

## EIB Intermediated Lending to HPPs in the Balkans

Complaint SG/G/2019/01

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

# CONCLUSIONS REPORT

30 September 2019

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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).

Complainants that are not satisfied with the EIB-CM's reply may submit a confirmatory complaint within 15 days of the receipt of that reply. In addition, complainants who are not satisfied with the outcome of the procedure before the EIB-CM and who do not wish to make a confirmatory complaint have the right to lodge a complaint of maladministration against the EIB Group with the European Ombudsman.

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>

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### **EXECUTIVE SUMMARY**

On 24 January 2019 a member of CEE Bankwatch Network, lodged a complaint with the Complaints Mechanism of the European Investment Bank. The complaint concerns a wide range of issues pertaining to the transparency of EIB's intermediated lending as well as its compliance with EIB standards as follows:

- (i) Non-compliance of EIB finance contracts for intermediated lending with EIB transparency requirements;
- (ii) Refusal of the EIB to disclose environmental information on intermediated loans;
- (iii) Non-compliance of EIB finance contracts for intermediated lending with EIB environmental requirements;
- (iv) Failure of EIB finance contracts for Mid-Cap Loans to include provisions enabling due diligence of loans between EUR 25m and EUR 50m.

The EIB-CM performed a compliance review in relation to the allegations. Based on the inquiry, the EIB-CM closes the case with the following conclusions.

In the reviewed finance contracts, there are contractual provisions put in place to comply with the requirements for transparency. The EIB has the possibility to monitor the correct implementation of the contractual requirements. Providing information and advice to intermediaries about transparency requirements is good practice which should be employed systematically.

Article 5.13 of the TP serves the purpose of illustrating the specific nature of intermediated loans and the fact that information on individual allocations may not be held by the Bank and should rather be requested from the intermediary. The Bank should have provided a substantive reply to the Complainant by checking whether it held the requested information and if so by examining the request under the TP exceptions.

The EIB-CM considers that the finance contracts in question ensure the compliance of intermediated lending with the EIB's environmental requirements.

A review of the relevant finance contract reveals that Mid-Cap Loans between EUR 25m and EUR 50m follow the EIB due diligence requirements, which implies that the EIB's approval is required for these sub-loans before allocation.

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

1. The Bank should update and strengthen its communication with intermediaries and systematically provide them with precise and thorough information and guidance on EIB transparency obligations, which are based on the provisions of the TP and the EIB social and environmental standards. In this regard, the Bank may consider systematising the wording of the Guidance note for promoters and partners on the EIB Group Transparency Policy and any other EIB legal or information documents to reflect the EIB requirements for transparency towards the public, as deemed relevant.
2. When the public requests to know the names of the projects supported by the EU bank, the EIB should ensure that this information is disclosed, irrespective of whether an intermediary is involved, provided that (i) the Bank holds the requested information and (ii) none of the exceptions set out in the TP applies to the disclosure of the requested information. Handling information requests concerning intermediated lending features a high degree of complexity due to the number of subjects and interests involved. Therefore, it is particularly important that the EIB's decision is based on an ad hoc assessment aimed at accurately evaluating the specific impact of disclosing the information requested.
3. The EIB's relevant services should develop and deploy dedicated training for intermediaries in Enlargement Countries and outside the EU which underscores the need for timely disclosure of the names of projects supported by the EIB, for setting up a straightforward and timely disclosure procedure that meets the requirements for transparency towards the public, as well as for dealing with grievances concerning access to information.
4. The EIB's relevant services should contact the Complainant and provide a substantive reply to the information request in line with the applicable regulatory framework.

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

## CONCLUSIONS REPORT

**Complainant:** CEE Bankwatch Network

**Date received:** 24 January 2019

**Confidential:** No

**Subject of complaint:** EIB intermediated lending to HPPs in the Balkans

### 1. THE COMPLAINT

1.1 On 24 January 2019 a member of CEE Bankwatch Network (hereinafter “the Complainant”), lodged a complaint with the Complaints Mechanism of the European Investment Bank (hereinafter “the EIB-CM”). The complaint concerned a wide range of issues pertaining to the transparency of EIB’s intermediated lending as well as its compliance with EIB standards, which, according to the Complainant, constituted instances of maladministration. The Complainant highlighted three allegations:

- *“noncompliance of contractual obligations of the commercial and public financial intermediaries with the requirements related to disclosure of information*
- *non-disclosure of environmental information for intermediated loans by the EIB itself, and*
- *noncompliance of the financial intermediary lending with the EIB’s requirements that final allocations comply with EU Environmental Law.”*

1.2 Following a review of the whole text of the complaint, the allegations made can be listed as follows:

- (i) Non-compliance of EIB finance contracts for intermediated lending with EIB transparency requirements;
- (ii) Refusal of the EIB to disclose environmental information on intermediated loans;
- (iii) Non-compliance of EIB finance contracts for intermediated lending with EIB environmental requirements;
- (iv) Failure of EIB finance contracts for Mid-Cap Loans to include provisions enabling due diligence for loans between EUR 25m and EUR 50m.

1.3 With regard to the first allegation, the Complainant pointed out that the EIB Environmental and Social Handbook (2013) contained clauses for Global Loans and Funds that required the financial intermediaries to publish environmental information. The Complainant further submitted that the only provision in EIB finance contracts with intermediaries that related to information disclosure was a general provision stipulating that projects need to be in line with Environmental law. According to the Complainant, that general clause did not constitute a requirement for the intermediary to publish environmental and social documents as required by the 2013 Handbook. The Complainant claimed that, in order to ensure that the requirement for financial intermediaries to disclose environmental and social information is effective, such a requirement should be included in the finance contracts. In this regard, the Complainant emphasised that, since – unlike the EIB – financial intermediaries are not bound by the Aarhus Convention or by EU law on access to information, the EIB must either disclose environmental information related to all projects it finances or clearly require financial intermediaries to do so.

1.4 In order to illustrate the first allegation, the Complainant referred to ten finance contracts that were disclosed by the Bank on 6 March 2018. Furthermore, the Complainant described the results of a survey carried out by Bankwatch on the disclosure of environmental information pertaining to small hydropower plants by financial intermediaries of the EIB in the Balkans region. In particular, the Complainant referred to cases in Serbia and Croatia where the EIB’s financial intermediaries (public sector financial institutions in both cases) not only refused to disclose environmental information but challenged decisions of national administrative or judicial authorities recognising the duty to release such



information<sup>1</sup>. The Complainant concluded that Article 5.13 of the EIB Transparency Policy and the Handbook disclosure requirements were purely declaratory and ineffective, insofar as disclosure of information by financial intermediaries did not happen automatically and was refused by commercial and public banks that were financial intermediaries of the EIB.

1.5 With regard to the second allegation, the Complainant submitted that in April 2018 Bankwatch had requested from the EIB information about projects that “have been built or are in construction in Serbia and their relation to the EIB” and asked the EIB to confirm whether those projects were financed via EIB credit lines. The EIB justified its refusal to reveal the information on the basis of Article 5.13 of the EIB Group Transparency Policy (TP).

1.6 According to the Complainant, the Bank did not comply with the general requirement to disclose environmental information in its possession. The Complainant took the view that the requested information constituted environmental information as it related to “*undertakings, in line with the EIA Directive, which are likely to have significant effects on the environment*”. The Complainant observed that the EIB, which was in possession of the allocations lists from financial intermediaries, was also in possession of environmental information, i.e. names of projects likely to have a significant impact on the environment and subject to environmental impact consideration. Therefore, the EIB was obliged to disclose the requested information.

1.7 Finally, the Complainant noted that, in the case of other requests for information concerning the Croatian Bank for Reconstruction and Development (HBOR) and the Macedonian Bank for Development Promotion<sup>2</sup> (MBDP) the EIB disclosed the names of the projects and the Environmental Impact Assessments (EIAs) (or equivalents) for final allocations. The Complainant thus contested the EIB’s justification for refusing to disclose the information requested in April 2018 on the basis that it was inconsistent with the EIB’s previous approach. Furthermore, the Complainant argued that the requested environmental information (names of final beneficiaries and projects included in the financial intermediaries’ allocation lists, EIAs and decisions of the competent authorities not to undertake EIAs) did not fall under any of the exemptions justifying the refusal to disclose it. The Complainant argued that Article 5.13 of the EIB Transparency Policy was not in line with Regulation (EC) No. 1049/2001 as the Regulation does not stipulate that the disclosure of certain types of environmental information held by EU institutions may be subject to specific arrangements between the latter and their financial intermediaries concerning division of competence.

1.8 With regard to the third allegation, the Complainant pointed out that the EIB’s Statement of Environmental and Social Principles and Standards required that all projects financed by the Bank in Enlargement Countries comply with applicable EU environmental law. The Complainant further submitted that the clauses in finance contracts for intermediary lending seemed to be based on the presumption that EU social and environmental law had been transposed into the national law of Serbia and North Macedonia. The Complainant provided an example of possible gaps between EU law and national law for projects outside the EU<sup>3</sup>.

1.9 Based on the above, the Complainant argued that “*applying the presumption was unfounded [...] without conducting a relevant gap analysis*” and that no evidence in the finance contracts suggested that this analysis had been carried out. Since final beneficiaries implemented their undertakings on the basis of the existing national legal framework and were not responsible for ensuring the compliance of that framework with EU law, the Complainant argued that the contractual clauses in question were illusory and did not ensure that projects comply with EU law and environmental treaties.

<sup>1</sup> In October 2017, Bankwatch requested information about specific hydropower projects financed via the EIB APEX credit line administered by the National Bank of Serbia (NBS). NBS refused to disclose this information relying on banking secrecy rules. Bankwatch challenged the refusal before the Serbian Commissioner for Information of Public Importance and Personal Data Protection, who, on 22 November 2018 ordered NBS to share the information. NBS ignored the Commissioner’s decision and currently the Commissioner is pursuing the administrative execution of its decision. A different set of proceedings in Croatia concerns the request by a journalist to receive from the Croatian Bank for Reconstruction and Development (HBOR) a list of companies that HBOR financed over the period 2010 – 2013, including the amounts provided as loans. In a decision of 25 May 2015, the Croatian Information Commissioner ruled in favour of the journalist’s request. HBOR challenged the decision. In a final judgment of 2 September 2015, the Croatian High Administrative Court upheld the decision of the Croatian Information Commissioner. The Croatian State Attorney made a request for carrying out an extraordinary review of the lawfulness of the final judgement of the Croatian High Administrative Court. On 17 October 2018 the Supreme Court of Croatia rejected the State Attorney’s request and took the view that the journalist had the right to access the information in line with the Access to Information Act.

<sup>2</sup> Submitted in October 2015, these requests were answered by the EIB in February 2016.

<sup>3</sup> The Complainant argued that, according to Serbian legislation, hydropower plants above 2 MW may be required to undergo an EIA while HPP below 2 MW are not considered for their environmental impact at all. The Complainant argued that this approach was not consistent with the EIA Directive requiring for such projects that a competent authority examines the need for an EIA on the basis of criteria specified in Annex III.

1.10 With regard to the fourth allegation, the Complainant maintained that finance contracts for Mid-cap loans did not contain relevant provisions requiring borrowers to provide the EIB with documents and information necessary for the Bank to undertake a review and issue an approval of individual allocations between EUR 25m and EUR 50m.

## 2. BACKGROUND INFORMATION

### **2.1 Previous exchanges of correspondence between the Complainant and the EIB**

2.1.1 In a reply to a Bankwatch request, on 20 July 2015 the EIB provided a list of investments in hydropower projects (HPPs) that were made under intermediated loans. The list provided information on country, year, name of the intermediary, amount of the loan and a project description (e.g. construction of hydropower plant, construction and operation of small hydropower plant). On 10 September 2015, Bankwatch submitted a follow-up request for information, in which the Bank was asked among others to identify the specific projects included in the list sent on 20 July 2015 for which an Environmental and Social Impact Assessment (ESIA) was conducted. Furthermore, Bankwatch asked to be provided with a link to the promoter's website where environmental documents such as the ESIA were posted. In its reply of 4 February 2016, the EIB informed the requester that an Environmental Impact Assessment (EIA) was required for two sub-projects: one in Croatia and one in North Macedonia (that sub-project consisted of four individual hydropower stations). The EIA documentation was attached and included the names of the specific projects concerned. The reply made reference to Article 5.13 of the TP and invited Bankwatch to contact the intermediaries directly in order to receive more information on the final beneficiaries, the names of the projects and their location.

2.1.2 On 3 July 2017, Bankwatch filed a request for information, asking for access to a number of types of documents with reference to an annex listing financial intermediaries (FIs) in the Western Balkans region. The requested information comprised the following:

- 1) all contracts with the FIs in the annex. Alternatively, excerpts from the contracts stipulating the disclosure of environmental information and the client's obligations in terms of project-level environmental and social due diligence;
- 2) all contracts between the EIB and the Green for Growth Fund (GGF). Alternatively, excerpts from the contracts stipulating the disclosure of environmental information and GGF's obligations in terms of project-level environmental and social due diligence;
- 3) all environmental and social performance audit reports of the GGF prepared by external parties, as well as documents outlining the EIB's review of the audit reports;
- 4) the names of all hydropower projects financed through the GGF, together with the amount and date of the investment, the name of the final client (beneficiary) and the project country indicated.

2.1.3 On 12 October 2017 the Bank replied. The reply can be summarised as follows:

- 1) the Bank had not signed any contracts with the entities listed in the annex and did not hold the documents;
- 2) the contractual relations between the EIB and GGF were set out in a single document called the Commitment Agreement, which contained a specific reference to the environmental and social terms, as well as the information requirements for GGF's activities in order for them to be eligible for EIB investments. The Bank attached the redacted document for disclosure;
- 3) Bankwatch was provided with redacted copies of the 2014 and 2016 external audit reports held by the Bank and was informed that capacity assessment was part of the Environmental and Social Data Sheet (ESDS) available on the Bank's website and that the EIB did not report its review of the audit reports in any specific document;
- 4) Bankwatch was referred to the GGF's Environmental and Social Performance Requirements for information on its disclosure of individual project information; the requester was also referred to a webpage for details about projects financed by GGF.

2.1.4 On 2 November 2017 Bankwatch lodged a confirmatory application, according to which the Bank had failed to respond adequately to the request. Among other points raised, Bankwatch asked again to receive contracts with FIs for a smaller sub-set of banks. On 14 December 2017 the Bank replied to the confirmatory application. In its reply, the Bank stated that under its finance contracts *"the EIB generally requires the financial intermediaries to include (among others) in their sub-financing agreements, environmental and social undertakings of the final beneficiaries, and therefore the undertakings are stipulated at the sub-project/final beneficiary level instead of the financial intermediary level."* The reply also stated that in a project/sub-project located in an EU Member State, Candidate Country or Potential Candidate Country, such undertakings would generally require that the financial intermediary will oblige final beneficiaries, in relevant on-lending agreements, to *"implement and operate the relevant sub-projects in compliance with environmental law"*. The reply explained that when the legal systems of Candidate Countries or Potential Candidate Countries do not provide for the same type of protection, EIB finance contracts supplement the requirements of such legal systems through additional undertakings such as by referring to the EIB's Environmental and Social Standards. The reply also



stated that “...the finance contracts do not contain requirements or undertakings specifically related to the public disclosure of environmental information, as this is covered by the general requirement to comply with environmental law, and ultimately remains under the responsibility of the counterparts and the national competent authorities.” Finally, with regard to the GGF-EIB Commitment Agreement, the EIB informed Bankwatch that the information received by the Bank at that point was presented “in an aggregate/portfolio level way and does not allow the Bank to identify the individual sub-projects, unless they have been screened as category A or high-risk category B projects from the Environmental and Social standpoint.” The Bank confirmed that GGF had not financed through intermediaries any Category A or high-risk Category B hydropower projects.

2.1.5 On 20 November 2017 Bankwatch lodged a request for information on the EIB’s indirect financing for small hydropower plants through financial intermediaries over the period 2015-2017 in Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, North Macedonia, Montenegro, Serbia and Slovenia. In particular, Bankwatch asked for details on the number of projects financed, number of projects financed in each country, the installed capacity and the loan amount of the projects. In a reply of 13 December 2017, the EIB provided Bankwatch with information on the total number of small hydropower projects financed through financial intermediaries for the period 2015-2017 with a breakdown per country, as well as the range of the individual allocation amounts and a summary table with the headings “allocation year”, “intermediary name”, “sub-project capacity” and “sub-project country name”. The reply also made reference to Article 5.13 of the TP, stating that in line with it “the EIB does not disclose detailed information on individual allocations made by local banks to support investment by their own customers under credit lines established with the EIB, as this information falls within the competence of the intermediary bank as part of the normal relationship between the respective bank and its customers.” Bankwatch was advised to contact directly the financial intermediaries involved in the projects.

## 2.2 The Complainant’s requests for information referred to in the present complaint

2.2.1 On 29 December 2017 Bankwatch lodged a request for information consisting of (i) a request for access to six finance contracts (listing the names, dates and website publication links of the operations<sup>4</sup>) and (ii) a request for access to the latest assessment reports on the respective FIs’ capacity to on-lend the EIB funds in line with the EIB’s standards and particular requirements (p. 46 of the EIB Environmental and Social Handbook) for four banks. Finally, Bankwatch asked for clarification of the term “high-risk category B” projects and information on the methodology for assignment of this category, given that this term was not mentioned in any of the relevant EIB policies.

2.2.2 On 6 March 2018 the EIB issued its reply and shared “the environmental and social information contained in the finance contracts with Financial Intermediaries (FI) requested...” The reply explained that the “overall assessment of the capacity of the FI is carried out as part of the EIB ex-ante appraisal of each FI, and is reported in the Board report for each operation. However, the assessment does not normally contain specific references to environmental and social matters, but is rather based on issues such as the FI’s previous relationships with the Bank and its knowledge of the EIB’s loan products and eligibility criteria.” The reply also stated that “[...] particularly for new clients and operations outside the EU, the Bank’s services check all the allocation proposals before approving disbursement, which is an additional safeguard to make sure that all sub-projects financed are in line with the eligibility criteria established by the Bank. All in all, the combination of i) the sectoral screening to be carried out by the FI on the basis of the eligibility criteria established by the Bank, and ii) the compliance with national legislation by the project promoters (as required in the finance contracts) are together sufficient to meet the EIB’s Environmental and Social standards.” Finally, the reply elaborated on the origins of the term “high-risk category B” projects and explained that Category A covers projects with high Environmental and Social risk per se, whereas a project is categorised as B when its potential adverse future environmental and/or social impacts are typically site-specific, and/or readily identified and addressed through mitigation measures.

2.2.3 As a follow-up to the EIB’s reply referred to in §2.1.5 of this report, on 11 April 2018 Bankwatch sent a list of hydropower projects that appeared to have been financed by the EIB via financial intermediaries in Serbia and asked the Bank to confirm whether the projects on the list were financed via its credit lines. On 24 April 2018 the EIB reiterated the reference to Article 5.13 of the EIB TP and that it could not disclose information on individual allocations made by local banks. As a result, the EIB could not confirm which projects listed in the query had been financed by the Bank through its intermediated loans and advised Bankwatch to contact directly the financial intermediaries involved in these projects in order to obtain this information.

<sup>4</sup> APEX LOAN FOR SMES AND OTHER PRIORITIES III; APEX LOAN FOR SMES AND MID-CAPS II; EB LOAN FOR SMES & OTHER PRIORITIES III; MBDP LOAN FOR SME&PRIORITY PROJECTS III; HBOR LOAN FOR MIDCAPS & OTHER PRIORITIES II and HBOR LOAN FOR SMES.

### 2.3 Operations related to the Complainant's allegations

2.3.1 The relevant operations concern intermediaries and on-lending in Croatia, North Macedonia and Serbia. The operations were approved by the Bank in the period 2011–2014 and the finance contracts were signed in the period 2011-2016.

2.3.2 Five of these contracts were signed between the EIB, the Republic of Serbia and the National Bank of Serbia<sup>5</sup>. These contracts set out the framework for on-lending agreements which bind the Financial Intermediary and the Final Beneficiaries of the loans. The purpose of the contracts is to make available a certain amount dedicated to the financing of projects related to SMEs, medium-sizes companies (Mid-Caps) or small and medium-size investments in the fields of environmental protection, the knowledge economy, energy infrastructure and industry.

2.3.3 A contract was also signed between the EIB and the Erste Bank AD Novi Sad (EB)<sup>6</sup> and falls under a framework agreement signed with the Republic of Serbia. The operation aims to provide funds for SMEs and Mid-Caps as well as for priority projects in the fields of the knowledge economy, energy, environmental protection, health, education and services.

2.3.4 Three contracts were concluded with HBOR for two operations<sup>7</sup>. The operations concern the provision of funds for SMEs (in the fields of industry, services, tourism and other priority sectors), as well as for Mid-Caps in the field of the environment, the knowledge economy, energy and other priorities, as defined under a framework agreement concluded between the Republic of Croatia and the EIB.

2.3.5 Finally, a contract was signed with the MBDP<sup>8</sup>. This operation concerns the financing of SMEs and small to medium-sized investment projects undertaken in the fields of environmental protection, services, energy infrastructure and industry.

### 2.4 Finance contract provisions

2.4.1 The EIB-CM reviewed the template environmental clauses and the specific provisions of each finance contract. The template clauses<sup>9</sup> are for reference purposes and may not reflect the precise terms concluded under specific operations. As regards the compliance with environmental requirements, including disclosure of environmental information:

- for operations in the EU, the template clauses propose covenants for the borrower (i) to comply with the environmental law<sup>10</sup> (defined as EU law, national regulations and applicable international treaties) and (ii) to provide information about the project to the EIB throughout the life of the loan<sup>11</sup>. *Ad hoc* conditions could be added under the respective finance contract<sup>12</sup>.
- for operations outside of the EU, the same provisions as above apply, except that the notion of environmental law could be replaced by "Environmental and social standards" which cover the environmental and social laws applicable to the project, the Environmental and Social Principles and Standards (ESPS)<sup>13</sup> and potential further requirements<sup>14</sup>.

2.4.2 The finance contracts requested by the Complainant and shared by the Bank have similar provisions concerning environmental and social standards. All contracts concluded with the four intermediaries contain clauses defining environmental law as presented above. As regards the definition of environmental law, the contracts with Erste Bank AD Novi Sad and the MBDP contain the same provision, but also a specific provision for derogation from EU environmental law<sup>15</sup>.

<sup>5</sup> Apex Loan for SMEs and Mid-Caps III (2010-0393) with three contracts and Apex Loan for SMEs and Other Priorities III (2013-0072) with two contracts.

<sup>6</sup> EB Loan for SMEs & Other Priorities III (2014-0516).

<sup>7</sup> HBOR Loan for SMEs A and, HBOR Loan for SMEs B ((2013-0655), as well as HBOR Loan for MidCaps and Other Priorities II (2016-0679).

<sup>8</sup> MBDP Loan for SME & Priority Projects III (2011-0480).

<sup>9</sup> [https://www.eib.org/attachments/documents/eib\\_standard\\_contractual\\_clauses\\_on\\_environmental\\_information\\_en.pdf](https://www.eib.org/attachments/documents/eib_standard_contractual_clauses_on_environmental_information_en.pdf)

<sup>10</sup> Template contractual clauses 1. (a).

<sup>11</sup> Template contractual clauses 1. (c).

<sup>12</sup> Template contractual clauses 1. (f).

<sup>13</sup> <https://www.eib.org/en/publications/environmental-and-social-principles-and-standards.htm>

<sup>14</sup> Template contractual clauses 2. (b)

<sup>15</sup> EB Loan for SMEs and Other Priorities III "Environmental law means: (a) EU Law, including principles and standards save for any derogation accepted by the Bank for the purpose of this Contract based on any agreement between the Republic of Serbia and the EU" and MBDP Loan for SME & Priority

2.4.3 Additionally to this standard provision, the reviewed contracts also contain relevant undertakings to ensure implementation of the environmental requirements throughout the provision of funds. Consequently, the borrowers undertake to reflect EIB environmental requirements in the on-lending agreements elaborated for the financing of projects and ensure that their policy in the sector covered by the contracts comply with the EIB environmental and social standards.

### **3. REGULATORY FRAMEWORK**

#### **3.1 The EIB Complaints Mechanism's mandate**

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 human rights, with applicable law, or with the principles of good administration. 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 Group (Articles 3.2-3.3 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. The EIB-CM functions independently of operational activities in order to ensure that each complaint is dealt with by applying the highest standards of objectiveness while safeguarding the interests of all internal and external stakeholders of the EIB Group according to Article 5.1.4 of the Policy.

#### **3.2 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)**

3.2.1 Croatia, North Macedonia and Serbia are bound by the Aarhus Convention. All three countries became parties to the Aarhus Convention in the period 1999-2009. In line with the national procedures for the entry into force of international treaties, the provisions of the Aarhus Convention are part of the domestic law of the countries concerned.

3.2.2 In addition to the international treaty, because of its status of an EU Member State, Croatia is also bound by EU law implementing the Aarhus Convention such as Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment<sup>16</sup>.

#### **3.3 The Aarhus Regulation<sup>17</sup>**

3.3.1 The Aarhus Regulation implements the Aarhus Convention<sup>18</sup> 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"*.

projects III "Environmental law means: (a) EU Law, including principles and standards save for any derogation accepted by the Bank for the purpose of this Contract based on any agreement between the Republic of Serbia and the EU"

<sup>16</sup> Provisions for public participation in environmental decision-making can be found in a number of other environmental directives, such as [Directive 2001/42/EC](#) of 27 June 2001 on the assessment of certain plans and programmes on the environment and [Directive 2000/60/EC](#) of 23 October 2000 establishing a framework for Community action in the field of water policy.

<sup>17</sup> 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).

<sup>18</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ L 124, 17.5.2005, pp. 1–3).



3.3.2 Environmental information is defined in Article 2(1)(d) of the Regulation.<sup>19</sup>

### 3.4 The EIB Group Transparency Policy

3.4.1 The EIB Group Transparency Policy (TP) was adopted by the EIB's Board of Directors on 6 March 2015 in accordance with Article 18 of the Bank's Rules of Procedure. The Policy sets out the EIB Group's approach to transparency and defines the procedures concerning information requests from the public.

3.4.2 The EIB Group Transparency Policy 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 [...]"* (§ 2.1).

3.4.3 The member institutions of the EIB Group consider that *"due to their dual character as financial and public institutions, to be transparent about how they make decisions, work and implement EU policies strengthens their credibility and accountability to citizens. Transparency also contributes to...ensuring adherence to environmental and social standards linked to financed projects, and promoting accountability and good governance."* (§ 2.2).

3.4.4 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 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"* (§ 2.5).

3.4.5 As per § 5.1 all information held by the Bank is subject to disclosure upon request, unless there is a compelling reason for non-disclosure. Exceptions to disclosure are detailed in §§ 5.3–5.15 of the TP. In applying the exceptions to disclosure the Bank shall, in line with § 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.

3.4.6 Article 5.13 of the TP covers information on individual allocations made by the local banks to support investments by their own customers under credit lines established with the EIB. This information falls within the competence of the intermediary bank as part of the normal business relationship between the respective bank and its customers<sup>20</sup>. However, the EIB encourages the intermediary bank to make information covering its relationship with the EIB available.

<sup>19</sup> "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. 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);"

<sup>20</sup> The EIB has no contractual relationship with final beneficiaries of intermediated loans. The intermediary bank is the beneficiary's business partner, carrying the project's commercial risks and signing the financing contract.

### **3.5 Guidance Note for Promoters and Partners on the EIB Group's Transparency Policy**

3.5.1 The EIB has developed a guidance note<sup>21</sup> to inform promoters and other EIB partners of some of the main provisions of the TP and their practical application to information that the EIB produces or receives in relation to its operations. The Guidance note states that the EIB encourages promoters, borrowers, or other competent parties "to follow the transparency principles detailed in its Policy in the context of the financed projects."

### **3.6 The 2009 EIB Statement of Environmental and Social Principles and Standards<sup>22</sup>**

3.6.1 The EIB Statement of Environmental and Social Principles and Standards (the Statement) sets the policy context for protection of the environment and human well-being. The Statement applies to all forms of EIB financing, in all regions of Bank operations in both the public and private sector. The Statement requires that financed projects be acceptable in environmental and social terms (§ 1 of the Statement).

3.6.2 For projects approved for EIB financing, the obligations of the promoter that derive from the environmental and social requirements of the Bank are described in the finance contract signed between the EIB and the borrower. The EIB monitors the environmental and social performance of the projects it finances, especially the fulfilment of any specific obligations described in the finance contract (§§ 7 and 8).

3.6.3 The environmental and social standards apply without qualification in the EU. Within the EU, EU law is mandatory, but the Bank reserves the right to set its own higher standards should this be considered appropriate. The same standards shall also be pursued in the Candidate and Potential Candidate Countries (i.e. the "Enlargement Countries") (§ 18 Background). Within the EU, the EIB assumes that EU environmental and social law has been correctly transposed into national law and that national law is being enforced by the responsible authorities. EIB due diligence focuses particularly on countries and/or specific laws where there is evidence to suggest these assumptions may be false (§ 20 Background). For EU and Enlargement Countries the EIB requires that all projects that it finances comply at least with:

- applicable national environmental law;
- applicable EU environmental law, notably the EU EIA Directive and the nature conservation Directives, as well as sector-specific Directives and cross-cutting directives;
- the principles and standards of relevant international environmental conventions incorporated into EU law (§ 36 Standards)

In Enlargement Countries, the EIB will pursue EU standards (§ 38 Standards).

3.6.4 Two different versions of the EIB Environmental and Social Handbook apply to the operations concerned by the complaint depending on the date when each specific operation was approved. The purpose of the EIB Environmental and Social Handbook is to provide an operational translation of the policies, principles and standards underpinning the Statement.

### **3.7 EIB Environmental and Social Handbook 2010 version (the 2010 Handbook)**

#### *Appraisal*

3.7.1 Under the rules of the 2010 Handbook, in the case of Mid-Cap loans, approval of individual allocations between EUR 25m and EUR 50m is the responsibility of the Bank's services, based on a fiche submitted by the intermediary, which includes environmental information (§ 118, Part C Appraisal). The Bank retains the right to ask for additional environmental information or to do a partial or an in-depth appraisal of any sub-project if judged necessary (§ 119).

3.7.2 Generally, the schemes to be financed under Global Loans are not known at the time of submission to the Board, and GLs are not normally appraised by the Bank. The Board of Directors approves the GLs and/or global authorisations on the basis of the objectives sought (e.g. financing of SMEs, infrastructure, the environment, etc.) and the project selection criteria (e.g. regions concerned, sectors excluded, etc.) which are then reflected in the contract(s) signed (§ 120). The appraisal and approval of a GL allocation is generally the responsibility of the intermediary institution (§ 122).

<sup>21</sup> <https://www.eib.org/en/publications/guidance-note-on-the-eib-transparency-policy.htm>

<sup>22</sup> [https://www.eib.org/attachments/strategies/eib\\_statement\\_esps\\_en.pdf](https://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf)



3.7.3 *"On the request of Ops, PJ may carry out an environmental and social assessment of a particular GL operation, including an assessment of the environmental risk management capacity of the promoter; it may also carry out an environmental and social assessment of a particular sub project (allocation) when requested by Ops. All projects financed through financial intermediaries are covenanted to comply with appropriate environmental legislation; within the EU, EU legislation, outside the EU, national legislation, with reference where appropriate to EU legislation."* (§ 121).

#### *Disclosure*

3.7.4 According to its Transparency Policy and in accordance with the Aarhus Regulation, the Bank releases non-confidential project-related information, on request, to members of the public (§ 195).

#### *Environmental and Social Finance Contract Conditions*

3.7.5 One of the types of control that could be put in place by the Bank are particular undertakings implying that a given environmental or social matter "[...] must be completed to the satisfaction of the Bank during the implementation and sometimes operation of the project [...]" (§ 243).

3.7.6 § 252 presents the standard environmental/social undertaking for a standard investment loan. If necessary, additional contractual conditions or undertakings may be proposed by the EIB operational services. (§ 253).

3.7.7 For framework loans and mid-cap loans, generally all sub-projects with significant impacts expected on the environment and in particularly any sub-project requiring an EIA, would be subject to the same conditions as a project in an Investment Loan. Flexibility is acceptable according to specific circumstances (§ 254).

### **3.8 EIB Environmental and Social Handbook 2013 version (the 2013 Handbook)**

#### *Appraisal*

3.8.1 The 2013 Handbook contains the same provisions as the 2010 Handbook for Mid-Cap Loan individual allocations between EUR 25m and EUR 50m (§ 305 Volume II: EIB Environmental and Social Practices and Procedures).

3.8.2 The assessment of the intermediary focuses on the capacity and capability of the intermediary to manage the environmental and social aspects, including the impacts and risks, arising from its operations. This will include an assessment of the adequacy and effectiveness of the environmental and social system that the intermediary has in place (§ 306). The EIB retains the right to ask for additional environmental and social information or to do a partial or an in-depth appraisal of any sub-project if judged necessary (§ 307).

3.8.3 In the EU, Candidate and Potential Candidate Countries, the intermediary will undertake to ensure compliance of the projects with appropriate national and/or EU and international environmental and human rights law. Compliance with applicable EU, national and/or international environmental and social legislation and guidelines and the EIB's environmental and social standards will be made a condition for the project. The underlying projects will be required to comply with the relevant national legal framework, to be acceptable in environmental and social terms to the EIB and aligned with EU environmental and social principles and standards, as well as the EIB's environmental and social standards. (§ 307 Role of the Intermediary).

3.8.4 §§ 309-313 of the 2013 Handbook concern the role of the intermediary. The provisions are similar to the ones in the 2010 Handbook (see §§ 3.7.1-3.7.3 above).

#### *Disclosure*

3.8.5 The 2013 Handbook elaborates on the EIB Transparency Policy, which is in line with international best practice and the transparency standards of other EU bodies and institutions. As an EU body, the EIB has a particular responsibility to be open and transparent towards its shareholders, the EU Member States, and ultimately, towards the citizens of the EU (§ 323). The Transparency Policy gives the public the right to request disclosure of all information and documents held at the EIB. At the same time the Policy ensures the protection of confidential information that the EIB holds from its clients and project partners (§ 324).

#### **4. THE EIB-CM INQUIRY**

4.1 In order to address the Complainant's allegations, the EIB-CM reviewed the applicable regulatory framework and relevant documents, including the correspondence between the Bank and the Complainant, the finance contracts for the relevant operations and the documents provided by the Bank's services and the Complainant. The EIB-CM liaised with the Complainant and the Bank's services. The information gathered during the investigation enabled the EIB-CM to reach findings and conclusions on the allegations as presented in the sections below.

#### **5. FINDINGS**

##### **5.1 Alleged non-compliance of EIB finance contracts for intermediated lending with EIB transparency requirements**

5.1.1 The Complainant alleged that the contracts signed between the EIB and several financial intermediaries do not contain sufficient provisions to ensure a disclosure of information in line with the transparency requirements pertinent to the EIB. In order to verify the grounds of this allegation, the EIB-CM proceeded with the review of the legal documents related to the operations listed by the Complainant.

5.1.2 The EIB-CM reviewed the ten finance contracts relevant for the complaint. All contracts contain clauses to ensure a general disclosure of information about the involvement of the EIB. The responsibility lies with the borrower and where applicable with its agent. Consequently, the borrower/agent must ensure that its contracts with a FI require that each final beneficiary (FB) is informed about the EIB's involvement in the process. In particular, it is required that the FI insert on its website an information page about the EIB's activity in favour of SMEs/Mid-Cap financing products.

5.1.3 The EIB-CM notes that the notion of "Environmental Law" is specifically defined in the different legal documents (see § 2.3.1 above). The review of the legal documents showed that all contracts contain clauses providing that the borrower (and where applicable its agent) undertake to ensure that the intermediaries and the implementation of the projects comply with the applicable environmental regulations, as defined. This reference is understood to cover the disclosure of environmental information.

5.1.4 The EIB-CM observes that the reviewed legal documents provide the possibility for the EIB to ask for documentary evidence in order to monitor the operations' compliance with the EIB's environmental requirements; this may imply further involvement of the Bank in the technical appraisal. Under its procedures, the EIB may also provide the borrower, the agent or the intermediary with indications concerning these transparency and environmental requirements.

5.1.5 In the reviewed finance contracts, there are contractual provisions put in place to comply with the requirements for transparency. These clauses contain undertakings to "implement and operate the project in compliance with "Environmental law", a term including Environmental Laws as the Aarhus Convention or the EU Directives referred to in § 3.2 of this Report, as well as the EIB's environmental and social standards (see also § 3.8.3). Finally, the TP clearly indicates that, in the case of intermediated loans, disclosure of information on individual allocations falls "within the competence of the intermediary bank".

5.1.6 The EIB-CM observes, however, that, currently, the quality of the work done by intermediaries when managing requests for disclosure of information on final projects relies mostly on unstructured monitoring by the relevant services of the Bank. In this regard, the EIB-CM underlines that the possibility for the Bank to provide information and advice about transparency requirements is good practice. In the EIB-CM's view, this aspect should be streamlined and employed systematically, especially taking into account the experience of the Complainant and other members of the public when filing requests for information with EIB intermediaries (see § 1.4 above).

5.1.7 The EIB-CM notes that at present the only document dedicated to providing information to promoters and partners on the TP is the Guidance note, which "encourages them to follow the transparency principles detailed in its policy in the context of financed projects" (see § 3.5.1 above). Under these circumstances, it appears appropriate for the Bank to update and strengthen its communication with and guidance to intermediaries with a view to systematically providing them with precise and thorough information on the transparency obligations, which are based on the provisions of the TP and the EIB's environmental and social standards.

5.1.8 In this regard, the Bank should consider systematising the wording of the Guidance note for promoters and partners on the EIB Group Transparency Policy and any other EIB legal or information documents, as deemed relevant, to reflect the requirements for transparency towards the public. The inquiry into the present complaint shows that, when members of the public request information about the names of projects supported by the EIB, the EIB's reply should be substantive irrespective of whether an intermediary is involved in the operation. The EIB should therefore provide the names of the final projects, if the Bank holds this information and provided that no exception established by the TP applies to the disclosure of the requested information. Handling information requests concerning intermediated lending features a high degree of complexity due to the number of subjects and interests involved. Therefore, it is particularly important that the EIB's decision is based on an ad hoc assessment aimed at accurately evaluating the specific impact of disclosing the information requested and with a view to abiding by the TP principles referred to in §§ 3.4.2-3.4.4 above.

## **5.2 Allegedly unlawful refusal of the EIB to disclose environmental information on intermediated loans**

5.2.1 With reference to the requests for information lodged with the EIB, the Complainant argues that the Bank did not comply with the requirement to disclose environmental information in its possession. The Complainant alleged that the EIB, which was in possession of the allocation lists from financial intermediaries, was in possession of environmental information, "specifically names of projects which were likely to have a significant impact on the environment and were subject to environmental impact consideration as described above, and thus was obliged to disclose it."

5.2.2 From the outset, the EIB-CM notes that project names *per se* do not qualify as environmental information. The EIB-CM observes that in its reply of 24 April 2018 the EIB made reference to Article 5.13 of the EIB Group Transparency Policy (see § 2.2.3 above) and stated that it could not disclose "[...] *information on individual allocations made by local banks to support investment by their own customers under credit lines established with the EIB as the disclosure of this information falls within the competence of the intermediary banks*". For this reason, the EIB could not confirm which projects listed in the query had been financed by the Bank through its intermediated loans. The EIB advised the Complainant to contact directly the financial intermediaries involved in the projects concerned.

5.2.3 In assessing the allegation put forward by the Complainant, the EIB-CM takes into account the decision of the European Ombudsman (EO) in case 1316/2016/TN<sup>23</sup>. The EO decision confirms the EIB's position that intermediated loans are subject to the same transparency requirements as other types of loans (§ 64). The Ombudsman further found that Article 5.13 of the TP does not introduce any exception in addition to the exceptions relating to the protection of commercial interests and third-party documents (§ 65). The EIB has confirmed to the EO that it is not its practice to use Article 5.13 to refuse information held by the Bank concerning intermediated loans.

5.2.4 Based on the above, the EIB-CM finds that the reference to Article 5.13 in the EIB's reply to the Complainant was not in line with the spirit of the TP and the practice of the Bank. Under the TP, the Bank releases non-confidential project-related information on request to the public (see § 3.4.4 above). The EIB-CM understands that Article 5.13 of the TP serves the purpose of illustrating the specific nature of intermediated loans and the fact that information on individual allocations may not be held by the Bank and should rather be requested from the intermediary bank. Under these circumstances, the Bank should have provided a substantive reply to the Complainant by checking whether it held the information and if so by examining the request under the TP exceptions. The EIB-CM urges the EIB relevant services to contact the Complainant and provide a substantive reply to the information request.

## **5.3 Alleged non-compliance of EIB finance contracts for intermediated lending with EIB environmental requirements**

5.3.1 The Complainant alleges that the clauses in the finance contracts concerned do not ensure that projects in Enlargement Countries comply with EU law and environmental treaties. In this regard, the Complainant points out that while the EIB Statement of Environmental and Social Principles and Standards requires that projects that the Bank finances in Enlargement Countries comply with applicable EU environmental law, clauses in finance contracts for intermediary lending seem to presume that EU environmental and social law has been transposed without conducting a relevant gap analysis. Furthermore, according to the Complainant, making relevant provisions in the finance contracts requiring the final beneficiaries to comply with environmental law, including EU law and environmental treaties is insufficient to ensure that final projects do comply. The Complainant provides an example arguing that in Serbia hydropower plants below 2 MW are not considered for their environmental impact at all, which according to the

<sup>23</sup> <https://www.ombudsman.europa.eu/en/decision/en/95520>



Complainant is inconsistent with the EIA Directive and is ultimately a result of a difference between Serbian legislation and the EIA Directive.

5.3.2 The EIB-CM reviewed the finance contracts pertinent to the Complainant's allegation. The review shows that the contracts require compliance with environmental law, including EU law, standards and principles. The contracts are therefore compliant with the requirements of the EIB Statement of Environmental and Social Principles and Standards and the requirements of the Handbook (see §§ 3.6.1-3.6.3, § 3.8.3 and § 3.8.4 above).

5.3.3 The salient question is whether the relevant provisions of the finance contract are sufficient to ensure that final projects actually comply. The EIB-CM understands that, in practice, the different levels of advancement of Enlargement Countries on their path towards EU membership do not enable the FIs in the respective countries to accept unconditional reference to EU legislation and national law remains generally the reference legislation. Because of this, more stringent reporting and information guidelines at the level of the individual allocations are maintained. This mitigates the risk of any potential use of EIB funding for sub-projects with a negative environmental impact.

5.3.4 From its inquiry, the EIB-CM understands that the relevant clauses in the finance contracts for intermediated lending are complemented by other safeguards to guarantee compliance with EU environmental law and EIB standards. When financing through a FI and particularly outside of the EU, the Bank assesses the FI and their capacity to on-lend the EIB funds in line with the EIB's environmental and social standards (see § 3.8.2 above). The FI is further required to apply equivalent screening procedures to those of the EIB and is required to take into account the EIB's environmental and social standards. At allocation stage, particularly for new clients and operations outside the EU, the Bank's services check all allocation proposals before approving a disbursement. The EIB retains the right to ask for additional environmental and social information or to do a partial or an in-depth appraisal of any sub-project if deemed necessary (see § 3.8.2 above). The EIB may also decide whether there is a need for additional requirements for sub-projects and if there is a need for training to strengthen the environmental capacity of the FI. The Bank performs monitoring at both the intermediary level the allocation process level.

5.3.5 The EIB-CM considers that the finance contracts concerned ensure the compliance of intermediated lending with the EIB's environmental requirements.

5.3.6 The EIB-CM inquired as to whether the EIB is considering strengthening its processes further. In 2019, the EIB will be launching a review through a public consultation of the EIB Statement on Environmental and Social Sustainability and the EIB's Environmental and Social Standards. The revised Statement will frame the Bank's response to environmental and social challenges and will spell out the Bank's actions and commitments. The Standards will define the mandatory requirements with which the EIB's clients and promoters shall comply when assessing and managing environmental and other risks throughout the project cycle.

5.3.7 The EIB-CM has also been informed that, in the third quarter of 2019, the EIB will start implementing revised eligibility criteria for final beneficiaries and sub-projects eligible for EIB financing in the hydropower sector. The hydropower sector becomes an excluded sector for all Multiple beneficiary intermediated loans (MBILs) inside and outside of the EU and for all types of beneficiaries where the EIB services responsible for the environmental and social due diligence of intermediated operations have not been involved in the appraisal stage. When a review by the EIB takes place, detailed project information will be required for the EIB's review prior to any allocation. The review will take place irrespective of the size of the sub-project.

5.3.8 The EIB's Environmental climate and social guideline on hydropower development, which was subject to public consultation, will be published in 2019.

5.3.9 Finally, with regard to the general issue raised by the Complainant concerning inconsistencies between Serbian legislation and EU law, the EIB-CM notes that the European Commission is the institution responsible for verifying progress on the transposition and implementation of EU acquis by Candidate Countries. As such, the European Commission should be informed about the issue raised by the Complainant.

#### **5.4 Alleged failure of EIB finance contracts for Mid-Cap Loans to include provisions enabling due diligence of loans between EUR 25m and EUR 50m.**

5.4.1 According to the Complainant, financial contracts for Mid-cap loans do not contain relevant provisions which would require borrowers to submit to the EIB the documents and information necessary for the Bank to undertake a review and approval of individual allocations between EUR 25m and EUR 50m. In the Complainant's view, this is an instance of maladministration.

5.4.2 According to EIB procedures, large Mid-Cap allocations (individual project cost between EUR 25m and EUR 50m) require the Bank's services to carry out a simplified appraisal of the sub-project concerned. Under the relevant finance contracts, following examination of a project as the Bank deems necessary, the Bank decides whether to approve or decline the allocation request. Monitoring is done with respect to environmental requirements, where applicable with the further involvement of the Bank in the technical appraisal (see § 5.1.4 above). A review of the relevant finance contract reveals that there is no exclusion of Mid-Cap Loans between EUR 25m and EUR 50m from these requirements. The Bank may require that the borrower provide documents and information for the Bank to undertake a review and approval of such individual allocations.

5.4.3 Finally, the EIB-CM observes that the finance contracts concerned contain an undertaking whereby, at its request, the Bank will receive evidence that the project is being implemented and operated in compliance with Environmental Law.

### **6. CONCLUSIONS AND RECOMMENDATIONS**

#### **6.1 Based on the inquiry the EIB-CM closes the case with the following conclusions:**

In the reviewed finance contracts, there are contractual provisions put in place to comply with the requirements for transparency of environmental information. The EIB monitors the correct implementation of the contractual requirements. The possibility for the Bank to provide information and advice to intermediaries about transparency requirements is good practice which should be applied systematically.

Article 5.13 of the TP serves to illustrate the specific nature of intermediated loans and the fact that information on individual allocations may not be held by the Bank and should rather be requested from the intermediary. The Bank should have provided a substantive reply to the Complainant by checking whether it held the requested information and if so by examining the request under the TP exceptions.

The EIB-CM considers that the finance contracts in question ensure the compliance of intermediated lending with the EIB's environmental requirements.

A review of the relevant finance contract reveals that Mid-Cap Loans between EUR 25m and EUR 50m follow the EIB's due diligence requirements, which implies that the EIB's approval is required for these sub-loans before allocation.

#### **6.2 Following up on the conclusions above the EIB-CM recommends the following to the Bank:**

6.2.1. The Bank should update and strengthen its communication with intermediaries and systematically provide them with precise and thorough information and guidance on the EIB transparency obligations, which are based on the provisions of the TP and the EIB's social and environmental standards. In this regard, the Bank may consider systematising the wording of the Guidance note for promoters and partners on the EIB Group Transparency Policy and any other EIB legal or information documents to reflect the EIB requirements for transparency towards the public, as deemed relevant.

6.2.2. When the public requests to know the names of the projects supported by the EU Bank, the EIB should ensure that this information is disclosed, irrespective of whether an intermediary is involved, provided that (i) the Bank holds the requested information and (ii) none of the exceptions set out in the TP applies to the disclosure of the requested information.

Handling information requests concerning intermediated lending features a high degree of complexity due to the number of subjects and interests involved. Therefore, it is particularly important that the EIB's decision is based on an ad hoc assessment aimed at accurately evaluating the specific impact of disclosing the information requested.



6.2.3. The EIB's relevant services should develop and deploy dedicated training for intermediaries in Enlargement Countries and outside the EU which underscores the need for timely disclosure of the names of projects supported by the EIB, for setting up a straightforward and timely disclosure procedure that meets the requirements for transparency towards the public, as well as for dealing with grievances concerning access to information;

6.2.4. The EIB's relevant services should contact the Complainant and provide a substantive reply to the information request in line with the applicable regulatory framework.

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

S. Derkum  
Head of Division  
Complaints Mechanism  
30.09.2019

V. Stoeva  
Complaints Officer

30.09.2019

**LIST OF ACRONYMS**

EIA	Environmental Impact Assessment
EO	European Ombudsman
ESIA	Environmental and Social Impact Assessment
ESDS	Environmental and Social Data Sheet
FB	Final Beneficiary
FI	Financial Intermediary
GGF	Green for Growth Fund
GL	Global Loan
HBOR	Croatian Bank for Reconstruction and Development
HPP	Hydropower Project
MBDP	Macedonian Bank for Development Promotion
MBIL	Multiple Beneficiary Intermediated Loan
Mid-Cap	Medium-Sized Company (250-3000 employees)
NBS	National Bank of Serbia
SHPP	Small Hydropower Project
TP	EIB Group Transparency Policy