

Mopani Copper Mines plc
Zambia

Complaint SG/A/2013/01

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

June 2014

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Complainant: Mrs Rachel BAIRD, Christian Aid

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The EIB Complaints Mechanism

The EIB Complaints Mechanism provides an enabling tool for alternative and pre-emptive resolution of disputes in cases where the public feels that the EIB Group did something wrong, i.e., when a member, or members, of the public considers that the EIB has committed an act of maladministration. When exercising the right to bring 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).

If complainants are not satisfied with the outcome of the EIB-CM's procedure, a confirmatory complaint can be submitted by the complainant within 15 days of the receipt of the EIB-CM's reply. Complainants who are not satisfied with the outcome of the EIB-CM's procedure and who do not wish to make a confirmatory complaint may also bring a complaint of maladministration against the EIB before 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 EO, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group activities and to project cycle related policies and other applicable policies of the EIB.

The EIB Complaints Mechanism intends to not only address non-compliance by the EIB to 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/complaints>.

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CONCLUSIONS REPORT

EXECUTIVE SUMMARY

The complaint

On 24 June 2013, Mrs Rachel Baird, of Christian Aid, a London based development organisation (the complainant) complained against the Bank's refusal to publish the report and conclusions of its investigation into allegations that Mopani Copper Mines plc. evaded tax in Zambia. The Bank had announced this investigation in May 2011. After an initial request in October 2012, the Bank's services had informed the complainant in early November 2012 that the EIB "does not publish its reports regarding specific investigations carried out by the Bank's Inspectorate General" and that "contrary to what you indicate to have heard, the Bank does not intend to publish this particular report". In a further telephone conversation on 10 November 2012 the Bank's services contacted the complainant by telephone, repeating and confirming the Bank's decision not to publish its findings from the aforementioned Mopani investigation.

Background

The EIB financed project, which was appraised in 2003/04 and for which a Finance Contract was signed in 2005, concerns the first phase of the rebuilding and modernization of the Mufulira copper smelter part of Mopani's operations, to be implemented by Mopani Copper Mines plc., Zambia (MCM), owned 73% by Glencore International, Switzerland.

Based on information revealed by a report that was leaked and had appeared on the internet in February 2011 the Bank's services confronted Mopani/Glencore with allegations regarding irregularities on operational costs, revenues, transfer pricing and other costs. Mopani/Glencore, however, strongly contested the allegations from the leaked report stating that "the leaked report is merely a draft of an incomplete version of the conclusions". Thus, in the summer of 2011 the EIB's Fraud investigation Division (IG/IN) decided to undertake an independent review, with an on-site investigation that was carried out in August 2011 and that was finalised in November 2011.

Findings and Conclusions

Concerning the EIB's refusal to publish the report of the Inspectorate General, the EIB 2010 Transparency Policy (TP) establishes an exception to its principle of presumption of disclosure and transparency (TP, Art 5.2): "Unless there is an overriding public interest, access to information shall also be refused where disclosure would undermine the protection of (...) the purpose of (...) investigations". The EIB has not explained to the requester why the restriction was necessary to protect the purpose of this investigation. Moreover, the inquiry of the EIB-CM found that the exception does not apply to the present case, as the investigation at stake had been finalised well before the Complainant's request (November 2011). Once the investigation is closed, it must be examined on a case by case basis whether full or partial access can be given, also in light of other applicable exceptions laid out in the EIB TP.

Another exception to disclosure of information, as enumerated by the Bank's Transparency Policy (but not mentioned in the reply to the complainant) concerns the protection of commercial interests of a natural or legal person as, e.g., formalised in a confidentiality agreement. Indeed, EIB signed a "Letter of Agreement on Confidentiality" with Glencore International AG/Mopani Copper Mines plc. on 16 December 2003. During the inquiry of the EIB-CM, this confidentiality letter was mentioned by the competent services of the Bank as a ground for confidentiality of the EIB IG-IN report. The EIB-CM's inquiry found that, when handling the complainant's request for access to information, the EIB competent services considered that the mere existence of the confidentiality agreement was sufficient to refuse the disclosure of the report.

However, the confidentiality agreement, drawn up in the context of the information exchanged for the appraisal, the financing and the consequent monitoring of the project in 2003, does not constitute an *a priori* argument for refusing the disclosure of information that does not undermine the protected interest. On the contrary, the party whose commercial interest may be undermined shall be consulted with a view to identifying which information should be deemed as "Confidential" and why. Finally the confidentiality agreement expired one year after the final maturity of the loan under the Finance Contract, i.e. in August 2013.

Other policy-based exceptions, such as those based on the protection of the privacy and the integrity of the individual, in accordance with EU law on data protection or the protection of the public interest, as regards international relations or the financial, monetary or economic policy of the EU, its institutions and bodies may have been applied in the refusal of the full disclosure of the report. When assessing the confidentiality of a document in the light of certain policy-based constraints, the EIB shall – together with the assessment of the interest whose confidentiality is protected by the Policy – also evaluate whether there is an overriding public interest in the disclosure. From the inquiry carried out by the EIB-CM, it appears, however, that none of these exceptions have been taken into consideration in the decision to refuse the disclosure of the report or communicated to the complainant.

Given the applicable regulatory framework, it is clear that the refusal to disclose finalised reports concerning completed investigations of the Inspectorate General must be motivated on one or more of these exceptions. The Bank's Transparency Policy lists the exceptions which justify the (full or partial) refusal to disclose EIB documents. The EIB-CM concludes that the decision not to disclose the report or parts of it, at the juncture when this was requested, was not motivated.

Recommendation

In line with the applicable regulatory framework, it is recommended that the EIB IG-IN report on the Mopani Copper Mines project is disclosed to the complainant, following a review of the parts of this document which fall within the policy-based exceptions, in consultation with the stakeholders concerned. Such parts should be blanked and the exceptions applied should be explained.

The EIB shall promptly establish which information contained in the EIB IG-IN Report cannot be disclosed based on the applicable regulatory framework. In case the assessment of the policy-based constraints should not enable the EIB to disclose a meaningful document, the EIB-CM recommends the EIB services competent for the investigations at stake to complement the disclosed document with a summary of the inquiry and of its outcome, containing the information that is not covered by the exceptions established in the EIB Transparency Policy.

The EIB-CM expresses its preference to disclose a redacted version of the Fraud Investigations Report; however it is the Bank's Management Committee choice to decide whether to do so or not. Should the Management Committee decide not to disclose such report, the EIB-CM invites the Management Committee to submit a management response to be attached to the CM Conclusions Report or to be sent to the complainant under the signature of Secretary General, whereby it justifies its decision of non-disclosure.

CONCLUSIONS REPORT

Complainant:	Mrs Rachel BAIRD of Christian Aid, London.
Subject of complaint:	The Bank's decision not to publish its report and conclusions of its investigation into allegations that Mopani Copper Mines (plc.) evaded tax in Zambia.

1. THE COMPLAINT

- 1.1 On 24 June 2013, Mrs Rachel Baird, of Christian Aid, a London based development organization (the complainant) lodged a complaint by email with the EIB's Complaint Mechanism concerning the Bank's decision not to publish the report and conclusions of its investigation into allegations that Mopani Copper Mines plc. (MCM) evaded tax in Zambia.
- 1.2 In her complaint the complainant recalls that the Bank announced the launch of an investigation in May 2011, as part of a press release¹. The complainant had contacted the Bank in early October 2012 to ask for the date of the publication of the findings of its investigation. On 4 October 2012, the complainant reiterated her request to the EIB in an email.
- 1.3 On 7 November 2012, the Bank replied in an email that the EIB *"does not publish its reports regarding specific investigations carried out by the Bank's Inspectorate General"* and *"contrary to what you indicate to have heard, the Bank does not intend to publish this particular report"*. Finally, the complainant was informed that in case there would be any new relevant information on this project, the Bank would update its website accordingly, as it had done in the past. On the same day, 7 November 2012, the complainant replied to the Bank, protesting against the negative response.
- 1.4 On 10 November 2012, the EIB competent services contacted the complainant by telephone and confirmed the Bank's refusal to publish its findings on the Mopani investigation, adding that the Bank's ban on further lending to Glencore and its subsidiaries communicated on the EIB website remained in place.
- 1.5 The complainant argues that, given the serious nature of the allegations against Mopani and its ultimate mother company Glencore, there is a strong public interest in the report being published immediately and in full. The complainant supports her views by the following arguments i) the vital importance of companies paying their fair share of taxes in all countries and ii) that Zambia has a great need for tax revenue.
- 1.6 The complainant further argues that the refusal to publish the report and conclusions of its investigation is in conflict with the Bank's own transparency policy, which states that the Bank is *"committed to achieving the highest possible level of transparency in all its activities"* and recognises that *"openness on how it makes decisions, works and implements EU policies strengthens its credibility and accountability to citizens..."*. The complainant also stressed that the Bank's transparency policy also states that *"all information held by the EIB is subject to disclosure on request, unless there is a compelling reason for non-disclosure"*.

¹ http://www.eib.org/infocentre/press/news/topical_briefs/2011-may-01/mopani-copper-project.htm.

- 1.7 The complainant expects to achieve publication of the report in full and takes the view that: on the one hand, the Bank ought not to be shielding the company from the consequences of that information becoming public (if the Bank's investigation found that the company did evade tax in Zambia); on the other hand both the Bank and the company itself will benefit from publication of the report (if the Bank's report found that Mopani has done nothing wrong and no-one has anything to hide). Finally, the complainant makes it clear that she does not want the Bank to treat this complaint as confidential and that she, herself, will not be treating it as such.
- 1.8 On 5 July 2013, the EIB Complaints Mechanism (EIB-CM) acknowledged receipt of the complaint and informed the complainant that a review of her case had been launched as well as the date by which she might expect a formal reply from the EIB-CM.
- 1.9 On 9 July 2013, the complainant drew the EIB-CM's attention to a recent judgment rendered by the European Court of Human Rights² as a further supporting argument for public bodies giving access to the information they hold, both to citizens and to non-governmental organisations. On 30 July 2013, the EIB-CM contacted the complainant by telephone and discussed the developments of its inquiry, in view of the upcoming summer break; on 21 August 2013 the EIB-CM met the complainant in London in order to further explain the complaint handling process.

2. THE PROJECT

- 2.1 The project concerns the first phase of the rebuilding and modernization of the Mufulira copper smelter part of Mopani's operations. Its objectives were to replace outdated technology and equipment, increase smelting capacity and significantly reduce dust and SO₂ emission.
- 2.2 The project was implemented by Mopani Copper Mines plc., Zambia (MCM), owned 73% by Glencore International, Switzerland, 17% by First Quantum, Canada and 10% by Zambia Consolidated Copper Mines – Industrial Holding (ZCCM-IH, majority held by the Government of Zambia). MCM was established following the privatisation of the assets of ZCCM in 2000. In 2004 it operated the Mufulira underground copper mine with concentrator, smelter and refinery as well as the Nkana copper/cobalt underground mine with concentrator and a cobalt plant, both marketed by Glencore. In 2004 MCM's production of finished copper had more than doubled since 2000 and was expected to reach some 160 000 tons. Production was expected to ramp up to 200 000 tons in 2005 and further production increases were planned, not least deriving from the smelter modernisation, i.e. the project.

² European Court of Human Rights, Case of Youth Initiative for Human Rights vs. Serbia
[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955#{"itemid":\["001-120955"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955#{).

3. THE APPLICABLE REGULATORY FRAMEWORK

3.1 *The scope of the EIB Complaints Mechanism*

3.1.1 The EIB Complaints Mechanism applies to complaints of maladministration³ brought against the EIB Group (article 4.1 of Title II “Principles” of the EIB CMPTR). Complaints may concern any alleged maladministration of the EIB Group in its actions and/or omissions (article 4.1 of Title IV “Rules of Procedure” of the EIB CMPTR).

3.1.2 Article 4.1 of the Terms of Reference of the CMPTR stipulates that the EIB CM reviews the compliance of EIB with its policies and regulatory obligations as well as determines if beyond such review there is room for problem-solving and/or mediation in the specific case brought to its attention.

3.2 *Primary sources of EU Law*

3.2.1 Article 41 of the European Charter of Fundamental Rights stipulates every person’s right “*to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions, bodies and agencies of the Union*”. In particular, this right includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy and the obligation of the administration to give reasons for its decisions.

3.2.2 Although the Lisbon Treaty has given a new legal status to article 42 of the European Charter (Right to access to documents) which refers to the right of “*any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State*” to have access to documents of “*the institutions, bodies, offices and agencies of the Union, whatever their medium*”, article 15 of the Treaty on the Functioning of the European Union extends the application of EC Regulation 1049/2001 to the EIB “*only when exercising ... administrative tasks*”. To date, neither the legislator nor the judicature have yet defined the scope of “*administrative tasks*” and its adjustment to the EIB.’s operational cycle.

3.3 *EC Regulation 1049/2001*

3.3.1 The EIB Transparency Policy states that, during its preparation, the EIB took account and committed to comply with the principles laid down by Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents. The Transparency Policy further stipulates that, when applicable to the EIB, the provisions of Regulation (EC) N° 1049/2001 and the Aarhus Regulation shall be used for the interpretation of the Transparency Policy and that in the event of divergence and to the extent these Regulations apply to the Bank, they shall prevail over the Transparency Policy. In the light of the considerations above and although the investigation of the EIB Inspectorate General may not be considered by the EIB as falling within the category of “*administrative tasks*”, it appears appropriate to identify the provisions of Regulation 1049/2001 which were used to forge the corresponding provisions of the Transparency Policy, with a view to interpreting the Transparency Policy in accordance with the spirit of the Regulation and the principles to which the EIB committed itself to comply when establishing its Policy.

³ Maladministration 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 rights¹. Some examples of failure to respect the principles of good administration, as set by the European Ombudsman, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group activities and to project cycle related policies and other applicable policies of the EIB.

3.3.2 Article 4.1 of Regulation 1049 determines that the institutions 'shall' refuse access to a document where disclosure would undermine the protection of: (a) the public interest e.g.: public security, international relations and the financial, monetary or economic policy of the Community or a Member State; and (b) the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. Article 4.2 stipulates that, unless there is an overriding public interest in disclosure, institutions 'shall' refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person (e.g. intellectual property),
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits.

3.3.3 According to Article 4.3 access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

3.3.4 Regarding third-party documents, Article 4.4 stipulates that, where it is not clear if the document shall or shall not be disclosed, the institution shall consult with that third party whether an exception in Articles 4.1 or 4.2 (see § 3.2.3) is applicable. Finally, Article 4.6 determines that if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

3.4 *The EIB Transparency Policy*

3.4.1 The request for disclosure of the report of the Inspectorate General and conclusions on the investigation concerning the Mopani Copper Mines and the EIB's decision not to disclose it date back to October 2012. Accordingly, the EIB 2010 Transparency Policy (TP) applies to the current information request and decision of the Bank. In line with EC Regulation 1049/2001, which constitutes a key reference for the EIB TP, the latter establishes a general presumption of disclosure of EIB-held information or documents unless there is a compelling reason for non-disclosure. Article 4.2 of the TP lays down that *"The EIB is committed to high standards of "Good administration" regarding its governing bodies, management and staff members' relations with the public, thus promoting values such as ...fairness – acting in a fair and reasonable manner [and] ... Courtesy – acting in a conscientious, correct, courteous and approachable manner."*

3.4.2 Article 5.2.2 of the EIB TP gives grounds for refusal to access to documents, if disclosure would undermine the protection of the public interest, as regards international relations or the financial, monetary or economic policy of the EU, its institutions and bodies or a Member State and if disclosure would undermine the privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data.

3.4.3 Article 5.2.3 of the EIB TP stipulates that, unless there is an overriding public interest, access to information shall (also) be refused where disclosure would undermine the protection of:

- commercial interests of a natural or legal person⁴;
- intellectual property;
- court proceedings and legal advice;
- the purpose of inspections, investigations and audits.

According to Article 5.2.5, access to information shall be refused where disclosure would seriously undermine the integrity of the Bank's decision-making process, i.e. of material in the course of completion or unfinished documents or data.

3.4.4 As regards third-party documents, article 5.2.7 establishes that *"the Bank shall consult with the third party whether the information in the document is confidential, according to this policy, unless it is clear that the document shall or shall not be disclosed."* In addition, article 5.2.8 of the EIB Transparency Policy stipulates that *"exceptions cover information typically forming part of the Bank's confidential relationship with its business partners"* and that the *"...Bank does not object to project promoters, borrowers, or other competent parties making information available on their relationship and arrangements with the EIB"*.

3.4.5 Article 5.2.11 of the TP stipulates that *"All requests for disclosure of specific information 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"*.

3.4.6 The EIB's TP should be read together with the "Letter of Agreement on Confidentiality" between Glencore International AG and Mopani Copper Mines plc. and the EIB of 16 December 2003. In this confidentiality agreement concluded by the Bank, Glencore/MCM undertakes to *"clearly and conspicuously"* identify information that is to be treated as "Confidential Information". Information that is exempt from this Confidentiality Agreement is i.a. information that the Bank is, or may be required, to disclose by law, regulation, treaties or agreements or to banking, examining or regulatory bodies of the EC or any EC country. The Confidentiality Agreement shall expire one year after the final maturity of the loan for the project.

3.5 Policy on preventing and deterring prohibited conduct in EIB activities (EIB Anti-Fraud Policy)

3.5.1 The EIB Anti-Fraud Policy of 2008⁵ formulates in respect of confidentiality of its investigations that *"all information and documents collected during an investigation, including the identities of the subject and witnesses, shall be kept strictly confidential"* and *"IG/IN shall disclose such information and documents only in reports to those persons or entities authorised to receive them, according to IG/IN's procedures"*.

3.5.2 On disclosure of findings the same policy states that, amongst other ways and means to disclose and cooperate/coordinate with national, e.g. law enforcement and legal or tax authorities, that, *"respecting the Bank's rules and procedures governing the disclosure of information, IG/IN may provide assistance to and share its findings and/or relevant information with other IFI's investigation functions"* and, IG/IN will write and present an Annual Report *"outlining in general terms its activities in the past year"*.

⁴ The term "commercial interest" covers confidentiality agreements concluded by the Bank.

⁵ In force at the time of the Bank's decision not to publish the report and conclusions of its investigation.

4. THE EIB-CM INQUIRY

4.1 *The leaked audit report*

4.1.1 In February 2011 a draft report of an audit conducted by Grant Thornton and Econ Poyry, commissioned by the Zambian Revenue Authority (ZRA), is leaked and appears on the Internet, highlighting irregularities concerning operational costs, revenues, transfer pricing and employee expenses and overheads.

4.1.2 In the report it is alleged that Mopani Copper Mines was overstating costs and understating profits, violating OECD guidelines on arm's length trading. It was also alleged that there were consequential tax losses to Zambia. More in detail, the auditors found that MCM "resisted the pilot audit at every stage" and that the company's bookkeeping was incomplete, several legally required documents were lacking and the general ledger analysis showed several loopholes and could not be matched with the trial balance. The auditors also found that the costs of the company had doubled from 2005 to 2007 (which could not be explained) and that this appeared to indicate that the company had inflated its costs to minimise the profits shown in their books in order to pay less taxes. The auditors concluded that "the Mopani cost structure cannot be trusted to represent the true nature of the costs of the Mopani mining operation".

4.1.3 Mopani/Glencore strongly disputed the conclusions of the leaked report, stating that the auditors never gave Mopani a chance of rebutting the allegations and that the leaked report is merely a draft of an incomplete version of the conclusions. Moreover, in discussions with the Bank's services, Glencore addressed the issue of transfer pricing, maintaining that *'Any sales of copper to Glencore take place on an arm's length basis and are determined by London Metal Exchange (LME) prices. There is no "transfer pricing" to avoid paying taxes. The contracts are regularly audited by the Zambian Revenue Authority.'*

4.2 *The EIB reaction*

4.2.1 In accordance its Anti-Fraud Policy, the EIB informed OLAF of the allegations contained in the leaked report and decided to launch its own investigation conducted by the EIB's independent Inspectorate General (IG).

4.2.2 The launching of the investigation was publicly announced by the Bank on a statement published on the EIB website on 17 March 2011, which indicated that while the EIB had no evidence at this point that proved the correctness of these allegations, it had taken all measures to address this issue.

4.2.3 On 23 May 2011, the EIB President replied to a question from an MEP on the Glencore/Mopani project at the end of an intervention in the Committee on the Environment, Public Health and Food Safety of the European Parliament, that the EIB has been informed about a report, commissioned by the Zambian Revenue Authorities that alleges Glencore/Mopani of systematic transfer pricing and tax-evasion and has carried out its own investigation through its anti-fraud investigation Division. On the basis of the recently widely reported issues in connection with the company, and not solely on these fraud charges, he had instructed the EIB services to no longer accept demands for financing from Glencore.

4.2.4 On 31 May 2011, the Bank published an update of the statement on its website which provided further details about its involvement in the project and also referred to the investigation indicating that "in the event that this investigation were to conclusively demonstrate tax evasion according to the Zambian authorities this would clearly expose MCM to local financial penalties and lead to events that may trigger early repayment of the EIB loan".

4.3 The IG-IN investigation

4.3.1 A first mission to Mopani was carried out in March 2011 where the EIB team met with Mopani management and the Zambia Revenue Authority. The independent review focusing on the issues raised by the leaked report was carried out between 1 and 17 August 2011. The IG/IN investigation report was issued in November 2011 and submitted to the EIB Management Committee.

5. FINDINGS AND CONCLUSIONS

- 5.1 Concerning the EIB's answer to the complainant that the EIB *"does not publish its reports regarding specific investigations carried out by the Bank's Inspectorate General"* and *"..... that the Bank does not intend to publish this particular report"*, the EIB 2010 Transparency Policy (TP) establishes exceptions to its principle of presumption of disclosure and transparency (TP, Art 5.2), notably, where disclosure of a document would undermine the protection of the purpose of investigations. However, from the inquiry carried out by the EIB-CM, it appears that such exception does not apply to the present case insofar as the investigation of the EIB Inspector General was finalised (November 2011) well before the Complainant's request. Once the investigation is closed, it must be examined on a case by case basis whether full or partial access can be given, also in light of other applicable exceptions laid out in the EIB TP.
- 5.2 From the information gathered during the inquiry of the EIB-CM it appears that, although the EIB TP stipulates a general presumption of disclosure unless there are compelling reasons for confidentiality listed in article 5.2 of the EIB's TP, the EIB services, competent for handling the request for disclosure, did not record their assessment of the document requested with a view to ensuring adequate protection to the interests listed in article 5.2 of the EIB TP. Indeed, although reports on investigations are not systematically covered by the above-mentioned exception of confidentiality, they may be otherwise subject to any of the exceptions outlined in the Bank's Transparency Policy. For instance, a review of the requested document shows that the privacy and the integrity of the individual and the protection of personal data may be relevant when deciding whether to grant full or partial disclosure of the document.
- 5.3 Another crucial factor for the EIB to decide whether to grant full or partial access to the requested document is the existence of commercial interests of a natural or legal person. Moreover, in the Bank's Transparency Policy document, the term "commercial interest" covers confidentiality agreements concluded by the Bank, as in the case of the project in question.
- 5.4 A "Letter of Agreement on Confidentiality" had been agreed between Glencore International AG/Mopani Copper Mines plc. and the EIB on 16 December 2003. That confidentiality agreement expired one year after the final maturity of the loan. Although it is now no longer valid, it was so at the time of the request for access to the document submitted by the complainant. However, the exception laid down by the applicable regulatory framework regarding the protection of commercial interests of a natural or legal person, still applies and needs to be properly evaluated.
- 5.5 As a general principle, the integrity of the EIB decision-making process shall also be protected and therefore the application of the relevant EIB TP exception properly assessed.
- 5.6 Finally, as referred to in § 3.4.3, the EIB services, when assessing the confidentiality of a document in the light of certain policy-based constraints, shall – together with the assessment of the interest whose confidentiality is protected by the Policy – also evaluate whether there is an overriding public interest in the disclosure.

- 5.7 From the review carried out by the EIB-CM, it appears that that the EIB's decision not to disclose, at least partially, the report was not motivated.
- 5.8 In particular, disclosure of fraud and corruption investigations should take into account the necessity to strike the right balance between the public interest to monitor the lawfulness of the exercise of public powers more effectively on one hand (*transparency*) and the need to ensure that sensitive information is not released in the public domain, if the disclosure may materially jeopardise the effectiveness of present or future investigations.

6. RECOMMENDATIONS

- 6.1 Based on the inquiry of the EIB-CM and in line with the applicable regulatory framework, it is recommended that the EIB IG-IN report on the Mopani Copper Mines project is disclosed to the complainant, following a review of the parts of this document which fall within the policy-based exceptions, in consultation with the stakeholders concerned. Such parts should be blanked and the exceptions applied should be explained.
- 6.2 The EIB shall promptly establish which information contained in the EIB IG-IN Report cannot be disclosed based on the applicable regulatory framework. In case the assessment of the policy-based constraints should not enable the EIB to disclose a meaningful document, the EIB-CM recommends the EIB services competent for the investigations at stake to complement the disclosed document with a summary of the inquiry and of its outcome, containing the information that is not covered by the exceptions established in the EIB Transparency Policy.
- 6.3 The EIB-CM expresses its preference to disclose a redacted version of the Fraud Investigations Report; however it is the Bank's Management Committee choice to decide whether to do so or not. Should the Management Committee decide not to disclose such report, the EIB-CM invites the Management Committee to submit a management response to be attached to the CM Conclusions Report or to be sent to the complainant under the signature of Secretary General, whereby it justifies its decision of non-disclosure.



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June 2014



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