would be extended beyond the statutory deadlines set out in Regulation (EC) No. 1049/2001. In this regard, the Complainant reiterated its view that extension of time is allowed under Article 8(2) of Regulation (EC) No. 1049/2001 in exceptional cases only. The Complainant reported that it had not received any formal notification about exceptional circumstances and detailed reasons thereof. In addition to reiterating that the EIB must correspond to each of the three applications separately as they had different timelines and were at different stages of the procedure, the Complainant stated that:
1) Regulation (EC) No. 1049/2001 applies to any request for environmental information, to all community institutions and bodies referred to in Article 3 of the Aarhus Regulation, and therefore it also applies to the EIB,

as a community institution, in respect of any request for environmental information;

2) because of the lack of an EIB list of the project's documents, the Complainant was not in a position to identify which documents the EIB might hold and which ones would have been useful for its purpose.

2.2.14 On 30 July 2018, pursuant to § 5.23 of the TP, the EIB informed the Complainant, that CE.1 Confirmatory Application could not be handled within the deadline and that the time-limit thereof had to be extended because the large number of documents and information not readily available required the EIB to identify the requested documents and review them to assess whether they might be fully/partially disclosed or withheld according to the TP. Therefore, the EIB engaged to strive to provide a reply within the following 30 working days from the receipt of CE.1 Confirmatory Application, in line with § 5.24 of the TP.

2.2.15 On 16 August 2018, due to the fact that EIB had to undertake third-party consultations to reply to the Complainant's request about the project, the EIB asked whether the Complainant authorised revealing the name of ClientEarth.

2.2.16 On 22 August 2018, the EIB informed the Complainant that it was not yet in a position to provide a full response to all the issues raised in CE.1 Confirmatory Application. In this regard, the EIB stated that its delay in handling CE.1 Confirmatory Application was mainly due to the complexity of the case, involving a large number of documents and information as well as the consultation of external third parties. Finally, the EIB engaged to provide the Complainant with a response "*within the shortest possible period*".

2.2.17 On 3 September 2018, the Complainant replied to the EIB request referred to in § 2.2.15 of this Report by stating that the identity of the applicant should have no relevance to a third party's assessment if the requested documents fall under any of the exceptions to disclosure. The Complainant did not refuse to allow its name to be revealed, provided that the name of the consulted third party would be revealed to them.

2.2.18 On 4 September 2018, the EIB clarified that it is up to the EIB to assess whether the exceptions provided for under the TP apply and that, in accordance with the principle of non-discrimination and equal treatment referred to in § 5.2 of the TP, the identity of the applicant has no relevance to the Bank's assessment. Should third party documents be requested, in accordance with § 5.9 of the TP, the Bank asks the third party if the information contained in the document shall be considered confidential according to the TP. The EIB asked the Complainant to clarify if its name may be disclosed or not to the third parties in question, which were the Project promoter and the authors of the Lenders' Technical Adviser Due Diligence Report (LTA). On the same day, the Complainant accepted that its name be revealed to the third parties involved in the consultation.

2.2.19 On 2 October 2018, the Complainant contacted the EIB to ask for information about the EIB's reply to CE.1 Confirmatory Application, drawing the EIB's attention to the fact that the final deadline for the reply had expired 29 working days before.

2.2.20 On 3 October 2018, the EIB replied to the Complainant stating that the Bank was endeavouring to reply to CE.1 Confirmatory Application as soon as possible and that it expected to provide a response in the following days, in any case before the end of October.

2.2.21 On 19 December 2018 the Complainant requested an update on the handling of CE.1 Confirmatory Application, drawing the EIB's attention to the expired deadline.

2.2.22 On 8 January 2019, the EIB informed the Complainant that the decision-making process was still ongoing and that the EIB was not yet in a position to provide "*a definite timeline for its conclusion*", while still

endeavouring to finalise the response as soon as possible.

2.2.23 On 27 June 2019, the EIB replied to CE.1 Confirmatory Application, disclosing the following documents and information:

1) the EIB had reviewed its initial reply taking into account any information (environmental or not) contained in the requested documents;

2) as to the applicable legal framework, the reply clarified that "the Treaty on the Functioning of the European Union (TFEU) states, in its Article 15(3), fourth subparagraph, that *the European Investment Bank shall be subject to [paragraph 3] only when exercising [its] administrative tasks.* The legal basis for Regulation 1049/2001 being Article 15(3), second subparagraph, of the TFEU (ex Article 255(2) TEC), the Bank reiterates that it is not applicable to your request." Therefore, the EIB handled the requests on the basis of the TP and interpreted the references to Regulation (EC) No. 1049/2001 as referring to the corresponding applicable provisions of the TP, if any;

3) as to the document referred to in § 2.2.3(1), the EIB satisfied the Complainant's request, apart from § 16 of the minutes of the BoD meeting, which had been redacted in order to protect the promoter's commercial interests;

4) the 3 Pillar Summary Sheet and complementary indicators were disclosed, save redactions in order to protect the Promoter's commercial interests;

5) as to the documents referred to in § 2.2.3(3), in addition to the ESDS, the EIB provided the PJ Appraisal report of March 2018 and the PJ Final Note attached to the Final Loan Proposal of July 2018, save the parts covered by disclosure exceptions (commercial interests, EIB's decision-making process and privacy of the individuals);

6) as to the documents referred to in § 2.2.3(4), the EIB indicated the availability of the ESDS on the EIB website;

7) as to the information referred to in § 2.2.3(5), the EIB reiterated that, although the information contained in the ESDS constitutes the carbon footprint assessment of the Project, detailed carbon footprint calculations were contained in the PJ Appraisal report of March 2018;

8) with regard to the EFSI Scoreboard, the EIB clarified that the document is originally produced without commercially sensitive information pursuant to the EFSI Regulation.

CE.2 Application

2.2.24 On 4 July 2018, the Complainant requested the EIB to provide copies of the following documents:

1) the Opinion of the Government of the Kingdom of Spain referred to under item 11 in the minutes of the EIB BoD meeting held on 12 April 2018;

2) the Opinion of the Commission referred to under item 11 in the minutes of the EIB BoD meeting held on 12 April 2018;

3) the Lenders' Technical Adviser Due Diligence Report described in the Board Report;

4) the Stage II Appraisal of the project;

5) the calculations of ERR described in §§ 26 and 29 of the Board Report;

6) the calculation of FIRR described in § 29 of the Board Report;

7) the Economic and Financial Appraisal described in § 28 of the Board Report.

The Complainant clarified that its request concerned "*environmental information, made under Article 6 of Regulation (EC) No. 1049/2001, as applied by the Aarhus Regulation*".

2.2.25 The EIB explored the possibility of finding a fair solution also for CE.2 Application by means of the e-mail dated 23 July 2018 referred to under § 2.2.10 of this Report.

2.2.26 On 24 July 2018, the Complainant replied to the EIB. The content of the reply referred to in §§ 2.2.11 in the context of CE.1 Application is also relevant for CE.2 Application. Furthermore, the Complainant stressed that Article 6 (2) and 6 (3) of Regulation (EC) No. 1049/2001 "*relates to the type and length of documents rather than the time allowed to produce them*" and expressed the view that the requested documents should be disclosed as soon as possible in line with the requirements of Article 7(1) of Regulation (EC) No. 1049/2001.

2.2.27 On 25 July 2018, the EIB provided the Complainant with partial access to the documents referred to in §2.2.24(1) and in § 2.2.24(2) of this Report. The EIB also extended the time to handle the remaining requests pertaining to CE.2 Application pursuant to Article 5.23 of TP because it related to very long documents and the requested information was not readily available and complex to collate. In particular, the EIB stated that:

1) the LTA was a very long document which, *prima facie*, contained information falling under the exceptions under the TP;

2) the "Stage II Appraisal" was not a document but a process and it was necessary to identify the document(s) and existence of possible exceptions to disclosure;

3) the same reasoning as to (1) and (2) was found applicable to the calculations of the ERR, FIRR and the economic and financial appraisal.

2.2.28 On 26 July 2018, the EIB replied to the Complainant's email of 24 July 2018 concerning the Fair Solution Proposal (see § 2.2.12). On 27 July 2018, the Complainant replied to the EIB's email of 26 July 2018 concerning the fair solution proposal. The content of the reply referred to in § 2.2.13 in the context of CE.1 application is also relevant for CE.2 application. Moreover, the Complainant took note of the EIB's e-mail concerning the extension to process the request and stated that it expected a reply by until 15 August 2018.

2.2.29 On 16 August 2018, the EIB provided the Complainant with:

1) in response to § 2.2.24(3), a redacted version of the LTA. The EIB specified that the redactions were intended to protect the privacy of individuals mentioned therein, intellectual property as well as commercial interests and explained the associated reasons. The EIB also indicated that a confidentiality agreement obliged the EIB to protect the confidentiality of the information;

2) in response to § 2.2.24(4), the clarification that the requested "*Stage II Appraisal*" is a process concerning technical, economic and financial aspects of the financing operation and does not contain environmental information, therefore falling outside of the scope of the Complainant's application. Moreover, even if the Appraisal documents were deemed to fall within the scope of the application, the EIB could not disclose further

information, in light of the need to protect commercial interests, relating to, *inter alia*, details of the technical and technological features of the Project. Further disclosure would also seriously undermine the EIB's decision making-process;

3) with regard to § 2.2.24(5) and to § 2.2.24(6), information that a reply would be provided by the following week;

4) in response to § 2.2.24(7), the clarification that the requested economic and financial appraisal is a process, documented in the Board Report disclosed to the Complainant on 19 June 2018.

2.2.30 Furthermore, the EIB's reply clarified that the EIB understood "*… from your request and the additional clarifications you have provided in our exchanges about our proposal for a fair solution that your request concerns the environmental information contained in the requested documents.*" On the same day, the EIB sought the Complainant's authorisation referred to in § 2.2.15. The further exchanges between the EIB and the Complainant referred to in §§ 2.2.17 and 2.2.18 are also relevant for CE.2 Application.

2.2.31 On 22 August 2018, the EIB provided the Complainant with a redacted version of the requested calculations of the ERR and the FIRR. The EIB stated that the withheld information did not include information on emissions into the environment or the environmental impacts or externalities of the project.

2.2.32 On 6 September 2018, the Complainant submitted the CE.2 Confirmatory Application requesting a review of the EIB's decision of 16 August 2018 (§ 2.2.29), while not contesting the decision of 22 August 2018. The content of §2.2.9 is relevant for the content of the CE.2 Confirmatory Application. The Complainant also alleged the existence of an overriding public interest in disclosure, on the basis that biomass is a controversial renewable energy source, potentially involving considerable negative environmental impacts. In addition, with regard to the LTA and the Stage II internal approval documents, the Complainant alleged that the withheld information also related to information on emissions into the environment. Moreover, with regard to the internal working documents, the Complainant asserted that the exceptions to disclosure had not been interpreted narrowly, as required by the case-law.

2.2.33 On 26 September 2018, the EIB informed the Complainant, pursuant to § 5.23 of the TP, that the CE.2 Confirmatory Application could not be handled within the deadline and that the time-limit thereof had to be extended. In this regard, the EIB stated that its delay was based on the complexity of the case, involving the consultation of external third parties as well as due to the several detailed allegations made by the applicant that the EIB was in the course of reviewing in order to provide the widest disclosure admitted by the TP. Therefore, the EIB would attempt to provide a reply within 30 working days from the receipt of the CE.2 Confirmatory Application, in line with § 5.24 of the TP.

2.2.34 On 2 October 2018, the Complainant replied to the EIB stating that it would await the reply to the Confirmatory Application "*as soon as possible and in any event by 18 October 2018*".

2.2.35 On 18 October 2018, the EIB informed the Complainant that it was not yet in a position to provide a full response to all the issues raised in the CE.2 Confirmatory Application within the deadline set out by Article 5.24 of the TP. The EIB undertook to provide the Complainant with a response "*within the shortest possible period*".

2.2.36 On 23 October 2018, the Complainant contacted the EIB to ask for information about the reply to CE.2 Confirmatory Application, while stressing that the final deadline to provide it had expired 44 working days before.

2.2.37 On 24 October 2018, the EIB replied to the Complainant stating that the EIB was endeavouring to send the reply to the CE.2 Confirmatory Application "*within the shortest possible timeframe*", although it was still not in a position to clearly indicate when.

2.2.38 On 27 June 2019, the EIB replied to the CE.2 Confirmatory Application. The content of the reply referred to in §§ 2.2.23 (1) (2) in the context of CE.1 Application is also relevant for CE.2 Application. Furthermore:

1) As to the document referred to in §2.2.24 (3), the EIB provided a further redacted copy of the LTA, following third party consultation. The EIB specified that redactions were justified by the need to protect (i) commercial interests such as, for example details of technical and technological features of the plant and its equipment, corporate market shares; (ii) the EIB's decision-making process; (iii) the privacy of individuals; and (iv) intellectual property.

2) As to the documents referred to in §2.2.24 (4) and (7), the EIB provided the Complainant with the PJ Appraisal Report of March 2018 and the PJ Final note, save redactions due to TP exceptions, given that the information concerned, for example, project cost components that would undermine commercial interests and the privacy of individuals. In addition, the EIB stated that disclosure of the redacted parts would seriously undermine the EIB's decision-making process by revealing the opinions and professional judgement of the EIB Staff.

CE.3 Application

2.2.39 On 10 July 2018, the Complainant requested the EIB to provide copies of the following documents:

1) the minutes and agendas of all MC meetings at which the Project has been considered;

2) all documents provided to the MC in respect of the Project.

The Complainant clarified that its request concerned "*environmental information*, *made under Article 6 of Regulation (EC) No. 1049/2001, as applied by the Aarhus Regulation*".

2.2.40 The EIB explored the possibility of finding a fair solution also for CE.3 Initial Application in its email dated 23 July 2018 summarised in § 2.2.10 above.

2.2.41 On 24 July 2018, the Complainant replied to the EIB. The content under § 2.2.26 is also relevant for CE.3 Application. In addition, the Complainant clarified that the request under § 2.2.39(2) referred to all documents provided to the MC in connection with the business described in each set of minutes.

2.2.42 On 26 July 2018, the EIB replied to the Complainant's email of 24 July 2018 concerning the fair solution proposal. In this regard, please refer to § 2.2.12.

2.2.43 On 27 July 2018, the Complainant replied to the EIB's email of 26 July 2018 concerning the fair solution proposal. The content of the reply referred to in §2.2.28 in the context of CE.2 is also relevant for CE.3 Application.

2.2.44 On 31 July 2018, the EIB informed the Complainant, pursuant to § 5.23 of the TP, that the CE.3 Initial Application could not be handled within the deadline and that the time-limit had to be extended. The EIB stated that its delay was justified by the need to identify the documents falling under the application. Therefore, the EIB undertook to strive to provide a reply within the following 30 working days from the receipt of the CE.3 Initial Application, in line with § 5.24 of the TP.

2.2.45 On 16 August 2018, the EIB contacted the Complainant in relation to the need to undertake third party consultations. This communication, together with further relevant exchanges between the EIB and the Complainant, is summarised in § 2.2.30 above.

2.2.46 On 22 August 2018, the EIB provided the Complainant with the following information:

1) in response to § 2.2.39(1), the information on the date of the MC meeting on the financing of the project (i.e. 20 March 2018), as well as a summary of the information contained in the agenda and minutes of the MC meeting. The EIB also clarified that such documents do not contain any environmental information;

2) in response to § 2.2.39(2), the ESDS and the Board Report contain all the environmental information mentioned in the documents provided to the MC, except for the EIB's environmental/social rating of the Project and a clarification that "*the project will enhance the sustainability of land management through long-term programmes to preserve and enrich the natural resources in the surrounding areas, which in turn increases economic value in a geographic area threatened by adverse demographic trends*";

The EIB considered the information that was not environmental to fall outside the scope of the application. In any case, even if the information were considered within the scope of the application, its disclosure would undermine the promoter's commercial interests (e.g. details of the EIB's financing terms), also protected by a confidentiality agreement, the EIB's decision-making process and the protection of legal advice.

2.2.47 On 12 September 2018, the Complainant submitted the CE.3 Confirmatory Application requesting a review of the EIB's decision of 22 August 2018. The content of the CE.2 Confirmatory Application referred to in § 2.2.32 is also relevant for CE.3 Confirmatory Application, save for the reference to the existence of an overriding public interest with respect to information on emissions into the environment.

2.2.48 On 3 October 2018, the EIB replied to the Complainant. The content of the reply referred to in § 2.2.14 in the context of CE.1 is also relevant for this reply. On 24 October 2018, the EIB sent a further email to the Complainant. The content of the reply referred to in § 2.2.16 above in the context of CE.1 is also relevant for CE.3.

2.2.49 On 11 December 2018, the Complainant requested further clarification as to the EIB's response. In particular, the Complainant asked whether the EIB had included in the response all MC meetings up to 22 August 2018 or only up to 10 July 2018. If the latter was the case, the Complainant requested confirmation as to whether the Project also appeared on the agenda or minutes of any MC meeting between those dates.

2.2.50 On 12 December 2018, the EIB replied to the Complainant underlining that what was reported in the decision of 22 August 2018 made reference to the MC meetings in which the Project had been discussed, up to 22 August 2018.

2.2.51 On 27 June 2019, the EIB replied to the CE.3 Confirmatory Application. The content of the reply referred to in §§ 2.2.23 (1) (2) in the context of CE.1 is also relevant for CE.3. In addition, the EIB stated that, in respect of the documents referred to in §2.2.38 (2), it was partially disclosing the PJ Final Note (see § 2.2.23 (5)) and had already partially disclosed the Board Report in its reply to CE.1 Initial Application (§ 2.2.6 (2)).

2.2.52 Table 3 presents the dates of the Complainant's three initial and confirmatory applications and the EIB's respective replies.

Table 3 – Time frame of CE.1, CE.2 and CE.3

Initial application	EIB reply	Confirmatory application	Extended deadline for EIB reply	Date of final reply
29 May 2018	19 June 2018	10 July 2018	22 August 2018	27 June 2019
4 July 2018	16 August 2018	6 September 2018	18 October 2018	27 June 2019
10 July 2018	22 August 2018	12 September 2018	24 October 2018	27 June 2019

3. REGULATORY FRAMEWORK

3.1 *The EIB Complaints Mechanism*

3.1.1 The EIB Group Complaints Mechanism Policy and Procedures apply to complaints of alleged maladministration lodged against the EIB Group (Article 1.1 of the EIB Group Complaints Mechanism Policy). The concept of maladministration includes failure by the EIB Group to comply with applicable law and policies or with the principles of good administration. (Articles 3.1-3.2 of the Policy).

3.1.2 When discharging its functions and pursuant to Article 5.3.2 of its Policy, the EIB-CM among others assesses concerns of maladministration raised by complainant(s); evaluates and reports on compliance with the EIB Group's relevant regulatory framework; provides advice and recommendations to the EIB's Management; and follows up and reports on efforts to take corrective actions, whenever applicable.

3.2 *EU Treaties*

3.2.1 Article 15 of the Treaty on the Functioning of the European Union (TFEU) establishes that "*the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible. […] Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. [...] The Court of Justice, the European Central Bank and the European Investment Bank are subject to this provision only when exercising their administrative tasks".*[3]

3.2.2. Article 339 of the TFEU requires of members of the institutions of the Union, the members of committees, and officials and other servants of the Union "*not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components*".

3.2.3 The right to good administration is enshrined in Article 41 of the European Charter. Under this provision, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. This right includes among others the obligation of the administration to give reasons for its decisions.

[3] This provision needs to be taken into account when considering the CJEU case-law on access to documents. The case-law referred to in this Report provides possible guidance for the interpretation and application of the relevant provisions of the TP.

3.3 *The Aarhus Convention*[4]

3.3.1 The Aarhus Convention establishes a number of rights of the public with regard to the environment. The rights are organised under three "pillars": access to environmental informaton, public participation in environmental decision-making and access to justice. The EU has been a party to the Aarhus Convention since 2005. The Aarhus Convention Compliance Committee (ACCC) is the non-judicial mechanism responsible for reviewing compliance with the provisions of the Aarhus Convention. The EU can be challenged before the ACCC for alleged breaches of the Convention by the EIB.[5]

3.3.2 Access to environmental information is regulated under Article 4 of the Aarhus Convention. Under this provision, each party to the Convention shall make available the requested environmental information *"as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it."*

3.3.3 Under Article 3(2), there is a general duty of asistance to the public, whereby "[e]ach Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information…"

3.3.4 According to Article 4(7), "*refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for…The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the resons justifying it*."

3.3.5 Under Article 5(2) there is an obligation to ensure the availability of environmental information to the public by establishing and maintaining practical arrangments, such as publicly available lists, registers or files.

3.4 *The Aarhus Regulation*[6]

3.4.1 The Aarhus Regulation implements the Aarhus Convention for EU institutions and bodies. Article 1 of 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 that Community institutions and bodies ensure that *"environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination*".

3.4.2 Environmental information is defined in Article 2(1)(d) of the Regulation.[7] Articles 3-8 regulate access to environmental information.

[4] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998.
[5] See Communication ACCC/C/2007/21.
[6] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).
[7] "*any information in written, visual, aural, electronic or any other material form on*

1. *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
2. *factors such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);*

3.4.3 The case-law of the Court of Justice of the European Union (CJEU) has, over the years, interpreted the concept of "information relating to the environment" as including a statement of views put forward by a countryside protection authority in development consent proceedings,[8] information submitted within a framework of a national procedure for the authorisation of a plant protection product with a view to fixing the maximum quantity of pesticide,[9] and impact assessments reports in the context of an EU environmental legislative process. [10] At present, there is no case-law of the CJEU clearly establishing that information used as part of the EIB's decision-making process as to the financing of projects is to be (albeit partially) qualified as "information relating to the environment." It appears that the financing operation of a project cannot be considered per se to fall within the definition of "measures" or "activities" indicated in Article 2(1)(d) of the Aarhus Regulation.

3.4.4 From the above definition and in line with the relevant CJEU case-law, it follows that in case of a request for environmental information, an adequate perusal of the information contained in each and every document must be duly carried out.[11]

3.4.5 In relation to disclosure of environmental information, the Aarhus Regulation provides for public access to environmental information either on request or as part of active dissemination by the authorities and institutions concerned.[12]

3.4.6 Regarding the collection and dissemination of environmental information, Article 4 (1) of the Regulation states that *"Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public [...] They shall make this environmental information progressively available in electronic databases that are easily accessible to the public through public telecommunication networks. To that end, they shall place the environmental information that they hold on databases and equip these with search aids and other forms of software designed to assist the public in locating the information they require".*

3.4.7 As regards the grounds to refuse access to environmental information, Article 6 of the Aarhus Regulation refers to the exceptions set out in Regulation (EC) No 1049/2001. Recital 15 of the Aarhus Regulation states that "the term "commercial interests" covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity." Under Article 6(1) of the Aarhus Regulation, in case of exceptions of commercial interests and inspections and audits "*…an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment."*[13] As regards the other exceptions, the

3. *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;*
4. *reports on the implementation of environmental legislation;*
5. *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii);*
6. *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii);"*

[8] Case C-321/96, 17 June 1998.
[9] Case C-266/09, 16 December 2010.
[10] Case C-57/16 P, 4 September 2018.
[11] Case C-612/13 P, 16 July 2015, para. 81. See also the Findings and Recommendations of the ACCC in the case referred to in footnote 5 where it is stated that "*financing agreements, even though not listed explicitly in the definition* [of environmental information], *may sometimes amount to "measures … that affect or are likely to affect the elements of the environment". For example, if a financing agreement deals with specific measures concerning the environment, such as the protection of a natural site, it is to be seen as containing environmental information. Therefore, whether the provisions of a financing agreement are to be regarded as environmental information cannot be decided in a general manner, but has to be determined on a case-by-case basis*".
[12] Case C-673/13 P, 23 November 2016, para. 52. See also Case OI/3/2013/MHZ, para. 47 in which the EO argues that two different obligations are incumbent on public authorities. On the one hand, they are obliged to communicate with citizens and, on the other hand, they must react when the initiative is taken by citizens by asking for information which is not already in the public domain.
[13] See also, General Court (Eighth Chamber), Case T-716/14, 7 March 2019, para. 57; European Court of Justice (Fifth Chamber), Case C-673/13 P, 23 November 2016, para. 54.

grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

3.4.8 Given that the Aarhus Regulation does not provide a definition of what constitutes "information relating to emissions to the environment", case-law has clarified that this concept (a) does not require the need to distinguish between "emissions", "discharges" and "releases", given that emissions and discharges are also releases into the environment; (b) entails that the emissions must be foreseeable and not purely hypothetical; (c) includes data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions, such as information concerning the nature, composition, quantity, date and place of the actual or foreseeable emissions; d) includes information enabling the public to check whether the assessment of actual or foreseeable emissions has been correctly carried out by the competent authority.[14]

3.4.9 On the other hand, 'information relating to emissions into the environment' may not, in any event, include information containing any kind of link, even direct, to emissions into the environment. As recognised by the EU judicature, an extensive interpretation of the concept of "information relating to emissions into the environment" would deprive the concept of 'environmental information' of any meaning. Consequently, it would no longer be possible to rely on the exceptions for disclosure of environmental information.[15]

3.4.10 With regard to the dissemination of environmental information, according to the General Court, "*since authorities and institutions may refuse a request for access to information where that information falls within the scope of a number of exceptions, it necessarily follows that they are under no obligation actively to disseminate that information.*".[16]

3.5 *The EIB Group Transparency Policy*

3.5.1 The EIB Group Transparency Policy (TP) was adopted by the EIB's BoD on 6 March 2015. It sets out the EIB Group's approach to transparency and defines the procedures concerning information requests from the public.

3.5.2 The TP is "*guided by openness and the highest possible level of transparency with the underlying presumption that information concerning the Group's operational and institutional activities will be made available to third parties (the public) unless it is subject to a defined exception ("presumption of disclosure")* […], *based on the principle of non-discrimination and equal treatment and in line with EU legislation* […]" (Article 2.1). Under Article 2.3 of the TP "*The EIB Group understands transparency to refer to an environment in which the objectives of policies, its legal, institutional and economic framework, policy decisions and their rationale, and the terms of its member institutions' accountability are provided to the public in a comprehensive, accessible and timely manner*." [Emphasis added]

3.5.3 The TP is also guided by the principle of ensuring trust and safeguarding sensitive information. *"As financial institutions the members of the EIB Group must maintain the confidence and trust of their clients, co-financiers and investors, and it is necessary to allay concerns about the treatment of confidential information which, otherwise, could affect these partners' willingness to work with the Group and thus impede its members from fulfilling their respective missions and objectives. This Policy ensures that information is protected from disclosure when disclosure would undermine the legitimate rights and interests of third-parties, and/or of the Group in line*

[14] European Court of Justice, (Fifth Chamber), Case C-673/13 P, 23 November 2016, paras 67-79.
[15] *Ibid*., para. 81.
[16] General Court, Case T-111/11, 13 September 2013, para. 128. Following the appeal, the ECJ stated that the European Commission should have not denied access to certain requested documents. The ECJ did not make any reference to the obligation to actively disseminate information (thus, not disputing what previously was stated by the General Court) (European Court of Justice, Second Chamber, Case C-612/13 P, 16 July 2015).

with the exceptions defined in the Policy. However, the Group does not object to third parties making information available on their relationship with the EIB Group" (Article 2.5).

3.5.4 Article 3.8 of the TP provides that *"Article 15(3) of the TFEU also states that such legislation applies to the EIB only when exercising its administrative tasks. The EIB understands that the intention of this provision is that the EIB itself should determine, in a way consistent with the principles of openness, good governance and participation, how the general principles and limits governing the right of public access should apply in relation to its specific functions as a bank. The EIB does this through the Policy and specifically through the applications of the exceptions to access set out in Article 5 below".* The EO decision in case 1316/2016/TN stated that the wording of Article 3.8 TP had been suggested by the same Ombudsman while contributing to the revision of the TP in 2014.

3.5.5 The TP defines the Bank's procedures concerning information made available to the public either on a routine basis (Articles 4.1-4.20) or upon request. Under Article 5.1 of the TP, all information held by the Bank is subject to disclosure upon request, unless there is a compelling reason for non-disclosure. Under the same provision, the TP applies without prejudice to the right of public access to information/documents held by the EIB which might follow from the Aarhus Convention and the Aarhus Regulation.

3.5.6 According to the jurisprudence of the CJEU, the system of exceptions "*is based on a balancing of the opposing interests in a given situation, that is to say, first, the interests which would be favoured by the disclosure of the documents in question and, secondly, those which would be jeopardised by such disclosure. The decision taken on a request for access to documents depends on which interest must prevail in the particular case*".[17]

3.5.7 Under Article 5.3 of the TP, in applying the exceptions to disclosure, the Bank shall, in line with Article 3.8 of the TP, have due regard for its specific role and activities, the need to protect its legitimate interests and the confidentiality of its relationship with its counterparts.

3.5.8 According to Articles 5.4-5.6 of the TP, the Bank will not disclose information that would undermine the protection of, among others, the commercial interests of a natural or legal person[18], the privacy and the integrity of the individual and the Bank's decision-making process[19]. As regards third-party documents, the Bank shall

[17] European Court of Justice, (Third Chamber), Case C-365/12 P, 27 February 2014, para. 63, with further reference.

[18] CJEU case-law has clarified that it is not possible to regard all the information concerning a company and its business relations as requiring the protection which must be guaranteed in respect of commercial interests (General Court, Fourth Chamber, Case T-545/11 RENV, 21 November 2018, para. 100). Therefore, in order to apply the exception in question, it must be shown that the documents at issue contain elements which, if disclosed, would seriously undermine the commercial interests of a legal person. This is the case, for example, when the requested documents contain commercially sensitive information relating, in particular, to (i) the business strategy of the undertakings concerned or to their commercial relations or (ii) where those documents contain information particular to that undertaking which reveal its expertise (Ibid., para. 101) or (iii) business secrets providing likely advantage to competitors (General Court, Fourth Chamber, Joined Cases T-109/05 and T-444/05, 24 May 2011, para. 140) or (iv) thresholds of financial covenants as well as (v) risk analyses relating to a loan (General Court, First Chamber, Case T-307/16, 27 February 2018, para. 119). It may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose (Court of First Instance, (Fourth Chamber), Case T-264/04, 25 April 2007, para. 37). Accordingly, the statement of reasons for refusing access to documents must contain, for each category of documents at least, the specific reasons why the institution in question considered that disclosure of the documents falls within the scope of one of the exceptions to disclosure (General Court, (Fourth Chamber), Joined cases T-109/05 and T-444/05, 24 May 2011, para. 84).

[19] Case-law has asserted that the concept of 'decision-making' must be construed as relating to decision-making, without covering the entire administrative procedure which led to the decision (European Court of Justice, (Fifth Chamber), Case C-60/15 P, 13 July 2017, para. 76). The exception at issue may only be applied if the disclosure of the environmental information would seriously undermine the institution's decision-making process. Therefore, the mere reference to a risk of negative repercussions linked to access to internal documents and the possibility that interested parties may influence the procedure do not suffice to prove that disclosure of those documents would seriously undermine the decision-making process of the institution concerned (*Ibid*., para. 83). The provisional nature of a document is also not capable, as such, of demonstrating that risk, which depends on factors such as the state of completion of the document in question and the precise stage of the decision-making process in question at the time when access to that document is refused, the specific context in which that process takes place, and the issues still to be discussed internally by the institution concerned (European Court of Justice, (Grand Chamber), Case C-57/16 P, 4 September 2018, para. 111). On the other hand, if a decision has already been taken by the institution, reliance on the exception at hand is subject to further strict conditions (European Court of Justice (Third Chamber), Case C-477/10 P, 28 June 2012, para. 77). The exception is only applicable for part of the documents for internal use, namely those containing opinions for internal use as

consult with the third party as to whether the information in the document is confidential, unless it is clear that the document shall or shall not be disclosed (Article 5.9) [20].

3.5.9 Article 5.7 of the TP provides that the exceptions set under Articles 5.5 and 5.6 "*shall apply unless there is an overriding public interest in disclosure*" [21]. Article 5.8. of the TP states that "*The grounds for refusal, in particular as regards access to environmental information/documents should be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment*".

3.5.10 Under Article 5.15 of the TP, "*All requests for disclosure of specific information/documents shall be handled promptly by the Bank, which will either grant full or partial access to the document requested (if only parts of a requested document are covered by any of the constraints above, information from the remaining parts shall be released) and/or the grounds for the total or partial refusal shall be stated.*" In this regard it is worth recalling that the CJEU established that the examination of partial access to a document must be carried out in the light of the principle of proportionality[22] and that the institutions are entitled to refuse partial access in cases where it would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant[23].

3.5.11 Pursuant to Articles 5.22-5.24 of the TP, the EIB commits to reply to disclosure requests without delay, and in any event no later than 15 working days following receipt; in exceptional cases, the time-limit may be extended. The EIB shall however endeavour to reply no later than 30 working days following the request. Exceptional cases, as provided for in the TP, may for example relate to "*a very long document or when the information is not readily available and complex to collate*" (Article 5.23). Time extensions may be reasonably expected for requests concerning "*large volumes of information and information that relates to third-parties*" (Article 5.22, footnote 8). Where, on account of the complexity of the issues raised, a reply cannot be provided within 15 working days following receipt, the correspondent "*shall be informed accordingly no later than 15 working days following receipt*" (Article 5.23).

3.5.12 The CJEU stated that "*The response to the initial request is only an initial statement of position*" and, as such, is not capable of being directly challenged in front of the CJEU, due to its provisional nature. The applicant has the right to request the relevant authority to reconsider its position.[24] This is also the case for the EIB; Article 5.31 of the TP stipulates that unsatisfied applicants may submit a confirmatory application asking the Bank to reconsider its position and that, alternatively, the applicant may lodge a complaint with the EIB-CM within one

part of deliberations and preliminary consultations within the institution concerned. This is due to the circumstance that, once the decision is adopted, the requirements for protecting the decision-making process are less acute, so that disclosure of any document other than those mentioned above can never undermine that process and that refusal of access to such a document cannot be permitted, even if its disclosure would have seriously undermined that process if it had taken place before the adoption of the decision in question (*Ibid*., para. 82). The reasons invoked by an institution and capable of justifying refusal of access to a document before the closure of administrative procedure might not be sufficient for the same document after adoption of the decision, without that institution explaining the specific reasons why it considers that the closure of the procedure does not exclude the possibility that the refusal of access may remain justified having regard to the risk of a serious undermining of its decision making process (*Ibid*., para. 82).

[20] Institutions are under no obligation to consult the third party concerned if it is clearly apparent that the document should or should not be disclosed. In all other cases, the institutions must consult the relevant third party. Consultation of the third party is, as a general rule, a precondition for determining whether the exceptions as to the right of access are applicable in the case of third party documents (General Court, Second Chamber, Case T-245/11, 23 September 2015, para. 222).

[21] It is for the party requesting access to refer to specific circumstances to establish an overriding public interest which justifies the disclosure of the documents concerned (European Court of Justice, Second Chamber, case C-612/13 P, 16 July 2015, para. 90; European Court of Justice, Second Chamber, Case C-127/13 P, 2 October 2014, para. 128). Considerations of general nature, without further and in-depth considerations on how refusal to disclose certain documents would undermine them, are not sufficient to establish that there is an overriding public interest capable of prevailing on the reasons justifying the refusal to disclosure *(Ibid*., para. 93). An overriding public interest in the disclosure of information cannot be inferred from the mere fact, even if it is proved, that the information at issue constitutes environmental information (General Court, Second Chamber, Case T-245/11, 23 September 2015, para. 196).

[22] General Court, First Chamber, Case T-852/16, 7 February 2018, para. 110

[23] Court of First Instance, Fifth Chamber, Case T-204/99, 12 July 2001, para. 69

[24] General Court, Fourth Chamber, Joined Cases T-109/05 and T-444/05, 24 May 2011, paras. 101 and 102.

year of the EIB's response. The EIB's failure to reply to a request within the prescribed time limit shall be considered as a negative reply and entitle the applicant to lodge a complaint before the EIB-CM or to institute court proceedings against the Bank. (Article 5.34).

3.5.13 In cases where the Bank is unable to divulge the requested information in full or partially, Article 5.25 obliges the Bank to state reasons[25]. In this regard, it is worth noting that, according to the jurisprudence of the CJEU[26], from the statement of reasons it should be possible to ascertain whether (a) the document requested does in fact fall within the scope of the exception relied on and (b) the need for protection relating to that exception is genuine. The EU judicature has also recognised that it may be impossible to provide adequate reasons for non-disclosure when, in order to satisfy this requirement, the same content of the document should be disclosed, therefore "*depriving the exception of its very purpose*"[27].

3.6 *Regulation (EU) No 2017/2396 ("EFSI Regulation")*

3.6.1 The purpose of the European Fund for Strategic Investments ("EFSI") is to support investments in the EU, through the supply of risk-bearing capacity to the EIB, contributing to achieving the EU policy objectives. In particular, the EFSI aim is to enable the EIB to provide additional funding to eligible projects in the EU, improving access to financing and the competitiveness of enterprises and other entities, with a particular focus on small and medium-sized enterprises.

3.6.2 In order to identify the eligible projects for funding, the EFSI Regulation envisages the use of the so-called EFSI Scoreboard, "*which is a tool for the Investment Committee to prioritise the use of the EU guarantee for operations that display higher scores and added value*".[28] The EFSI Scoreboard shall be used to ensure an independent and transparent assessment of the possible use of the EU guarantee.[29] According to Article 7(12), second sub-paragraph, of the EFSI Regulation "*the scoreboard,* […]*, shall be publicly available after the signature of a project. The publication shall not contain commercially sensitive information*". In line with the provisions of the EFSI Regulation, EFSI Scoreboards are originally drafted without commercially sensitive information.

3.6.3 The EFSI Guarantee Request Form ("EGRF") contains specific and detailed information provided by the EIB to the EFSI Investment Committee in order for the Committee to adopt its decisions. In this regard, Article 7(12), second sub-paragraph, of the EFSI Regulation provides that "*decisions approving the use of EU Guarantee shall be public and accessible* […] *The publication shall not contain commercially sensitive information. In reaching its decision, the Investment Committee shall be supported by the documentation provided by the EIB*".

3.6.4 Only the decision approving the EGRF, not the guarantee itself, shall be published[30]. The EGRF is meant to enable the EFSI Investment Committee to have all necessary means to make an informed choice.[31]

3.7 Soft law on Good Administration

3.7.1 Articles 7 and 9 of the Code of Good Administrative Behaviour for the Staff of the European Investment Bank in its Relations with the Public refer to general principles of fairness and courtesy. Article 13 further

[25] In case of refusal to access, the institution must clearly explain, on a case-by-case basis (General Court, Second Chamber, Case T-611/15, 24 February 2018, para. 31) how disclosure of that document could specifically and actually (not merely hypothetically) undermine the interest protected by the exception (General Court, First Chamber, Case T-307/16, 27 February 2018, para. 105).
[26] General Court, Fourth Chamber, Joined Cases T-109/05 and T-444/05, 24 May 2011, para. 83.
[27] General Court, Fourth Chamber, Joined Cases T-109/05 and T-444/05, 24 May 2011, para. 82. To this extent, please see also Case T-264/04, para. 37).
[28] Article 7(12), second sub-paragraph, of the EFSI Regulation.
[29] Annex 2, point 7 of the EFSI Regulation
[30] Article 7(12), second sub-paragraph, of the EFSI Regulation.
[31] Annex 2, point 5 of the EFSI Regulation.

contains an obligation to reply to all requests "within an acceptable period, without delay and in any event no later than two months following receipt".

3.7.2 The EO considers that timeliness forms an integral part of the principles of good administration, and in particular the principle of respect for others. Principle 4 of the Public Service Principles, established by the EO to guide EU civil servants, reads as follows: *"Civil servants should act respectfully to each other and to citizens. They should be polite, helpful, timely and co-operative"*.

3.7.3 The European Code of Good Administrative Behaviour lays down the general principles of good administrative behaviour applicable to the EU institutions and their officials in their relations with the public. The code contains the obligation of replying to every request within a reasonable time-limit, without delay, and in any case no later than two months following receipt (Article 17). The code also refers to the general principles of fairness and courtesy (Articles 11 and 12).

4. THE EIB-CM INQUIRY

4.1 In order to address the Complainant's allegations, the EIB-CM reviewed the applicable regulatory framework, the correspondence between the Bank and the Complainant and the documents/information pertaining to the CE.1, CE.2 and CE.2 applications.

4.2 With regard to the allegation concerning the failure to disclose the requested information, the EIB-CM initiated its inquiry by reviewing the EIB's failure to reply to the confirmatory applications within the prescribed time-limit, which on the basis of Article 5.34 of the TP shall be considered as a negative reply. However, during the EIB-CM's inquiry, the EIB provided the Complainant with substantive replies to the confirmatory applications containing the legal grounds relied on to (fully or partially) refuse access.

4.3 Whereas the Complainant has not challenged the EIB's substantive replies to the confirmatory applications, the EIB-CM has only reviewed them with a view to establishing whether additional documents/information had been released by the EIB and examining the time taken for the EIB to reply.

4.4 During its inquiry, the EIB-CM liaised with the Complainant and the Bank's services. The information reviewed during the investigation enabled the EIB-CM to reach findings and conclusions on the allegations as presented in the sections below.

5. FINDINGS AND CONCLUSIONS

5.1 *Failure to disclose the requested information*

5.1.1 Firstly, it is worth recalling that some of the documents have already been proactively published by the EIB. For instance, the full version of the EFSI Scoreboard has been published by the Bank in accordance with the provisions of the EFSI Regulation. In addition, the ESDS, including information regarding the carbon footprint assessment of the Project, was published on the Bank's website.

5.1.2 The EIB-CM takes note that in its replies to the confirmatory applications, the EIB fully disclosed the GHG Footprint Assessment, while providing partial access to a number of documents for which the EIB had provided no or more limited partial access in its replies to the initial applications (LTA due diligence report, PJ Appraisal reports, Board report and Annex 3 - PJ Final Note). Whenever refusing in full or partially access to the requested

documents, the EIB's reply to the confirmatory applications provided the rationale behind the EIB's decision, including an explanation of the exceptions applied in accordance with the TP.

5.1.3 Finally, as to the LTA, the EIB-CM finds that the EIB did not provide a statement of the reasons specifically regarding one instance of non-disclosed information. The EIB-CM invites the Bank to revert to the Complainant in this regard.

5.1.4 Based on the above, the EIB-CM concludes that, with the exception of the instance referred to in § 5.1.3, the EIB has settled the matter by providing the Complainant with additional information or the legal grounds for refusing it.

5.2 *Failure to reply to the Confirmatory Applications within the deadlines*

5.2.1 The EIB-CM takes note that the Complainant lodged its confirmatory applications in 2018 and that deadlines for reply to the different confirmatory applications expired on different dates in 2018 (see Table 3 above). The Bank replied on 27 June 2019.

5.2.2 The EIB-CM considers that although the Complainant's applications were complex, especially due to the need to identify and review the documents/information requested, the timeframe within which the Bank replied is not fully justified. The Bank did not reply to the Complainant in a timely manner in line with the requirements of the TP (see § 3.5.11 above). Therefore, the EIB-CM concludes that the allegation is **grounded.**

5.3 *Systemic issues in applying the legal framework on access to information – maladministration in the handling of information requests*

Mischaracterisation of the scope of the requests

5.3.1 Although in its complaint to the EIB-CM, the Complainant considered that it did not delimit its application to only environmental information (see § 1.9 above), a review of its correspondence to the EIB as part of its applications (see §§ 2.2.3, 2.2.24, 2.2.39) shows that the Complainant defined its applications as requests concerning environmental information.

5.3.2 Furthermore, the EIB-CM notes that, in practice, the EIB provided the Complainant with both environmental and non-environmental information and did not limit its replies to environmental information only. As a result, the EIB-CM concludes that the allegation is **not grounded**.

Failure to apply the correct legal framework

5.3.3 The EIB-CM observes that in the field of access to information, the EIB is subject to a complex regulatory framework (see §§ 3.2-3.7 above). In this regard, the EIB-CM considers that it is correct to rely on the TP as it operationalises the Aarhus Regulation. The TP clearly states that it applies without prejudice to the right of public access to information/documents held by the EIB which might follow from the Aarhus Convention and the Aarhus Regulation (see § 3.5.5 above).

5.3.4 In light of these considerations, the EIB-CM concludes that the applications were handled under the correct regulatory framework. As a result, the EIB-CM concludes that this allegation is **not grounded**.

Failure to identify environmental information

5.3.5 The EIB-CM recalls that the term "environmental information" is defined by the Aarhus Regulation (see § 3.4.2 above) and, as outlined in § 3.4.3 above, at present, there is no case-law establishing that information used as part of the EIB's decision-making process as to the financing of projects is to be (albeit partially) qualified as "information relating to the environment." A review of the case-law of the Aarhus Convention Compliance Committee shows that EIB documents, like the Finance Contracts, may contain environmental information, but that this is not always the case. From a review of the applicable regulatory framework including the relevant case-law, it cannot be inferred that all information about a EIB-financed project qualifies as "environmental information".

5.3.6 As to the underlying cost-benefit and other economic analyses and assumptions within the framework of activities and measures, in the absence of a clear judicial indication that the related activities and measures qualify as "environmental information", it cannot be concluded that they constitute environmental information under the Aarhus Regulation. As a result, the EIB-CM concludes that the allegation is **not grounded**.

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

5.3.7 With regard to the EIB's referral to a partially redacted version of the Minutes of the meeting of the BoD of 12 April 2018, the EIB-CM refers to its conclusions in § 5.1.4 as a wider disclosure of this document has been granted by the EIB in its reply to CE.1 Confirmatory Application (see § 2.2.23 above). Concerning the redactions of the EFSI Scoreboard, from a review of the applicable regulatory framework (see § 3.6 above) and as clarified by the EIB's competent services (see § 2.2.23 (8) above), pursuant to the EFSI Regulation this document is produced without sensitive information. The EIB-CM finds that this allegation is **not grounded**.

5.3.8 As to the EIB's refusal to give access to documents because they form part of a larger process, the EIB-CM finds that in the reply to the CE.2 Initial Application, of 16 August 2018, the EIB specified that "Stage II Appraisal" is a process "whereby the EIB Board of Directors approves a financing operation in principle and delegates the final approval of the loan to the EIB Management Committee (MC). All relevant environmental information related to the appraisal of this particular financing operation was presented to the Board of Directors at Stage I, and is made public as part of the Environmental and Social Data Sheet (ESDS). The Stage II Appraisal of this financing operation only concerned the technical, economic and financial aspects of the financing operation. The Stage II Appraisal documents do not contain any environmental information and therefore fall outside the scope of your request." As for the the economic and financial appraisal, the Bank informed the Complainant that this was a process, documented in the Proposal from the MC to the BoD and which was provided to the Complainant (see § 2.2.6(2)). The EIB-CM further takes note that, in its reply to the CE.2 Confirmatory Application, the EIB identified and provided further documents to the Complainant (§2.2.38), following the submission of the complaint. Therefore, the EIB-CM concludes that that the matter underlying this allegation has been **settled**.

5.3.9 Finally, the EIB-CM observes that in its reply to the CE.3 Initial Application, the EIB provided a summary of the content of the agendas and minutes of the MC meeting (see § 2.2.46), without relying on the exceptions set forth in the TP, due to the fact that it specified that no environmental information was contained therein. This approach seems to be reasonable in line with the EIB-CM's findings and conclusions referred to in §§ 5.3.1 and 5.3.2 above.

Misapplication of the exceptions to disclosure and failure to state reasons

5.3.10 The EIB-CM recalls the jurisprudence of the CJEU referred to in § 3.5.11 of this Report. Based on the above, the EIB-CM concludes that at that initial application stage, the EIB was not required to explain in further detail the reasons for non-disclosure of certain documents/parts thereof. As a result, the EIB-CM concludes that the allegation is **not grounded**.

Error of law in relying on the exception relating to commercial interests

5.3.11 The EIB-CM's review shows that, in the instances raised by the Complainant, the EIB clearly explained why disclosure of some of the requested information would undermine the protection of commercial interests, and only as a residual remark highlighted the existence of a confidentiality agreement (see §§ 2.2.29 (1) and 2.2.46). Therefore, it appears that, notwithstanding the existence of a confidentiality agreement, the EIB carried out a case-by-case assessment in order to ascertain whether it was possible to disclose the requested information. Finally, the fact that the EIB decided to consult third parties shows that the EIB did not consider the existence of a confidentiality agreement as establishing a presumption of confidentiality. As a result, the EIB-CM concludes that the allegation is **not grounded**.

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

5.3.12 As indicated in the case-law mentioned in § 3.5, it is for the party requesting access to refer to specific circumstances to establish an overriding public interest which justifies the disclosure of the documents concerned. The EIB-CM notes that in the context of CE.1, CE.2 and CE.3 Initial Applications, the Complainant did not in any way raise the existence of an overriding public interest in disclosure.

5.3.13 As a result, the EIB-CM concludes that the allegation related to failure to consider the overriding public interest in disclosure is **not grounded**.

5.4 *Further issues of maladministration in the handling of the information requests*

Misleading information about the timeline

5.4.1 Although the TP does not impose such an obligation on the Bank, the EIB-CM considers that it is good practice to keep applicants regularly informed of the progress of requests for information and documents once the deadlines to provide an official answer have exprired. In the context of the CE.1, CE.2 and CE.3 Confirmatory Applications, the EIB replied on 27 June 2019, i.e. with a delay of respectively 10, 8 and 8 months. It is worth highlighting that although throughout the process the EIB and the Complainant had more than 30 exchanges (see Table 2), of which about 20 originated from the EIB, for a period of time between 8 January 2019 and the final replies of 27 June 2019, the EIB did not engage with the Complainant.

5.4.2 The EIB-CM finds that, in line with the applicable regulatory framework (see §3.5.11 of this Report), the EIB's failure to provide the Complainant with information on the updated timeline for the handling of the applications did not in fact negatively affect the Complainant's access to the available remedies. However, the EIB-CM considers that the EIB should have continued to engage with the Complainant throughout the processing of the confirmatory applications, as a matter of courtesy and good administration. For this reason, the EIB-CM considers that the allegation is **grounded.**

Failure to treat the requests separately

5.4.3 While the EIB-CM understands that applications submitted on different dates trigger different timeframes, it cannot fail to note that the three applications concerned the same project and in some cases overlapped documents and information. For this reason, the EIB-CM considers that the EIB's initiative to propose a fair solution to the Complainant was reasonable and in the interest of administrative efficiency. Conversely, the EIB-CM considers that the Complainant's refusal to accept the EIB's proposal was unfortuntate.

5.4.4 From a review of the documentation, it results that the Bank in practice treated the requests separately, sending three different replies to the initial applications, as well as three different replies to the confirmatory applications (see Table 3 above). As a result, the EIB-CM considers that the allegation is **not grounded**.

5.5 *Failure to proactively disseminate information*

Failure to publish environmental information

5.5.1 As for the general point about failure to actively disseminate environmental information, which was the subject of a previous complaint, on 3 April 2019 the EIB provided the Complainant with a reply including the EIB-CM's Conclusions Report. [32]

5.5.2 With regard to the specific allegation raised as part of the present complaint, the applicable regulatory framework (see § 3.4.6) establishes an obligation to make environmental information as defined in Article 4 of the Aarhus Regulation "*progressively available".* The EIB-CM observes that in respect of the project in question, the EIB has published on its public register the ESDS, the Non-Technical Summary in Spanish and, as of 22 July 2019, the Environmental and Social Impact Assessment (ESIA) in Spanish.

5.5.3 The EIB-CM further notes that in decision OI/3/2013 the EO recognised that the ESDS summarises the environmental information gathered by the EIB as part of its due diligence. As for environmental information gathered as part of the EIB's monitoring, such information is published by the Bank in a document entitled Environmental and Social Completion Sheet (ESCS). Based on the above, the EIB-CM concludes that the allegation is **not grounded**.

Failure to inform about information held by the Bank

5.5.4 With regard to environmental information gathered as part of its activities, the EIB fulfils the obligation to publish it through its public register[33], whose objective is also to inform the public about environmental information held by the Bank. With regard to the duty to establish a public register of documents established by Regulation 1049, the EIB-CM notes that such obligation does not exist under the regulatory framework applicable to the EIB, (see §§ 3.2.1, 3.3 and 3.5). However, the EIB informs the public about key documents produced during the EIB project cycle and publishes a list of such documents on the EIB website[34]. Based on the above, the EIB-CM concludes that the allegation is **not grounded**.

5.6 *Final remarks*

5.6.1 The EIB-CM recognises the complex nature of the applications, involving assessment by the EIB services of many different documents for the purpose of disclosure. In this regard, it is important to recognise the

[32] https://www.eib.org/attachments/complaints/conclusions-report-transparency-policy-sg-g-2016-012.pdf
[33] https://www.eib.org/en/registers/index.htm. See also Guide to accessing environmental and social information/documents held by the EIB at https://www.eib.org/attachments/access_to_information_en.pdf
[34] https://www.eib.org/attachments/consultations/eib_group_tp_list_of_eib_documents_en.pdf

commitment of the EIB services to deal with this complexity and enhance the transparency of the EIB as part of the Bank's reply to the confirmatory applications.
5.6.2 Based on its inquiry, the EIB-CM found that the majority of the allegations are not grounded. The EIB-CM found that in handling the Complainant's applications, the Bank failed to comply with its obligations to reply within the time prescribed by the relevant regulatory framework. Although the preparation of the EIB's replies presented a certain level of complexity justifying a delay in the completion of these procedures, the time that the Bank took in order to issue its replies was not reasonable and, in any case, went well beyond the timeframe envisaged by the applicable regulatory framework. Furthermore, the EIB-CM found that, in 2019, the EIB did not proactively engage with the Complainant to keep it informed about the developments of the procedure and a new timeframe, if possible, for its reply to the confirmatory applications.

5.6.3 With regard to the documents/information claimed as part of the present complaint, the EIB-CM found that with the exception of the instance referred to in § 5.1.3, the EIB has settled the matter by providing the complainant with additional information or with the reasons for refusing disclosure.

6. RECOMMENDATIONS

6.1 Following up on the conclusions above, the EIB-CM recommends the following to the Bank:

- In two recent cases[35], the EIB-CM recommended improvements to the EIB's systems and procedures when dealing with applications. In particular, the EIB-CM underlined the need for development of detailed implementation guidelines/arrangements for handling applications in complex cases which could cover issues such as workflow and processes, timelines and responsibilities for the different steps involved, and the need to distinguish certain steps for different categories of documents and types of information. The EIB-CM reiterates its recommendations also with reference to the present case.

- As to the LTA, the EIB-CM finds that in respect of one instance of non-disclosed information the EIB should revert to the Complainant to confirm whether or not disclosure exceptions specifically apply also to that information.

6.2 The EIB-CM will monitor the implementation of its recommendations within 12 months of the date of issue of this report.

S. Derkum
Head of Division
Complaints Mechanism
11 March 2020

V. Stoeva
Complaints Officer

11 March 2020

[35] SG/A/2019/02 African Lion Mining Fund III https://www.eib.org/en/about/accountability/complaints/cases/african-lion-mining-fund-iii and SG/A/2019/03 Corridor Côtier- Section Nord https://www.eib.org/en/about/accountability/complaints/cases/corridor-cotier-section-nord

LIST OF ACRONYMS

ACCC	Aarhus Convention Compliance Committee
BoD	Board of Directors
CJEU	Court of Justice of the European Union
EFSI	European Fund for Strategic Investments
EIB	European Investment Bank
EIB-CM	EIB Group Complaints Mechanism
EO	European Ombudsman
ESDS	Environmental and Social Data Sheet
ESIA	Environmental and Social Impact Assessment
LTA	Lenders' Technical Adviser Due Diligence Report
MC	Management Committee
TFEU	Treaty on the Functioning of the European Union
TP	EIB Group Transparency Policy