

**Management Committee / Secretary General response to the CM Conclusions report concerning the Complaint SG/A/2013/01 (Mopani Copper Mines)**

The Management of the EIB acknowledges the receipt of the Conclusions Report of the Complaints Mechanism in reference to the above-mentioned complaint. The EIB Management acknowledges the EIB Complaints Mechanism's value as a key element of the Bank's accountability mechanisms to address concerns from external parties on important issues such as transparency and public access to information.

Based on the EIB Complaints Mechanism Conclusions Report and the comments of the EIB Services concerned, the EIB Management has the following comments to the preference expressed by the EIB Complaint Mechanism to publish a redacted version of the EIB Inspectorate General Fraud investigation report regarding its investigations into the allegations against Mopani Copper Mines plc.

The Management of the EIB is committed to ensure that the Bank maintains the highest levels of transparency and accountability, but is of the view that, as a general principle, there are justified and legitimate compelling reasons for the Bank not to publish or publicly disclose documents related to its own investigations.

While the EIB Management recognises that the EIB Transparency Policy, which takes into account the principles laid down by Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, provides for a wide presumption of disclosure, it also considers that this principle must be read in conjunction with Article 15 (3) of the Treaty on the Functioning of the European Union (TFUE) which submits the EIB (as well as the EU Court of Justice and European Central Bank) to transparency rules only as far as administrative tasks are concerned. Definition of the terms "administrative tasks" have nevertheless not yet been defined, neither by the Legislator (EU Parliament and Council) nor by the EU Court of Justice. As a result, it appears reasonable to the Bank's Management to consider that investigations carried out by the EIB Inspectorate General into matters relating to financing of the EIB do not fall within the definition of "administrative tasks" and by consequence are not covered by the obligation of disclosure.

In addition to this argument, the presumption of disclosure provided in the EIB Transparency Policy should be reconciled with the specific presumption of non-disclosure of documents and information relating to EIB investigations, based on the legitimate interest to protect investigations, deriving from the EIB Anti-Fraud Policy, both in its 2008 version and 2013 revised version, the latter providing in its Article 55 that "*Within the Bank's rules on access to information, all information and documents collected and generated during an investigation, not already in the public domain, shall be kept strictly confidential. The confidentiality of the information collected must be respected both in the interests of those concerned and the integrity of the investigation*". This presumption of non-disclosure of documents relating to EIB own investigations is also in line with the recent general Policy applied by the European Anti-Fraud Office (OLAF) on specific provisions regarding its investigation activities, which OLAF considers as overriding the presumption of disclosure established by Regulation 1049/2001.

While noting that it is not customary practice by OLAF or among International Financial Institutions to publish or disclose its own investigation reports, and taking into account the financial activity of EIB, the Management of the EIB would also like to highlight that the Bank's capacity to request and obtain frank and reliable internal or external advice necessary to carry out investigations would be seriously undermined should the Bank be under the obligation to publish or publicly disclose such information, including when this information concerns a finalised investigation.

The Management of the EIB also notes that transparency about the investigation activities of the EIB towards the public is being ensured by the publication of the Inspectorate General-Fraud Investigations Division Annual Reports on the Bank's website.

On the basis of the above, the Management is of the opinion that, although recognising a certain lack of clarity within the applicable rules, there are sufficient arguments in order not to disclose the Fraud investigation report at stake.

Taking into account nevertheless the legitimate interest on behalf of the public to be informed, in the present case, about the outcome of the EIB Inspectorate General investigation, the EIB Management has instructed the EIB services to update the information relating to the case under consideration published on the EIB website.

The EIB Management acknowledges the challenges raised by this complaint, which represents the first case received by the Bank concerning the public disclosure of its own investigation reports. Within this context, the EIB Management welcomes that this complaint and the EIB Complaints Mechanism's work has provided the Bank with an opportunity to identify a number of issues related to its policies and procedures which go beyond this particular case and needs to be improved and clarified in order to ensure a swift and comprehensive response to future similar requests.