

September 2014

Review of the EIB transparency policy

Introduction

1. We welcome the simplification and the more user-friendly aspect of the policy.
2. We also welcome the commitment of the EIB to act transparently and to engage with representatives of civil society and stakeholders affected by the projects the Bank finances.
3. We, however, have some concerns about some of the proposals made in the draft which tend to restrict the scope of the right of access to information. We also regret that the Bank has not taken the opportunity of this revision to amend some of the policy provisions that are way too vague to have any legal meaning and leave too much discretion to the Bank to decide on the disclosure of information. This lack of clarity prevents external stakeholders from having any legal certainty about the applicable rules on transparency. Other provisions are not in line with the applicable legal framework enshrined in Regulation 1049/2001, Regulation 1367/2006 and Article 4 and 5 of the Aarhus Convention. We address all these issues in the sections below.

Compliance with EU law (section 3.3)

4. In section 3.3 of the draft policy, it is stated that the EIB activities "*respect EU policies and laws*". This statement could be made clearer, by stating that the EIB will ensure that EU law is complied with.
5. In the environmental sector, it happens that projects are realised without the mandatory environmental impact assessment having been made beforehand. The EU Court of Justice has stated on several occasions that in such case, the permit, which authorises the project to proceed, is not valid. This practice should not be accepted by the EIB financing such projects.

Administrative tasks (section 3.5)

6. Section 3.5 of the draft provides that according to the fourth indent of Article 15(3) TFEU, the EIB is subject to the rest of the paragraph of Article 15 only when exercising their administrative tasks. This implies that the EIB is subject to Regulation 1049/2001 only when exercising their administrative tasks.
7. However, the draft still does not clarify what "*administrative tasks*" means.
8. Admittedly, Article 15(3) TFEU is not drafted in too clear a manner. In public law, a distinction is made for activities exercised by public authorities between legislative, administrative and judicial tasks. As regards the Court of Justice, which is also mentioned in Article 15(3) TFEU, the differentiation clearly refers to judiciary activities on the one hand, and to administrative (non-judiciary) activities on the other hand. The latter concern for example statistics, press releases, repartition of work among judges etc.
9. With regard to the EIB, this differentiation is not relevant, as the Bank does not carry out any legislative or judicial activities. Arguably, all activities of the EIB are - in accordance with the

distinction between legislative, administrative and judicial activities - administrative tasks. it is thus redundant to state that the Regulation only applies to the Bank when exercising administrative tasks. However, that does not prevent some of the information on the activities of the Bank to remain confidential provided it falls under the scope of one exceptions provided either by Regulation 1049/2001 or by the Aarhus Convention.

10. The case-law of the Court of Justice also evidences the fact that the word "*administrative*" is used to describe different types of very substantial actions. It also demonstrates that administrative functions are very broad and do not only concern organizational tasks. For example, in case T-111/07¹, the court considers that when the Commission acts as a control body in proceedings related to merger investigations under Regulation 139/2004 it does so as an administrative authority. In Case C139/07 P, the Court held that "*documents relating to procedures for reviewing state aid, such as those requested by TGI, fall within the framework of administrative functions specifically allocated to the said institutions by Article 88EC*"².
11. Article 2(2) of Regulation 1367/2006 provides another example of what the term "administrative tasks" may include, as it refers to "administrative acts" define as "any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects". The regulation also refers to "administrative omissions" as well as the capacity of the Commission as "*an administrative review body such as under*" competition rules and infringement proceedings. It also include Ombudsman proceedings and OLAF proceedings under that definition³.
12. An Environment Impact Assessment is considered as being an administrative procedure as well.
13. All these examples therefore demonstrates that the word administrative refers to functions of the Commission as well as the decision it takes as opposed to the legislative and quasi-judicial ones. By analogy, the activities of the EIB as an EU body must also be qualified as administrative.
14. The draft policy further specifies in point 5.1a) that information/documents held as part of the exercise of the Bank's administrative tasks is subject to disclosure upon request and makes a distinction with the other type of information/documents held as part of the exercise of its non-administrative tasks. This is confusing as there is no way to know what types of information/documents pertain to the different categories and prevents the public from having any legal certainty and foreseeability.
15. We therefore call on the Bank to apply the relevant legal framework constituted by Regulation 1049/2001, Regulation 1367/2006 and the Aarhus Convention to all the information held by the Bank which pertains to its lending activity.

¹ T-111/07, *Agrofert Holding a.s. v Commission*, 7 July 2010, see paragraphs 93 and 129.

² Paragraph 60.

³ Article 2(2) (a)(b)(c)(d) of Regulation 1367/2006.

Compliance with the Aarhus Convention (sections 3.7, 3.8)

16. Sections 3.7 and 3.8 of the draft do not mention the Aarhus Convention. It is, however, mentioned in section 5.1, where it is said that the applicable EIB rules are "*without prejudice*" to the rights which individuals and NGOs derive from the Aarhus Convention.
17. According to Article 216(2) TFEU, the Aarhus Convention is binding on the institutions and bodies of the EU and became an integral part of EU law. It is also settled case-law that international agreements adhered to by the EU prevails over secondary EU law.
18. For these reasons, it appears necessary to also mention the Aarhus Convention under sections 3.7 or 3.8.

Public register (sections 4.1, 4.3, 4.12)

19. Section 4.1 of the draft states that it is "Within the limits imposed by applicable laws and regulations, the final determination as to what information may be released to the public shall rest with the Bank who shall also decide which documents to publish, through its website and/or paper form, and which documents are available on requests only".
20. The relevant provisions of Regulations 1049/2001 and 1367/2006 should be referred to as even if the Bank has a margin of discretion in deciding which documents will be published or made publicly accessible on request, it still has an obligation to publish the information that exists and that it holds in the register even if it does not intend to disclose it. The purpose of the register is to inform the public on the existing information.
21. Article 4 of Regulation 1367/2006 provides that the environmental information "relevant to their functions" [of EU institutions] shall be organised "*with a view to its active and systematic dissemination to the public*" meaning that a wide range of information must be processed and made available.
22. The list of information provided by Article 4(2) of the regulation is not exhaustive and includes "data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment" as well as "*authorisations with a significant impact on the environment, and environmental agreements*" and "*environmental impact studies and risk assessments concerning environmental elements*". This information should thus be the priority of the Bank, however it is not the only type of information that needs to be placed in the register. The fact that the EIB is a financial institution does alter the obligation imposed by the regulation.
23. Indeed, Article 5(2) (a) of the Aarhus Convention provides that each Party shall provide "sufficient information to the public about the type and scope of environmental information held by the relevant public authorities".
24. It is also not clear what documents are to be considered "of general public interest". Also, the terms "could" and "interest a large number of stakeholders and/or members of the public" are not specific enough. It is not clear what "large number" refers to, how many people would that be.

25. Reports carried out by the relevant departments of the bank on environmental and social background, context and impact of the project, on-site visits, projects indicators, and any other relevant environmental information needs to be listed in the register.
26. For these reasons, section 4.2 of the draft is way too vague to comply with the requirements of Article 4 of Regulation 1367/2006 and 11 and 12 of Regulation 1049/2001 as it leaves too much discretion to the Bank. Quoting the relevant provisions of Regulation 1367/2006 would make the requirements applicable to the Bank clearer and it would make its commitment to comply with the "*applicable legislative framework*" on a public register (as stated in section 4.12) more consistent.

Project information (section 4)

27. We regret that the EIB intends to delete the wording of section 4.3.2 of the policy which provides that "All public sector projects are included on the Project list on the Bank's website, at least 3 weeks prior to Board approval, as are all private sector projects when there has been a call for international tender published in the Official Journal of the European Union and/or which have been subject to an environmental Impact Assessment (EIA)".
28. The new draft is clearly a step backward towards less transparency which is not justified. The fact that the EIB published these projects until today shows that this practice is possible and does not undermine the decision-making process of the Bank. The new draft runs counter the commitment of the Bank to transparency.
29. As already stated in previous comments addressed to the Bank, the distinction between public sector projects and private ones is not allowed either under the Aarhus Convention, Regulation 1049/2001 or Regulation 1367/2006. The Bank is required to examine on a case by case basis whether the commercial interests of the promoter would be undermined by disclosure. Especially if it's just about publishing project summaries.
30. We can infer that if the Board does not approve the financing of a project, this decision will be based on sound and solid reasons and arguments and should therefore be made public. Moreover, the fact that the disclosure of this decision would undermine the commercial interests of the project promoter as mentioned during the public consultation meeting, still needs to be demonstrated. Indeed, it is settled case-law that the risk of a protected interest being undermined by disclosure must be reasonably foreseeable and not purely hypothetical⁴. It must also be demonstrated that the interest will be specifically and effectively undermined.
31. Additionally, the provision is drafted in a much too broad way and leaves way too much discretion to the EIB. The term "*justified*" is not appropriate, it is too subjective. With regard to environmental information, Article 4(4) of the Aarhus Convention uses the term "*legitimate*", which requires the EIB to control whether indeed the commercial interests of an applicant must be protected and must prevail over the fundamental right of the public to access to information.

⁴ Case C-64/05P, *Sweden v Commission*, [2007] ECR I-11389.

32. The fact that disclosure would undermine commercial interests is not enough to refuse access to the requested information and does not allow confidentiality systematically. The EIB is required under Article 4(2) of Regulation 1049/2001 to demonstrate that there is no overriding public interest in disclosure.

Exceptions to the right of access (section 5)

33. Regulation 1049/2001 provides for “absolute” grounds for refusal. Article 4 (1) and 4(2) provide that “*The institutions shall refuse access...*” and list exceptions to refuse access to information. Whereas Article 4(3) and 4(4) of the Aarhus Convention state only that “*a request for environmental information may be refused if...*” one of the conditions listed in the paragraph is fulfilled. Where the Regulation sets out an obligation to refuse access, the Convention only provides the possibility of doing so. It leaves a certain discretion to the public authorities which have to decide on the disclosure of information in a specific case, whether or not they disclose the environmental information. An official working for an EU institution is obliged to withhold a piece of information if it falls under the scope of an exception in Regulation 1049/2001, whereas she/he is offered a choice in deciding whether to disclose or withhold information despite the fact that an exception provided by the Aarhus Convention applies. The distinction between the obligation and the mere possibility to refuse to provide access is not correctly transposed in EU law which results in keeping more environmental information confidential.
34. Furthermore, the exception of “*financial, monetary or economic policy of the EU, its institutions and bodies or a member State*” does not exist in the Aarhus Convention. Thus, this exception should not apply to environmental information. Section 5.4 of the draft should therefore be made more specific and distinguish between environmental and non-environmental information.

Confidentiality agreements (section 5.5)

35. Section 5.5 of the draft on the protection of commercial interests and the reference to confidentiality agreements mentioned in the footnote 4 is not clear enough. The Aarhus Convention Compliance Committee⁵ held that finance contracts concluded by the Bank may contain environmental information falling under the scope of the Convention. Agreements cannot therefore be rubber stamped “confidentiality agreements” and be withheld from the public in their entirety. The Bank must carry out a case specific examination to be argued on its merits.

⁵ ACCC/C/2007/21 Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Union adopted by the Compliance Committee on 3 April 2009.

Presumption of confidentiality (section 5.5)

36. The new exception on "*inspections, audits and compliance and due diligence*" provided in section 5.5 of the draft is much too broad and is as such not acceptable. This is the case for several reasons laid down below.
37. The draft exemption applies the case-law of the CJEU in which the Court set out the conditions according to which access to documents contained in administrative files under competition law procedures can or cannot be provided.
38. In case C-139/07, the Court established a presumption of confidentiality applying to the administrative file held by the Commission within state aid review procedure. The Court held that for the purpose of interpreting the exception laid down in Article 4(2), third indent, of regulation 1049/2001, there was "*a general presumption that disclosure of documents in the administrative file [in state aid review procedure] in principle undermines protection of the objectives of investigation activities*".⁶
39. This presumption of confidentiality has been replicated in the context of merger control proceedings in case C-404/10P⁷ and in investigations carried out by Olaf in case T-447/11⁸.
40. However, in the state aid and merger control contexts, the Court drew its presumption from the applicable legal frameworks to both fields of EU law enshrined respectively in Regulation 659/1999⁹ and Regulations 4064/89¹⁰ and 447/98¹¹ which contain specific provisions on access to information pertaining to the relevant files. In these contexts, pieces of EU legislation already provided that parties other than the Member States concerned in the procedures do not have the right to consult the documents in the Commission's file and that certain documents would not be disclosed. No such pieces of regulation exists with regard to the EIB. This case-law has therefore been adopted in a very specific context, completely different from the one of the Bank's activities. Another noticeable difference is that the information that was requested in these cases was of a different nature than the one that would be sought from the Bank.
41. The presumption of confidentiality cannot therefore be transplanted into the EIB funding activities context.
42. Moreover, only in *Odile Jacob*, did the court allow disclosure to be refused after the investigation was closed. However, that was in a merger control proceeding context. Nothing to do with the EIB's activities or Olaf investigations. The EIB cannot therefore transplant the ruling of the Court in that specific case into its own transparency policy.

⁶ Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, ECLI:EU:C:2010:376 para.61

⁷ Case C-404/10, *Lagardere SCA v Editions Odile Jacob*, ECLI:EU:C:2013:808.

⁸ Case T-447/11, *Lian Catinis v Commission*, ECLI:EU:T:2014:267

⁹ Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L83, p.1)

¹⁰ Regulation No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p.1)

¹¹ Regulation No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1998 L 61, p.1).

43. On the contrary with regard to Olaf investigation proceedings, the General Court, in case T-447/11, insisted several times in its ruling on the fact that the investigation was still on-going at the time the access to document request was made¹². The Court held that "*it is common ground that the eight documents in question do in fact relate to investigations within the meaning of that provision and that investigations were on-going at the time that decision was adopted*"¹³. The court explains how disclosure of certain information would have undermined the investigation at the time it was being carried out¹⁴. It can therefore be inferred from that ruling that had the investigation been closed the Court would have decided differently.
44. The proposed provision in the EIB 's policy to keep documents confidential even once the investigation is closed is therefore not in line with the interpretation of the Court.
45. Additionally, the Court recalled that "*the fact that a document concerns an inspection or investigation cannot in itself justify the application of the exception involved. The institutions concerned must also provide explanations as to how disclosure of such a document could specifically and actually harm the interest protected by one of the exceptions provided for in Article 4(2) of Regulation No 1049/2001*"¹⁵. The obligations to provide adequate reasons and to examine whether there is an overriding public interest justifying disclosure of the documents in question must also be complied with despite of the possibility to subsume documents under the presumption.
46. According to the Court, Olaf had carried out the required examination and provided adequate reasons and could therefore apply the presumption of confidentiality.
47. Additionally, the draft exemption provides that the presumption will apply to "**all** [*emphasis added*] *information and documents collected and generated during inspections, investigations, audits and compliance due diligence*". This provides a blanket exemption to any information or documents held by the Bank which goes further than what the court allows. This exempts the EIB from carrying the required assessment by the Court to determine whether the requested documents and information fall under the scope of the exception enshrined in Article 4(2) third indent of Regulation 1049/2001, to provide adequate reasons and assess whether there is an overriding public interest in disclosure.
48. It follows from the foregoing that section 5.5 of the draft policy stretches the case-law of the Court beyond any reasonable limits and unduly applies it to the EIB's activities.
49. During the public consultation meeting held on the 10th September, some concerns were raised by the Bank about the fact that the EIB and Olaf should have similar policies so that investigations carried out by both bodies are consistent and that a climate of mutual trust is ensured. However, not all investigations on the EIB's activities are carried out with Olaf. The Bank is therefore not bound by Olaf's policy and stance on the matter when it investigates on its own.
50. Finally, it is not only a legal issue. This section of the policy contravenes the commitment of the EIB to act openly and transparently. The Bank should deal with maladministration,

¹² Case T-447/11, paras 51, 56, 60.

¹³ Case T-447/11, para 51.

¹⁴ Case T-447/11, para. 54.

¹⁵ Case T-447/11, para 53.

illegality, fraud and corruption in a responsible and accountable manner. It should deal with these issues and show the public that it does so that any suspicion is alleviated and that citizens have trust in the Bank and in the EU institutions at large. The draft policy as it stands, with section 5.5, gives the exact opposite impression, that is that the EIB intends to keep any matter related to corruption, fraud and violation of the law internal and confidential. Yet, it is transparency that prevents corruption and confidentiality that allows it.

51. We therefore recommend the EIB to delete the new wording of the revised draft and keep a simple reference to the exception on the protection of the purpose of the inspections, investigations and audits enshrined in Article 4(2) third indent of Regulation 1049/2001. The case-law of the Court will need to be applied on a case by case basis as appropriate.

New exception on selection procedure (section 5.5)

52. The new exception on the protection of the objectivity and impartiality of selection procedures is also questionable and nowhere mentioned in the applicable regulations or Convention. These procedures should be transparent and open.

Member States objection (section 5.10)

53. Section 5.10 of the draft policy does not comply with the ruling of the Court of Justice in case C-64/05P *Sweden v Commission* since it provides that a Member State from which the requested document originates but which is held by the Bank, may refuse granting access to it by giving reasons based on the exceptions set out in Article 4(1) to (3) of the regulation but also on the provisions of its national legislation.
54. The Bank's proposal implies that access to documents of the same kind and of the same importance which would shed light on the EU decision-making process could be granted or refused solely depending on the origin of the document. Documents likely to have played a decisive role in the decision of the Bank would thus sometimes be accessible to the public and sometimes not depending on the rules on access to documents of the Member State which would have transmitted the document to the Bank to influence its decision.
55. This directly contravenes the jurisprudence of the Court according to which Member States do not have a right of veto and that to refuse to disclose a document they must rely on the exceptions provided by Regulation 1049/2001. The judgment of the Court of Justice in case C-64/05P stated that:

“Article 4(5) of Regulation No 1049/2001 cannot be interpreted as conferring on the Member State a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution, with the effect that access to such documents would cease to be governed by the provisions of that regulation and would depend only on the provisions of national law.

On the contrary, several factors militate in favour of an interpretation of Article 4(5) to the effect that the exercise of the power conferred by that provision on the

Member State concerned is delimited by the substantive exceptions set out in Article 4(1) and (3), with the Member State merely being given in this respect a power to take part in the Community decision.¹⁶[emphasis added]

56. The Bank's proposal should thus be amended accordingly as the Member States constitute an important source of information and documentation which contribute to the Community decision-making process. The effectiveness of the right to public access would be substantially reduced if the States could rely on provisions of national legislation other than the one implementing article 4 of the regulation.
57. In addition, it should be clear that the final decision, to grant or refuse to grant access, lies with the institution, body, office or agency holding the requested document. Indeed, according to the court, "*the institution is itself obliged to give reasons for a decision to refuse a request for access to a document. Such an obligation means that the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access in Article 4(1) to (3) of the regulation applies*"¹⁷.
58. The Bank shall thus assess the reasons given by the Member States to decide whether the requested documents should be publicly accessible and not only rely on the arguments provided by the Member States.

Confidential relationship (section 5.11)

59. The sentence in Section 5.11: "*information/documents typically forming part of the Bank's confidential relationship with its business partners*" does not set out clearly the type of information covered by this provision and is therefore not specific enough to be applicable.
60. The vagueness of the exception provided under section 5.11. of the draft results in a misleading situation for the public, a lack of legal uncertainty and in a breach of the Aarhus Convention.
61. The language is simply not legal and as a result does not allow the public and potential applicants for access to information held by the EIB to know what information is covered by the exemption. By using the words "typically" and "confidential relationship" without explaining what these enshrine, no useful guidance is given. Instead, way too much discretion is provided to the EIB to resort to this exception to withhold information, including environmental one, in violation of the Aarhus Convention, Regulations 1049/2001 and 1367/2006.
62. It is nowhere define in the policy and impossible for the laymen to know what "typically" forms part of the confidential relationship between the EIB and the project promoter. Yet, the European Court of Justice has constantly held that the principle of legal certainty is a fundamental principle of EU law which requires, in particular, that rules should be clear and

¹⁶ Case C-64/05P, *Sweden v Commission*, [2007] ECR I-11389, paragraphs 75 and 76.

¹⁷ Case C-64/05P, *ibid*, paragraph 89.

precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly¹⁸. This principle was reaffirmed and applied in *Intertanko*¹⁹.

63. Moreover, with regards to environmental information, even information contained in a finance contract concluded between the EIB and a project promoter must be disclosed²⁰. There is thus almost no environmental information which can be kept confidential even if it was contained in the so called "confidential relationship" between the EIB and the project promoter.
64. It follows that section 5.11 of the draft departs from the exceptions allowed under Article 4 of the Aarhus Convention and from the ones provided by Article 4 of Regulation 1049/2001. Besides, it is not clear what this provision adds to the one provided in Article 4(2), first indent, of Regulation 1049/2001 on the protection of commercial interests and in Article 4(3) on the decision-making process of EU institutions.

Disclosure of Framework agreements (section 5.16)

65. On Section 5.16, we refer to the point made about section 5.10 of the draft. Framework agreements should not be exempted from the general regime of exceptions set out by Regulation 1049/2001 and the Aarhus Convention and be kept confidential only because the country opposes to disclosure.

Time limits (section 5.23 and 5.25)

66. The footnote 7 of Section 5.23 of the draft provides that deadlines to reply to requests to access documents originating from third-parties may be expanded. Neither Regulation 1049/2001 nor the Aarhus Convention allow the time-limit to be extended even for third parties documents.
67. Section 5.24 of the draft deletes the former wording of the policy which provides that "the correspondent shall be informed without delay and no later than 10 working days following receipt". The draft constitutes a step backwards since it replaced this wording by "at the earliest possible date" which is much more subjective and does not provide any guarantee or predictability as to when a reply will be given. This is not acceptable as the applicant needs to be informed on the time-span within which he/she will get a reply.

¹⁸ Case 169/80 *Administration des douanes v Société anonyme Gondrand Frères and Société anonyme Garancini* [1981] ECR 1931, [17]; Case C-143/93 *Gebroeders van Es Douane Agenten BV v Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431, [27]; Case C-110/03 *Belgium v Commission* [2005] ECR I-2801, [30]; Case C-158/06 *Stichting ROM-projecten v Staatssecretaris van Economische Zaken* [2007] ECR I-5103, [25]; Case T-240/04 *France v Commission* [2007] ECR II-4035, [48]-[49]; Case T-94/98 *Alferink v Commission* [2008] ECR II-25, [65]; Case C-201/08 *Plantanol GmbH & Co KG v Hauptzollamt Darmstadt* [2009] ECR I-8343.

¹⁹ Case C-308/06 *The Queen (on the application of Intertanko) v Secretary of State for Transport* [2008] ECR I-4057, [69]-[80].

²⁰ Aarhus Convention Compliance Committee, Draft findings and recommendation with regards to compliance by the European Community with the obligations under the Aarhus Convention in relation to decision-making by the European Investment Bank, Communication ACCC/C/2007/21, paragraph 29(b).

Costs (section 5.29)

68. Section 5.29 of the draft should be clarified as according to Article 10 of Regulation 1049/2001, only the cost of producing and sending copies may be charged to the applicant.

Provisions for Appeals

Complaints mechanism (sections 5.35 and 6)

69. Section 5.35 of the draft provides that in the event of a refusal to provide access following a confirmatory application, the applicant may make a complaint using the complaint mechanism in accordance with Section 6. However, Article 8(1) of Regulation 1049/2001 provides that "in the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively". According to Article 8(3) of the regulation, failure to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to use the same remedies.

70. The additional step of making a complaint to the complaint mechanism of the Bank is therefore not in compliance with the regulation as it obliges the applicant to go to the internal complaint mechanism of the Bank and prevents the applicant of challenging the decision of the Bank directly before the Ombudsman or the Court. Only the decision of the Complaint mechanism may be challenged before the Ombudsman or the Court according to section 6.3 of the draft.

71. However, Article 263 TFEU provides that actions must be brought before the Court within two months following the adoption of an institution's decision. Consequently, once the applicant will have lodge its complaint to the complaint mechanism the two months period will have elapsed and the Bank's decision won't be challengeable anymore.

72. This section therefore needs to be rectified as it prevents the public from exercising their right to access to justice and is a way to prevent external pressure on the Bank. It should be clarified that an applicant may challenge a partial or total refusal as well as a failure to reply within the time-limits following a confirmatory application before the Ombudsman or the Court of Justice.

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