

Nenskra HPP

Complaint SG/A/2018/01

Georgia

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

6 February 2019

Prepared by

Complaints Mechanism

External Distribution

Complainant

Internal Distribution

Management Committee

Secretary General

Inspector General

EIB services concerned

The EIB Complaints Mechanism

The EIB Complaints Mechanism provides the public with a tool enabling alternative and pre-emptive resolution of disputes in cases where the public feels that the EIB Group has done something wrong, i.e. if 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 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 EO.

The EO was created by the Maastricht Treaty of 1992 as an EU institution to which any EU citizen or entity may appeal with a request 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 identified 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's 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 with its policies and procedures but to endeavour to solve the problem(s) raised by complainants such as those regarding the implementation of projects.

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

TABLE OF CONTENTS

EXECUTIVE SUMMARY	5
1. INTRODUCTION	7
2. BACKGROUND	7
3. REGULATORY FRAMEWORK	9
4. COMPLIANCE REVIEW	10
5. CONCLUSIONS	17
ANNEX 1 ACRONYMS	19
ANNEX 2 TIMELINE.....	20

EXECUTIVE SUMMARY

On 9 March 2018, the EIB Complaints Mechanism (EIB-CM) received a complaint from CEE Bankwatch Network regarding Nenskra HPP project. The project relates to a 280-megawatt hydropower plant on the Nenskra River in the Svaneti region of north-western Georgia.

The complainant alleges that the Bank failed to comply with its Transparency Policy on two grounds:

First, the Bank failed to comply with Article 5.22 that provides for standard disclosure of requested documents within a prescribed 15 working day period.

Secondly, the Bank failed to apply correctly those provisions of the EIB-TP that limit the right of access to information.

The EIB-CM has concluded that:

- By informing the complainant of an extension of time limit for disclosure some 24-26 working days after the complainant's initial requests for information, the Bank's notification fell outside its notice period¹ (15 working days following receipt).
- By disclosing the requested documents some 47-49 working days after the complainant's initial requests for information, the Bank fell short of its deadlines - in the case of standard disclosure, a commitment to disclose within 15 working days, or in complex cases, an endeavour to respond within 30 working days following receipt of initial requests².
- Discussions held with both the EIB and the complainant reveal a material discrepancy in the interpretation of the requested information. Given the lack of clarity surrounding the requested documents, EIB-CM considers the Bank's disclosure reasonable with regard to (i) EIB's economic assessment, (ii) EIB's environmental appraisal report and (iii) Indigenous Peoples assessment. Recognizing that the complainant's request may be subject to different interpretations and taking into account the complainant's dissatisfaction with the outcome of disclosure, EIB-CM transferred the complaint to EIB services for handling in accordance with the EIB-TP.
- EIB-CM considers that redactions applied to the Results Measurement (ReM) sheet under Article 5.4(b) relating to personal data are justified. However, EIB's application of exception 5.5, first indent, relating to commercial interests fails to comply with the EIB-TP. EIB's application of the exception was based on insufficient grounds which did not contain individual reasoning. In this regard, the Bank failed to supply the complainant with an explanation as to how access to the information at issue could specifically and effectively undermine the interest protected by the exception.

¹ As prescribed by Article 5.23 of the EIB-TP.

² As prescribed by Article 5.24 of the EIB-TP.

Based on issues raised and addressed in this complaint, EIB-CM considers that the following actions would strengthen EIB's commitments in handling information requests under the Transparency Policy:

- In order to process requests expeditiously and productively, and in particular when requests may have more than one objective interpretation, the Bank should work with the requester to clarify the nature and scope of the information sought at the outset.
- In order to ensure fullest possible disclosure of requested information/documents in a manner consistent with the principles for disclosure, the Bank should develop specific guidance on the application of the EIB-TP exceptions for use by EIB staff.

1. **INTRODUCTION**

On 9 March 2018, EIB-CM received a complaint from CEE Bankwatch Network regarding Nenskra HPP project. The complaint was registered on 16 March 2018 in accordance with paragraph 4.3 of the EIB-CM Operating Procedures. Thereafter, EIB-CM received a supplemental complaint dated 30 April 2018.

The complainant alleges two areas of non-compliance with regard to transparency and disclosure practices of the EIB. Firstly, the complainant contends that the Bank failed to comply with its Transparency Policy, in particular Article 5.22 that provides for disclosure of requested documents within a prescribed 15 working day period. She believes her requests do not fall within the exceptions of the policy as the documents are Bank-held and environment-related. The EIB formally responded to the complainant's requests for information on 23 April 2018.

Secondly, the complainant alleges the Bank failed to interpret strictly those provisions of the EIB Group Transparency Policy that limit the right of access to information. According to the complainant, the Bank provided insufficient justification in withholding information and displayed inconsistencies in its disclosure practice. Further, the complainant alleges the Bank failed to take due account of public interest in the application of the exceptions. On 3 July 2018, in an effort to resolve pending issues, EIB-CM forwarded the complainant's written expression of dissatisfaction to EIB services to be handled in accordance with the Bank's Transparency Policy. The Bank formally responded to the complainant on 14 August and 16 November 2018.

This compliance review will consider, in respect of the matters raised by the complaint, whether the EIB met its obligations under the 2015 EIB Group Transparency Policy³ as relate to (i) disclosure timelines and (ii) level of disclosure.

2. **BACKGROUND**

2.1. *The project*

On 6 February 2018, the European Investment Bank (EIB) approved financing of Nenskra HPP for a loan of up to EUR 127 million. The project is being developed by JSC Nenskra Hydro (the "sponsor") whose main shareholders are Korea Water Resources Corporation, a Korean government agency, and Georgian state-owned JSC Partnership Fund (referred to jointly as the "promotor").

The project involves the construction of a 130-metre dam, 3-square-kilometre reservoir and 280-megawatt hydropower plant on the Nenskra River in the Svaneti region of north-western Georgia. Nenskra HPP is expected to improve Georgia's energy security by reducing the long-term power supply gap and decreasing reliance on electricity imports. The project's main construction period is scheduled to commence in 2018.

³ Available at http://www.eib.org/attachments/strategies/eib_group_transparency_policy_en.pdf

2.2. The complaint

The specific issues raised by the complainant are:

1. Whether the Bank properly applied its requirements for handling information requests within the prescribed timeline

The complainant alleges that the Bank's delay in disclosing requested information failed to respect the prescribed 15 working day timeline provided in the EIB-TP. She believes her requests do not fall within the exceptions of the policy as the documents are Bank-held and environment-related. Further, she contends the Bank failed to inform her of an extended timeline as mandated in the EIB-TP.

The complainant refers to three instances of communication with the Bank on 6⁴, 8 and 12 February 2018 in request for information. First, an oral request for the disclosure of two project-related documents during a meeting in Luxembourg with Bank staff. Secondly, a formalised written request of the aforementioned

Following the discussion, I would like to request disclosure of the EIB's economic assessment for Nenskra project as well as expertise the bank possesses related to the issue of identification of Svans as indigenous people.⁵

Thirdly, a second written request to the Bank for the disclosure of five additional project-related documents

I would also like to request disclosure of the Management Proposal to the Board, EIB's environmental appraisal report, ESIA gap analysis done by the EIB, ReM sheet, environmental forms (as required by EIB Environmental Handbook) provided by the borrower.⁶

2. Whether the Bank properly applied its requirements regarding exceptions to disclosure

The complainant expresses her dissatisfaction with the Bank's response dated 23 April 2018 concerning four documents (hereinafter referred to as "documents at issue")

- **With respect to EIB's economic assessment**, the complainant argues the Bank failed to comply with her request, in particular, to disclose its economic assessment of the project drawn up at the time of appraisal and conducted on the basis of its methodology⁷. The complainant considers the information contained therein to be environmental information as defined in Regulation (EC) N°1367/2006;
- **With respect to EIB's environmental appraisal report**, the complainant indicates the Bank failed to disclose environmental and social (E&S) assessment forms D1/D2/D3;

⁴ Allegations of delay incurred by the Bank with regard to requested information is assessed by EIB-CM on the basis of the complainant's formalized written request of 8 February 2018.

⁵ Complainant's email dated 8 February 2018. Not publicly available.

⁶ Complainant's email dated 12 February 2018. Not publicly available.

⁷ The Economic Appraisal of Investment Projects at the EIB, March 2013, available at http://www.eib.org/attachments/thematic/economic_appraisal_of_investment_projects_en.pdf

- **With respect to 'expertise the bank possesses related to the issue of identification of Svans as indigenous people'**, the complainant expressly draws attention to the discrepancy between the document requested and the summary provided. She believes the Bank's refusal to disclose the report and attempt to conceal its author are contrary to EU standards, both of which she insists should be disclosed;
- **With respect to the ReM sheet**, the complainant believes portions of the document containing environmental information have been unnecessarily redacted, in particular, the cost of electricity generated with environmental externalities and national savings made from import reduction/export gains. The complainant cites specific references to the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "Aarhus Convention") and Regulation (EC) N°1367/2006. The complainant finds that the Bank has applied a simplistic and inconsistent approach in its application of exceptions.

3. REGULATORY FRAMEWORK

The EIB-TP defines EIB procedure concerning information made available to the public either on a routine basis or upon request. The relevant provisions on disclosure of information are based on a 'presumption of disclosure' unless subject to a defined exception.

Pursuant to Article 5.22-5.24, EIB commits to reply to disclosure requests within 15 working days and, in exceptional cases, endeavours to reply no later than 30 working days following receipt. Exceptional cases, as provided for in the policy, may relate to *"a very long document or when the information is not readily available and complex to collate."*⁸ Time extensions may be reasonably anticipated for requests concerning *"large volumes of information and information that relates to third-parties."*⁹ Where, on account of the complexity of the issues raised, a reply cannot be provided within the abovementioned period, the correspondent *"shall be informed accordingly no later than 15 working days following receipt."*¹⁰

According to Article 5.4-5.6, the Bank will not disclose information that would undermine the protection of, inter alia, personal data (5.4), commercial interests of a natural or legal person (5.5) or integrity of the Bank's decision-making process (5.6), the latter exception being subject to an analysis on whether or not an overriding public interest is deemed to exist¹¹. Where information or material is submitted or produced by a third party, the Bank may consult the other party to establish whether it is confidential, unless otherwise clear¹². To this end, all requests for disclosure of information/documents are subject to the presumption of disclosure unless the exceptions of the EIB-TP apply. In the latter case, and where non-disclosure or partial disclosure is foreseen, the reasoning of the Bank with regard to the application of the exceptions must be stated.

⁸ EIB Transparency Policy, March 2015, Article 5.23

⁹ EIB Transparency Policy, March 2015, Article 5.22

¹⁰ EIB Transparency Policy, March 2015, Article 5.23

¹¹ Exceptions under 5.5 and 5.6 apply.

¹² EIB Transparency Policy, March 2015, Article 5.9

4. **COMPLIANCE REVIEW**

4.1. *The Bank services' response*

The EIB services set out their perspective of the complaint during a meeting with EIB-CM on 28 March 2018 and through subsequent exchanges. The Bank staff indicate that requests for disclosure of documents were received on 6, 8, and 12 February 2018.

The Bank acknowledged receipt of the requests by email on 8 and 13 February 2018. Given the complexity of the request, the Bank sent an email on 16 March 2018 informing the complainant that an additional 15 working days were required to deal with the request, as provided by Articles 5.23 and 5.24 of the EIB-TP.

The EIB services acknowledge its failure to inform the complainant of an extended timeline in a timely manner. Nevertheless, EIB services consider that additional time was required due to the complexity of the information requested. According to EIB services, the main reason for the delay was the time taken to (a) redact confidential or sensitive information, (b) collate information not readily available and (c) consult third parties. As regards third party consultation, the EIB services indicate that all requested documents were shared with the promotor as part of a disclosure package.

The Bank provided its final response to the complainant on 23 April 2018, in which it disclosed

- 1 Summary of EIB's economic appraisal of the project**
- 2 Summary of EIB's assessment on the applicability of Standard 7**
- 3 EIB proposal from the Management Committee to the Board of Directors (redacted)**
- 4 ReM sheet (redacted)**
- 5 Environmental and Social Data Sheet (ESDS)**
- 6 Environmental forms provided by the promotor**

With respect to the EIB proposal from the Management Committee to the Board of Directors and the ReM sheet, the Bank's response¹³ indicates that redacted information is covered by the exceptions provided for in Articles 5.4(b), 5.5 and 5.6 of the EIB-TP. These exceptions include

- *the protection of the privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data*
- *the protection of commercial interests of a legal person*
- *the Bank's ongoing decision-making process*

The EIB further notes that as regards Articles 5.5 and 5.6, no overriding public interest is found to exist and none of the redacted information relates to the environment. As subsequently explained to EIB-CM the application of Articles 5.4(b) and 5.5 were relevant to the ReM sheet.

¹³ Bank's email dated 23 April 2018. Not publicly available.

4.2. Findings

The Bank's acknowledgements of receipt were sent to the complainant on 8 and 13 February 2018, both within one working day following receipt. Thereafter, the Bank failed to inform the complainant of the reasons for delay in a timely manner. The requested documents were finally disclosed by the Bank to the complainant on 23 April 2018. This response was provided in the form of two emails each addressing its corresponding request some 49 and 46 working days, respectively, following receipt of the complainant's requests. As accepted by both the complainant and EIB staff, the response exceeded the prescribed time limit as set forth in EIB's Transparency Policy.

However, the parties diverge over the exceptionality of the complainant's requests. While the Bank considers some documents to contain sensitive, confidential or third-party information subject to redaction or summary, the complainant sees the documents as Bank-held, readily available and environment-related. The nature of the information requested and prepared by the EIB, and the level of disclosure applicable to those requests (latter aspect strictly relevant to the documents at issue) is therefore a key focus in addressing the compliance question above.

Before proceeding to examine the documents at issue, it is necessary to establish that all requested documents, aside from both the EIB's economic assessment¹⁴ and Indigenous Peoples assessment¹⁵, are considered by EIB-CM to be Bank-held, that is, drawn up or received by the EIB and in its possession. In this regard, it is important to note that Article 5.1(a) of the EIB-TP states: *"All information and documents held by the Bank are subject to disclosure upon request, unless there is a compelling reason for non-disclosure."*¹⁶ From this perspective, and while recognising that contract negotiations remain ongoing, Bank consultation with the promotor on all requested documents would appear unreasonable.

Table 1: Summary of documents

	Complainant-requested documents	EIB-disclosed documents	Level of disclosure	Exception(s) applied
* (1)	EIB's economic assessment	Summary of the EIB economic appraisal of the project	Disclosed in summary form	No
* (2)	Expertise the Bank possesses related to the issue of identification of Svans as indigenous people	Summary of EIB's assessment on the applicability of Standard 7	Disclosed in summary form	No
(3)	Management proposal to the Board	EIB proposal from the Management Committee to the Board of Directors	Partial disclosure	Exceptions 5.4(b), 5.5 (first indent) and 5.6
* (4)	EIB's environmental appraisal report	ESDS	Disclosed	No
(5)	EIB's ESIA gap analysis	ESDS/promotor's ESIA gap analysis	Disclosed	No
* (6)	ReM sheet	ReM sheet	Partial disclosure	Exceptions 5.4(b) and 5.5 (first indent) ¹⁷
(7)	Environmental forms provided by the borrower	Environmental forms provided by the promotor	Disclosure	No

* Documents at issue

¹⁴ A review of project documentation reveals that an economic and financial analysis was conducted by Bank staff at appraisal. This information is documented in the PJ internal appraisal report as part of a wider appraisal exercise, all information of which may be classified as Bank-held. However, due to the discretionary nature of the appraisal process, an EIB economic assessment document, as such, does not exist.

¹⁵ With respect to the study conducted by an external expert as mentioned in the supplementary complaint, EIB services note that there is no stand-alone document held by the Bank that comes under the scope of this part of the request.

¹⁶ EIB Transparency Policy, March 2015, Article 5.1(a)

¹⁷ Applicable exceptions as clarified by Bank staff.

a) EIB's economic assessment

The complainant requested EIB's economic assessment on 6 and 8 February 2018. The Bank instead provided an ad-hoc document largely prepared using excerpts drawn from EIB's Project Directorate (PJ) internal appraisal report. It generally provided context and background, market supply and demand and financial and economic justification for Nenskra HPP project. More specifically, the document included, among other EIB-generated figures, the project's discount rate, economic rate of return and discounted generating cost (EUR/MWh).

With respect to the form and content of the information provided, the EIB services note there is no stand-alone EIB economic appraisal document. According to the Bank services, its economic appraisal of the project is reflected in decision-making documents via the economic rate of return (ERR), which was disclosed. The Bank explains that the document produced was based on the financial and economic analysis of the project included in its appraisal report in order to provide the complainant with information in a meaningful yet comprehensive manner.

In addition, the Bank services note that its general approach to environmental externalities is laid out in the publicly available EIB guide "The Economic Appraisal of Investment Projects" which was provided to the complainant for the sake of completeness. The Bank also notes its response included an invitation to provide further clarifications to the complainant, if required.

Ensuring that information is supplied in an existing version and format is the Bank's obligation under the 2015 EIB-TP. EIB-CM notes that there is no specific reference in the EIB-TP to the provision of information in the form of a summary¹⁸. However, it has to be considered that the complainant's request for information related to a decision-making process rather than a single existing document. In EIB-CM's view, the efforts of the Bank in providing the complainant with fundamental analytical considerations guiding the choice and justification for the project in the form of a summary is a reasonable one.

Nevertheless, it is important to acknowledge that, as the complainant rightly points out, Regulation (EC) №1367/2006 establishes the relevance of economic analyses, such as cost-benefit analyses, to environmental issues. While the Bank provided the complainant with the ERR and other complementary figures, that is, the outcome of the cost-benefit analysis, EIB-CM notes the absence of project-specific calculations quantified during the Bank's cost-benefit exercise from the information provided.

On 3 July 2018, EIB-CM transferred the complainant's written expression of dissatisfaction regarding said document to EIB services to be handled in accordance with the EIB-TP. In its response dated 14 August 2018, the Bank supplied the complainant with a redacted form of Appendix G: Financial & Economic Analysis of the EIB's PJ appraisal report.

¹⁸ In exceptional cases, the Bank may disclose a summary of investigations which have been closed, as provided by Article 5.5, fourth indent of the EIB-TP.

b) Indigenous Peoples assessment

On 6 and 8 February 2018, the complainant requested 'expertise the Bank possesses related to the issue of identification of Svans as indigenous people', in response to which the Bank prepared a summary of its assessment on the applicability of Standard 7 in the context of Nenskra HPP project. Discontent with the Bank's reply, the complainant subsequently clarified in her supplementary complaint

During the meeting on 6th February the Bank project team explained that it did not rely on the project promotor's ESIA assessment of the status of Svans as indigenous people but it commissioned an external analysis from the expert. This analysis was a subject of my request for disclosure.¹⁹

According to Bank staff, the information sought by the complainant during the 6 February 2018 meeting was an explanation on the key criteria for its conclusion that Standard 7²⁰, specifically with respect to Indigenous communities, was not triggered in the context of the project. The EIB staff note that the document produced explains how the EIB assessed the applicability of Standard 7 in the context of the Nenskra project.

The EIB staff further note that during the meeting of 6 February 2018, the complainant was informed by Bank staff that with respect to the applicability of EIB's Indigenous Peoples policy, the Bank did not solely rely on the project promotor's initial environmental and social impact assessment (ESIA) but took into account other relevant information available.

With respect to the study conducted by an external expert as mentioned in the supplementary complaint, the EIB services note that the document is not Bank-held.

With respect to the complainant's request on 30 April 2018 for the names of (a) the author of the document in question and (b) Lender's Social Advisors, the EIB services points out that this information was not a part of the complainant's initial request.

EIB-CM notes discussions with the relevant parties reveal a material discrepancy of the content requested. It should be noted that discrepancies in interpretation were clarified with the parties during the course of the compliance investigation

¹⁹ Complainant's email dated 30 April 2018. Not publicly available.

²⁰ Rights and Interests of Vulnerable Groups

On 3 July 2018, EIB-CM transferred the complainant's written expression of dissatisfaction to EIB services regarding said document to be handled in accordance with the EIB-TP. The Bank states in its response to the complainant dated 14 August 2018 that it is '*currently in the process of consulting with the relevant third parties*'.²¹ A final response was provided to the complainant on 16 November 2018 in which the Bank confirms it neither commissioned nor holds any standalone document as described by the complainant. With respect to the name of the external expert, the Bank notes the disclosure of this information would seriously undermine the protection of privacy and integrity of the individual under Article 5.4(b).

c) EIB's environmental appraisal report

The complainant requested disclosure of EIB's environmental appraisal report on 8 February 2018, in response to which the Bank provided a link to the project's ESDS. In the complainant's view, the Bank only partially fulfilled her request, failing to provide E&S assessment forms D1 (Overall Environmental and Social Assessment), D2 (Residual Environmental Impact Assessment) and D3 (Social Impact Form).

The EIB notes that the ESDS contains all the E&S information resulting from the Bank's E&S appraisal of the project and is the outcome of its E&S due diligence. The Bank also notes that the ESDS is submitted to the EIB Board of Directors for its decision regarding the loan. According to Bank services, EIB's PJ internal appraisal report, distinct from the EIB environmental appraisal report, contains an Appendix D (Environmental Summary Sheet), all non-confidential information of which is included in the ESDS. The EIB services further note that the Environmental Summary Sheet is not provided to the governing bodies of the EIB when the project is submitted for approval.

In addition, the EIB services emphasise that environmental forms D1/D2/D3 were never requested by the complainant in her initial request. The EIB services further explain that forms D2 and D3 are no longer produced by the Bank's Project Directorate as this information is now captured in the ESDS.

Again, discussions with relevant parties raise questions of interpretation in relation to the information requested. It is important to point out that, in neither of the two initial requests was the complainant expressly seeking the disclosure of forms D1/D2/D3. The allegation that the forms were absent from the request was the subject of specific follow-up, based on the documents provided by the Bank. Given that the ESDS purports to incorporate findings and judgements of the forms, EIB-CM finds that the Bank's interpretation of the request, as disclosed, is a reasonable one.

On 3 July 2018, EIB-CM transferred the complainant's written expression of dissatisfaction to EIB services regarding said document to be handled in accordance with the EIB-TP. In its response dated 14 August 2018, the Bank provided the complainant with Appendix D: Environmental Summary Sheet/Overall Environmental and Social Assessment Form of the EIB's PJ appraisal report.

²¹ Bank's email dated 14 August 2018. Not publicly available.

d) *ReM sheet*

The complainant requested disclosure of EIB's ReM sheet²², in response to which the Bank provided a redacted form of the requested information. The redactions applied under the EIB-TP relate to

Project Team

- a) **Loan Officer** [name]
- b) **PJ Contact** [name]
- c) **ECON Contact** [name]

Pillar 2 – Quality and Soundness of the project

- d) **Financial Sustainability (IRR)** [%]
- e) **Cost of electricity generated with environmental externalities** [EUR/MWh]
- f) **National savings made from import reduction/export gains** [MEUR/yr + comment]
- g) **Fiscal revenues (Private Sector)** [MEUR + comment]

Pillar 3 – EIB Technical and Financial Contribution to the project

- h) **Financial Contribution** [comment]
- i) **Extension of tenor** [% + comment]
- j) **Extension of tenor** [rating 1-4]
- k) **Match with Economic Life** [% + comment]
- l) **Match with Economic Life** [rating 1-4 + comment]
- m) **Innovative financing** [rating + comment]
- n) **Attracting other private sector financiers** [rating + comment]
- o) **Working with public sector partners** [rating + comment]

The Bank noted in its response to the complainant on 23 April 2018 that the redacted information was being withheld so as not to undermine

- the protection of the privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data (Article 5.4(b));
- the protection of commercial interests of a legal person (Article 5.5);
- the Bank's ongoing decision-making process (Article 5.6)

The foregoing exceptions were also applied to the requested EIB Proposal from the Management Committee to the Board of Directors, causing the difference between them to become somewhat blurred. As noted above, the Bank later clarified to EIB-CM that the application of exceptions 5.4(b) and 5.5 were relevant to the document at issue.

With regard to exception 5.4(b), the Bank services maintain that the complainant has not established that this data is required and there is no reason to assume that the complainant is contesting this decision.

²² The Results Measurement Framework (ReM) was introduced in 2012 in response to new requirements of the External Lending Mandate and upon request from the European Parliament, the European Commission and the Investment Committee to improve the reporting on results of the EIB's activities outside the European Union. The purpose of this framework is to: (a) improve the ex-ante assessment of expected project results, of the EIB's additionality and of the contribution to mandate objectives; (b) strengthen monitoring and ex-post evaluation of project results; and (c) enhance the EIB's ability to report to internal and external stakeholders on project results achieved.

With regard to exception 5.5, the Bank notes it carried out third party consultations with the promotor and sponsor. The Bank considers that the disclosure of this information could hinder the commercial interests of the promotor. More specifically, the Bank makes reference to the implementation and power purchase agreements between the Government of Georgia and the sponsor, of which, if disclosed, would equate in disclosing confidential information. Moreover, the Bank considers none of the redacted information to relate to the environment.

Lastly, with respect to the complainant's concern regarding inconsistencies in the Bank's application of exceptions, the EIB explains that the economic appraisal summary disclosed to the complainant included an explicit reference to the cost of electricity generated with environmental externalities, together with EIB's reasoning on the project benefits. According to the Bank, the data redacted from the document at issue refers to the same figures as disclosed to the complainant in the summary and therefore, the information was ultimately disclosed.

EIB-CM considers that redactions applied under Article 5.4(b) relating to personal data are justified. However, as regards the redaction of substantive sections of the document at issue relating to commercial interests of a natural or legal person, EIB-CM notes the absence of any justification in applying exception 5.5, first indent. In applying the exceptions to disclosure, the Bank must ensure that *"the reason(s) why such information cannot be provided shall be stated."*²³ This substantive obligation of the Bank is an established principle in

Article 13(3) of the Code of good administrative behaviour for the staff of the European Investment Bank in its relations with the public: *"All replies to requests and complaints must be reasoned in such a way that the person concerned is precisely informed of the grounds and arguments on which they are based."*²⁴

Article 22(3) of the European Ombudsman's European Code of Good Administrative Behaviour: *"If an official may not disclose the information requested because of its confidential nature, he or she shall, in accordance with Article 18 of this Code, indicate to the person concerned the reasons why he or she cannot communicate the information."*²⁵

Article 41(2) of the EU Charter of Fundamental Rights: *"[...] the obligation of the administration to give reasons for its decisions."*²⁶

It is important to stress that in order to justify refusal of access to the information at issue, it is not sufficient to merely state the applicable exception. In this regard, the Bank failed to supply the complainant with an explanation as to how access to the information at issue could specifically and effectively undermine the interest protected by exception 5.5, first indent.

In addition, EIB-CM notes inconsistencies in the Bank's application of exceptions. As the complainant rightly points out, the cost of electricity generated with environmental externalities indicator, to which

²³ EIB Transparency Policy, March 2015, Article 5.25

²⁴ Available at: <http://www.eib.org/en/infocentre/publications/all/code-of-good-administrative-behaviour-for-the-staff-of-the-eib-in-its-relations-with-the-public.htm>

²⁵ Available at: <https://www.ombudsman.europa.eu/en/resources/code.faces#/page/1>

²⁶ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

Aarhus Convention and related regulation requirements are relevant and applicable, is redacted in the document at issue, but provided for in the Bank's summary of its economic appraisal. This figure has also been disclosed publically on the promotor's webpage.

On 14 August 2018, the Bank provided a newly redacted form of the ReM sheet to the complainant in response to her request for information regarding the Bank's economic assessment. Newly disclosed figures include (a) cost of electricity generated with environmental externalities, (b) national savings made from import reduction/export gains and (c) percentile extension of typical maturity.

Table 2: Documents at issue

	Complainant-requested documents	EIB-disclosed documents	Level of disclosure	Exception(s) applied	Comments
(1)	EIB's economic assessment	Summary of the EIB economic appraisal of the project	Disclosed in summary form	No	Level of disclosure reasonable
(2)	Expertise the Bank possesses related to the issue of identification of Svans as indigenous people	Summary of EIB's assessment on the applicability of Standard 7	Disclosed in summary form	No	Material discrepancy of the interpretation of the information requested
(3)	EIB's environmental appraisal report	ESDS	Disclosed	No	Material discrepancy of interpretation of the information requested
(4)	ReM sheet	ReM sheet	Partial disclosure	Exceptions 5.4(b) and 5.5 (first indent)	Redactions applied under Article 5.4(b) relating to personal data are qualified Failure to supply reasoned justification for redactions applied under Article 5.5, first indent, relating to commercial interests

5. CONCLUSIONS

In light of the findings set out above, this compliance review has determined that:

- By informing the complainant of an extension of time limit for disclosure some 24-26 working days after the complainant's initial requests for information, the Bank's notification fell outside its notice period²⁷ (15 working days following receipt).
- By disclosing the requested documents some 47-49 working days after the complainant's initial requests for information, the Bank fell short of its deadlines - in the case of standard disclosure, a commitment to disclose within 15 working days, or in complex cases, an endeavour to respond within 30 working days following receipt of initial requests²⁸.
- Discussions held with both the EIB and the complainant reveal a material discrepancy in the interpretation of the requested information. Given the lack of clarity surrounding the requested documents, EIB-CM considers the Bank's disclosure reasonable with regard to (i) EIB's economic assessment, (ii) EIB's environmental appraisal report and (iii) Indigenous

²⁷ As prescribed by Article 5.23 of the EIB-TP.

²⁸ As prescribed by Article 5.24 of the EIB-TP.

Peoples assessment. Recognizing that the complainant's request may be subject to different interpretations and taking into account the complainant's dissatisfaction with the outcome of disclosure, EIB-CM transferred the complaint to EIB services for handling in accordance with the EIB-TP.

- EIB-CM considers that redactions applied to the ReM sheet under Article 5.4(b) relating to personal data are justified. However, EIB's application of exception 5.5, first indent, relating to commercial interests fails to comply with the EIB-TP. EIB's application of the exception was based on insufficient grounds which did not contain individual reasoning. In this regard, the Bank failed to supply the complainant with an explanation as to how access to the information at issue could specifically and effectively undermine the interest protected by the exception.

Based on issues raised and addressed in this complaint, EIB-CM considers that the following actions would strengthen the EIB's commitments in handling information requests under the Transparency Policy:

- In order to process requests expeditiously and productively, and in particular when requests may have more than one objective interpretation, the Bank should work with the requester to clarify the nature and scope of the information sought at the outset.
- In order to ensure fullest possible disclosure of requested information/documents in a manner consistent with the principles for disclosure, the Bank should develop specific guidance on the application of the EIB-TP exceptions for use by EIB staff.

Complaints Mechanism

Annex 1 Acronyms

E&S	Environmental and Social
EIB	European Investment Bank
EIB-CM	EIB Complaints Mechanism
EIB-TP	EIB Transparency Policy
ERR	Economic Rate of Return
ESDS	Environmental and Social Data Sheet
ESIA	Environmental and Social Impact Assessment
PJ	Project Directorate
ReM	Results Measurement

Annex 2 Timeline

Date	Milestones, Events, and Documents
2018	
Feb 6	EIB Board of Directors approve project
	EIB receives oral request for information from complainant during civil society meeting
Feb 8	EIB services receives written request for information from complainant
	EIB services submits receipt of request to complainant
Feb 12	EIB receives second written request from complainant for additional information
Feb 13	EIB services submits receipt of request to complainant
Mar 9	EIB-CM receives a complaint from CEE Bankwatch Network
Mar 16	EIB-CM registers complaint
	EIB services notifies the complainant of an extension of time limit for disclosure
Mar 28	EIB-CM meeting with EIB services
Apr 23	EIB services discloses requested documents (7) to complainant
Apr 30	EIB-CM receives a supplementary complaint from CEE Bankwatch Network
Jul 3	EIB-CM transfers supplementary complaint for handling by EIB services
Aug 14	EIB services provides formal response to complainant concerning supplementary complaint
Nov 16	EIB services provides formal response to complainant regarding Indigenous Peoples assessment