

Lega Dembi Gold

Complaint SG/A/2020/01

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

25 May 2021

Prepared by

Complaints Mechanism

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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).

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>

TABLE OF CONTENTS

1.	THE COMPLAINT	7
2.	BACKGROUND INFORMATION	9
3.	REGULATORY FRAMEWORK.....	11
4.	THE EIB-CM INQUIRY.....	15
5.	FINDINGS AND CONCLUSIONS	16
6.	RECOMMENDATIONS AND SUGGESTION FOR IMPROVEMENT	17

EXECUTIVE SUMMARY

On 25 March 2020, Development by Unity and Brotherly Action for the Future (DUBAF) (hereinafter “the Complainant”) lodged a complaint with the Complaints Mechanism of the European Investment Bank (hereinafter “the EIB-CM”). The complaint concerns an application for information/documents about the project Lega Dembi Gold in Ethiopia. The Complainant alleged that the EIB’s refusal to provide access to the information/documents was in violation of the EIB’s obligations under Regulation 1367/2006 (the Aarhus Regulation), Regulation 1049/2001, the Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention) and the EIB Group Transparency Policy (TP). The Complainant considered that the EIB’s refusal constituted maladministration. The Complainant requested the EIB-CM to investigate the case and to consequently call upon the EIB to disclose all of the requested documents in its possession, in line with its obligations under EU law.

The EIB-CM takes note that, at time of initial application, the EIB identified documents of relevance that dated back to the late eighties/early nineties. The EIB-CM notes that the EIB’s decision not to release any (parts) of said documents is based on the consideration that disclosure would undermine international relations. The EIB-CM recalls that under EU law, when that exception is applied, the interests protected by it cannot be overridden. The EIB-CM further notes that the EIB’s reply to the applicant contains the reasons for the refusal. In this respect, the EIB-CM acknowledges the clear links between public protests against the activities of MIDROC vis-à-vis the environmental impact and health implications of their operations in the area and the government’s decision to suspend the project’s mining license, which led to the establishment of the amicable dispute resolution process. However, the EIB-CM notes that, at time of initial application, some of the documents identified as being relevant to the request dated back to more than 30 years and that the EIB’s decision to refuse partial disclosure was based on the exception as regards international relations, which is not referred to in article 5.14 of the TP.

In line with the applicable regulatory framework, the EIB-CM considers that:

- **with regard to documents dating back to more than 30 years at time of initial application**, the EIB should have exclusively assessed (i) how disclosure of the documents could specifically and actually undermine the interests protected by the exceptions referred to in article 5.14 of the TP and (ii) how the risk of the interests being undermined was reasonably foreseeable and not purely hypothetical;
- **with regard to documents dating back to less than 30 years at time of initial application**, the EIB established clear links between public protests vis-à-vis the environmental impact and health implications of the mine and the government’s decision to suspend the project’s mining license, which led to the amicable dispute resolution process. In this context, the EIB-CM wishes to recall the fact that the EU judicature recognises a margin of appreciation in the decision to apply the exception as regards international relations.

In addition, an inspection of the EIB archives by the EIB-CM reveals that at least one document, which was not identified by the EIB services at time of initial application, is directly relevant to the initial application.

For the above reasons, the EIB-CM concludes that:

- the EIB’s decision to refuse partial disclosure of the requested information/documents dating back to more than 30 years at time of initial application was based on an exception which is not referred to by article 5.14 of the TP and, as such, does not comply with the applicable regulatory framework.
- the EIB’s decision to refuse partial disclosure of the requested information/documents dating back to less than 30 years at time of initial application appears to comply with the applicable regulatory framework, considering the margin of appreciation recognised by the EU judicature.

- when dealing with the initial application, the EIB did not identify a document which belongs to the concerned operation's file and is directly relevant to the initial application.

The EIB-CM recommends that:

- the EIB initiate — in line with article 5.14 of the TP — the process of declassification of documents dating back to more than 30 years at time of initial application and provide partial disclosure of these documents to the Complainant; and
- the EIB assess — in line with the TP — the disclosure of the additional document in the concerned operation's file, which is directly relevant to the Complainant's initial application.

With regard to the documents which dated back to less than 30 years at the time of initial application, the EIB-CM suggests that, in line with article 5.14 of the TP, once they are more than 30 years old, the EIB initiate the process of declassification and provide partial disclosure of these documents to the Complainant.

The EIB-CM will monitor the implementation of its recommendation within 3 months of report issuance.

CONCLUSIONS REPORT

Complainant: Development by Unity and Brotherly Action for the Future (DUBAF)

Date received: 25 March 2020

Confidential: No

Subject of complaint: EIB's reply to an initial application for access to information about the project Lega Dembi Gold

1. THE COMPLAINT

1.1 On 25 March 2020, Development by Unity and Brotherly Action for the Future (DUBAF), (hereinafter "the Complainant") lodged a complaint with the Complaints Mechanism of the European Investment Bank (hereinafter "the EIB-CM"). The complaint concerns the EIB's reply to an initial application for the disclosure of information/documents about the project Lega Dembi Gold. The Complainant alleged that the EIB's refusal to provide access to the information/documents was in violation of the EIB's obligations under Regulation 1367/2006 (the Aarhus Regulation), Regulation 1049/2001, the Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention) and the EIB Group Transparency Policy (TP). The Complainant considered that the EIB's refusal constituted maladministration.

1.2 The Complainant requested the EIB-CM to investigate the case and to consequently call upon the EIB to disclose all of the requested information/documents in its possession, in line with its obligations under EU law.

1.3 The allegation and the different points addressed by the Complainant in the complaint are outlined in Table 1 below and presented in more detail in §§ 1.4-1.11 of the report.

Table 1 - Allegations

Allegation	Points
Failure to disclose the requested information and provide the applicant with adequate grounds for non-disclosure	(a) Passage of time
	(b) International relations
	(c) Commercial interests
	(d) Privacy and integrity of identifiable individuals

1.4 The Complainant stated that gold mining has taken place in the Shakiso area in southern Ethiopia for decades and that it appeared that there were dangers to the health and well-being of local citizens as a result of the mining operations. According to the Complainant, since 2018 mining operations had been suspended. There had been no independent environmental impact assessment and assessment reports that had been completed were not shared with the affected communities. According to the Complainant, there had been recent recurring reports that the mine would soon be allowed to reopen.

1.5 The Complainant explained that there had been serious lack of transparency as to the nature and extent of the toxic contamination caused by mining operations in Lega Dembi and of the risks to the people living in communities near the mine. The Complainant pointed out that none of the documents relating to the Government's operation of the mine were available to the public. In addition, a March 2018 environmental audit report and a health impact study were not made public. Furthermore, the majority of people living in communities near the mine had not been informed about the hazards of human and livestock ingestion of mercury and arsenic-contaminated water from Lega Dembi.

1.6 The Complainant stated that the health concerns due to the Lega Dembi mining operation are grave and ongoing. The Complainant further explained that a more robust compilation of evidence concerning the health hazards from the site is still awaited, and the response to the information request to the EIB will be a part of it. The prevalence of high concentration of arsenic in ores, the mine wastes and the blowing of dust is a constant feature of local citizens' complaints. According to the Complainant, information about the operation that the EIB financed at that site, and the extent to which it might have contributed to those conditions, is necessary for understanding the nature and extent of the current health impacts on the local population. The Complainant pointed out that it was overwhelmingly in the public interest that the information was public so that those that were affected could have a better understanding of what was happening to their health, livelihoods and environment. The Complainant further pointed out that one of the primary purposes of the transparency rules of the EIB was "ensuring adherence to environmental and social standards linked to financed projects, and promoting accountability and good governance."

1.7 Underlining the presumption of disclosure in the TP, the Complainant went on to argue that in its case there were no adequate grounds for non-disclosure. According to the Complainant, the EIB's refusal to produce any of the requested documents could not be justified by any of the recognised exceptions to the TP, particularly if those exceptions were properly, i.e. narrowly, construed. According to the Complainant, other justifications may possibly warrant at most redaction of financial or personal information. The Complainant concluded that by completely denying the request, the EIB did not narrowly interpret the legitimate disclosure exceptions nor conduct any real balancing of the public interest.

1.8 The Complainant further pointed out that there was no exception in EU law or the TP based on the time elapsed since the EIB had provided its financial assistance to the mine. According to the Complainant, the refusal letter seemed to imply that because the loans had occurred some years ago, those concerns were somehow less pressing or no longer relevant. The Complainant stated that the harm caused by the mine was still continuing and the information was still relevant.

1.9 The Complainant pointed out that there was no provision in the TP or in EU law that gave governments veto power over disclosures. In the Complainant's opinion, that is what the EIB's letter refusing access did. The Complainant took the view that in the letter there were vague statements about international relations being harmed but all that was offered was in fact the EIB just consulted the Government of Ethiopia, which preferred that the information remained confidential. The Complainant questioned the EIB's conclusion that disclosure of the requested documents would improperly interfere in local decision-making processes that were still ongoing. The Complainant pointed out that if a government's ongoing oversight of mining operations were enough to block access to documents related to the mine's prior toxic exposures (documents that were more than thirty years old) it was hard to see how any documents relating to toxic dangers would ever be shared with the public. The Complainant further stated that the EIB did not engage in any actual balancing of the public interest in disclosure and did not mention the environmental pollution caused by the mine's emissions.

1.10 With reference to the next ground evoked in the EIB's reply, namely that disclosure could undermine commercial interests, the Complainant stated that that exception was limited and did not apply where there

was an overriding public interest in disclosure. The Complainant pointed out that it was hard to see how disclosure of the EIB's 1987 assessment of the quality and quantity of minable reserves, cost components, profitability estimates, co-financiers' exposures, etc. could directly harm the present-day commercial interests of the company operating the mine and any co-financiers. The Complainant added that even if the documents, old as they were, contained financial information damaging to the commercial interests of the current mine operator, that would still not warrant the wholesale denial of the documents. At most, the specifically financial information should have been redacted. The Complainant pointed out that information relating to the actual or potential environment impact of the mining operations that the EIB chose to finance could not be redacted. The Complainant further stated that information about serious pollution is fundamentally public business and protecting companies against allegations of pollution was not one of the exceptions of the TP or EU law.

1.11 With reference to the final ground evoked in the EIB's reply, privacy and integrity of identifiable individuals, the Complainant stated that it was not the policy of the EU or the EIB to conceal the identity of polluters. According to the Complainant, if there was truly something that was a recognised privacy interest of an individual, this might justify redacting a name or a number of a bank account but it hardly justified a complete blackout of any information on the subject.

2. BACKGROUND INFORMATION

2.1 *The Project*

2.1.1 The Lega Dembi Gold mine project concerns the development of an open-cast gold mine and ore processing plant in Ethiopia and infrastructure including means of access, townsite and supplies of water and power. In 1987 the EIB Board of Directors approved the provision of two loans totalling at the time ECUs 21 million. This was the EIB's first operation under the Lomé III Convention. The EIB financed the project together with the African Development Bank and the Government of Ethiopia. The borrower was the Government of Ethiopia¹. In 2007, the loans were repaid in full. The finance contracts associated with the loans have come to an end. Therefore, the EIB no longer has any relevant contractual relationships with this project.

2.2 *The Complainant's application*

2.2.1 The exchange of e-mails between the Complainant and the Bank as part of the Complainant's initial application is summarised in the table below and presented in detail in §§2.2.2-2.2.8 below.

Table 2: Chronology of the exchanges between the Complainant and the EIB

	Date	Sender	Paragraphs of this Report where content of the exchange can be found
1.	19/08/2019	Complainant	§ 2.2.2
2.	22/08/2019	EIB	§ 2.2.3
3.	09/09/2019	EIB	§ 2.2.4
4.	27/09/2019	EIB	§ 2.2.5
5.	06/11/2019	EIB	§§ 2.2.6 - 2.2.8

The initial application

2.2.2 On 19 August 2019, the Complainant requested from the EIB to be provided with the following:

- 1) information pertaining to the nature and scope of the EUR 13 million loan, co-financed with AfDB on

¹ MIDROC Gold acquired the Lega Dembi Gold mine from the government through privatization in 1997.

18/11/1987, including but not limited to:

- a. any documents submitted to the EIB Board or other approving body at the time the loan was approved;
- b. environmental and social impact studies related to this project;
- c. any data on water quality at the project site;
- d. any data on public health conditions at or near the site, or prevalence of diseases or adverse health conditions, specifically including but not limited to any conditions that could be related to mercury contamination; and
- e. any post-project assessment of the loan.

2) information pertaining to the nature and scope of the EUR 8 million loan, co-financed with AfDB on 18/11/1987, including but not limited to:

- a. any documents submitted to the EIB Board or other approving body at the time the loan was approved;
- b. environmental and social impact studies related to this project;
- c. any data on water quality at the project site;
- d. any data on public health conditions at or near the site, or prevalence of diseases or adverse health conditions, specifically including but not limited to any conditions that could be related to mercury contamination; and
- e. any post-project assessment of the loan.

3) copies of environmental and social standards that the EIB applied to its support of the project

2.2.3 On 22 August 2019, the EIB acknowledged receipt of the Complainant's application.

2.2.4 On 9 September 2019, the EIB provided a partial reply to the initial application, stating that the two loans were signed in 1987 and that "[a]t the time, the EIB did not have a formal policy equivalent to today's Environmental and Social Standards. The EIB does not therefore hold the documents requested. However, relevant assessments were part of the project appraisal conducted by the EIB Technical Advisory Service insofar as applicable." The EIB further stated that they had to extend the time limit to reply to the remainder of the request and that the EIB would endeavor to provide a reply within 30 working days from the receipt of the request.

2.2.5 On 27 September 2019, the EIB wrote to the Complainant stating that it was not yet in a position to reply to the outstanding part of the request. The EIB further stated that it was "... currently consulting relevant third parties to determine whether the disclosure exceptions set out in our Policy continue to apply to the documents or information that you requested. The third parties consulted have asked for additional time to review the matter and revert to us. We expect to receive their input around mid-October and will get back to you as soon as possible thereafter."

2.2.6 On 6 November 2019, the EIB replied to the outstanding parts of the initial application. The EIB apologised for the time taken to reply to the request. It confirmed that the two relevant loans were signed on 19 November 1987, that the associated finance contracts had since come to their natural end and that the EIB no longer had any relevant contractual relationships with the project. The reply went on to explain that the EIB had consulted the Ethiopian Government about a possible disclosure of documents relating to the points in the request. In its response, the Government clarified that, following the suspension of the licence for the operation of the gold mine, an amicable process was in progress with the license holder. The EIB stated that the Government had taken the view that until the case was resolved, disclosure of any information by the EIB would risk undermining

the process. The reply further informed that the EIB was aware of recent news stories concerning the Lega Dembi gold mine, reporting for example that local communities had lodged complaints about the gold mine and that the authorities were reviewing the situation with a view to addressing the concerns raised. The EIB then concluded that *“[g]iven the above, the EIB considers that further disclosures in reply to your request at this specific stage would undermine the public interest in international relations with the Government, notably by improperly interfering in local decision-making processes that are still ongoing.”*

2.2.7 The reply further stated that *“disclosure could undermine the commercial interests of the company currently operating the gold mine, as well as other parties such as co-financiers. The information at stake was produced for the purpose of the above-mentioned finance contracts. It therefore reflects the EIB’s assessment made at the time, which may no longer be accurate. It concerns inter alia the quality and quantity of the minable reserves, cost components, profitability estimates, co-financiers’ exposures, etc. In the absence of any ongoing contractual relationship relating to the Lega Dembi gold mine, and to avoid further delays in replying to your request, the EIB could not consult with parties whose commercial interests may be harmed by disclosure.”* The EIB added that disclosure of information relating to identified or identifiable individuals would undermine their privacy and integrity.

2.2.8 The EIB concluded that it *“considers that, at the present time, the interests protected by relevant disclosure exceptions still deserve protection. The EIB does not consider that an overriding public interest exists that would prevail over the applicable disclosure exceptions. In particular, any potential public interest in the disclosure of information related to emissions into the environment could not prevail over the public interest in international relations.”*

3. REGULATORY FRAMEWORK

3.1 The EIB Complaints Mechanism

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 applicable law and policies or with the principles of good administration. (Articles 3.1-3.2 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.

3.2 EU Treaties

3.2.1 Article 15 of the Treaty on the Functioning of the European Union (TFEU) establishes that *“the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible. [...] Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. [...] The Court of Justice, the European Central Bank and the European Investment Bank are subject to this provision only when exercising their administrative tasks”*.²

3.2.2. Article 339 of the TFEU requires of members of the institutions of the Union, the members of committees,

² This provision needs to be taken into account when considering the CJEU case-law on access to documents. The case-law referred to in this Report provides possible guidance for the interpretation and application of the relevant provisions of the TP.

and officials and other servants of the Union *“not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components”*.

3.2.3 The right to good administration is enshrined in Article 41 of the European Charter. Under this provision, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. This right includes among others the obligation of the administration to give reasons for its decisions.

3.3 The Aarhus Regulation³

3.3.1 The Aarhus Regulation implements the Aarhus Convention⁴ 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”*.

3.3.2 Environmental information is defined in Article 2(1)(d) of the Regulation.⁵ Articles 3-8 regulate access to environmental information.

3.3.3 As regards the grounds to refuse access to environmental information, Article 6 of the Aarhus Regulation refers to the exceptions set out in Regulation (EC) No 1049/2001. Recital 15 of the Aarhus Regulation states that *“the term “commercial interests” covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity.”* Under Article 6(1) of the Aarhus Regulation, in case of exceptions of commercial interests and inspections and audits *“...an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.”*⁶ As regards the other exceptions, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

³ 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).

⁴ The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998.

The Aarhus Convention establishes a number of rights of the public with regard to the environment. The rights are organised under three “pillars”: access to environmental information, public participation in environmental decision-making and access to justice. The EU has been a party to the Aarhus Convention since 2005. The Aarhus Convention Compliance Committee (ACCC) is the non-judicial mechanism responsible for reviewing compliance with the provisions of the Aarhus Convention. The EU can be challenged before the ACCC for alleged breaches of the Convention by the EIB (See Communication ACCC/C/2007/21).

Under Article 3(2), there is a general duty of assistance to the public, whereby “[e]ach Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information...”

According to Article 4(7), *A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for...*

⁵ *“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);”*

⁶ See also, General Court (Eighth Chamber), Case T-716/14, 7 March 2019, para. 57; European Court of Justice (Fifth Chamber), Case C-673/13 P, 23 November 2016, para. 54.

3.4 The EIB Group Transparency Policy

3.4.1 The EIB Group Transparency Policy (TP) was adopted by the EIB's Board on 6 March 2015. It sets out the EIB Group's approach to transparency and defines the procedures concerning information requests from the public. The obligations deriving from the Aarhus Regulation have been transposed in the EIB Transparency Policy.

3.4.2 The TP 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 [...]"* (Article 2.1). Under Article 2.3 of the TP *"The EIB Group understands transparency to refer to an environment in which the objectives of policies, its legal, institutional and economic framework, policy decisions and their rationale, and the terms of its member institutions' accountability are provided to the public in a comprehensive, accessible and timely manner."*

3.4.3 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"* (Article 2.5).

3.4.4 Article 3.8 of the TP provides that *"Article 15(3) of the TFEU also states that such legislation applies to the EIB only when exercising its administrative tasks. The EIB understands that the intention of this provision is that the EIB itself should determine, in a way consistent with the principles of openness, good governance and participation, how the general principles and limits governing the right of public access should apply in relation to its specific functions as a bank. The EIB does this through the Policy and specifically through the applications of the exceptions to access set out in Article 5 below"*. The EO decision in case 1316/2016/TN stated that the wording of Article 3.8 TP had been suggested by the Ombudsman itself while contributing to the revision of the TP in 2014.⁷

3.4.5 The TP defines the Bank's procedures concerning information made available to the public upon request. Under Article 5.1 of the TP, all information held by the Bank is subject to disclosure upon request, unless there is a compelling reason for non-disclosure. Under the same provision, the TP applies without prejudice to the right of public access to information/documents held by the EIB which might follow from the Aarhus Convention and the Aarhus Regulation.

3.4.6 According to the jurisprudence of the CJEU, the system of exceptions *"is based on a balancing of the opposing interests in a given situation, that is to say, first, the interests which would be favoured by the disclosure of the documents in question and, secondly, those which would be jeopardised by such disclosure. The decision taken on a request for access to documents depends on which interest must prevail in the particular case"*.⁸

3.4.7 Under Article 5.3 of the TP, in applying the exceptions to disclosure, the Bank shall, in line with Article 3.8 of the TP, have due regard for its specific role and activities, the need to protect its legitimate interests and the

⁷ Decision in case 1316/2016/TN on alleged shortcomings in the European Investment Bank's Transparency Policy, May 2018, ¶135, <https://www.ombudsman.europa.eu/en/decision/en/95520>

⁸ European Court of Justice, (Third Chamber), Case C-365/12 P, 27 February 2014, para. 63, with further reference.

confidentiality of its relationship with its counterparts.

3.4.8 According to Articles 5.4 and 5.5 of the TP, the Bank will not disclose information where such disclosure would undermine the protection of, among others, the public interest as regards international relations (Article 5.4. (a) first bullet point), the privacy and the integrity of the individual (Article 5.4 (b)) and the commercial interests of a natural or legal person (5.5. first bullet point)⁹. As regards third-party documents, the Bank shall consult with the third party as to whether the information in the document is confidential, unless it is clear that the document shall or shall not be disclosed (Article 5.9)¹⁰.

3.4.9 With regard to the international relations exception, according to the settled case law of the CJEU, *“the particularly sensitive and essential nature of the interests protected..., combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation.”*¹¹ The CJEU has acknowledged that the criteria for applying this exception *“are very general, since access must be refused, as is clear from the wording of that provision, if disclosure of the document concerned would ‘undermine’ the protection of the ‘public interest’ as regards, inter alia, ... ‘international relations’”*.¹² The CJEU noted, in particular, that *“various proposals intended to define more precisely the scope of the public-interest exceptions...which would undoubtedly have enabled the opportunities for judicial review in regard to the institution’s assessment to be correspondingly increased, were not accepted”*.¹³ If the institution concerned decides to refuse access to a document, it must, in principle, explain how disclosure of that document could specifically and actually undermine the public interest protected by the exception upon which it is relying. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.¹⁴ With regard to the standard of review of the institution’s decision, *“the Court’s review of the legality of [such] decisions ... must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers....refusal of access by the institution is mandatory...without the need, in such a case and in contrast to [other disclosure exceptions] ... to balance the requirements connected to the protection of those interests against those which stem from other interests.”*¹⁵

3.4.10 Article 5.7 of the TP provides that the exceptions set under Articles 5.5 *“shall apply unless there is an*

⁹ CJEU case-law has clarified that it is not possible to regard all the information concerning a company and its business relations as requiring the protection which must be guaranteed in respect of commercial interests (General Court, Fourth Chamber, Case T-545/11 RENV, 21 November 2018, para. 100). Therefore, in order to apply the exception in question, it must be shown that the documents at issue contain elements which, if disclosed, would seriously undermine the commercial interests of a legal person. This is the case, for example, when the requested documents contain commercially sensitive information relating, in particular, to (i) the business strategy of the undertakings concerned or to their commercial relations or (ii) where those documents contain information particular to that undertaking which reveal its expertise (Ibid., para. 101) or (iii) business secrets providing likely advantage to competitors (General Court, Fourth Chamber, Joined Cases T-109/05 and T-444/05, 24 May 2011, para. 140) or (iv) thresholds of financial covenants as well as (v) risk analyses relating to a loan (General Court, First Chamber, Case T-307/16, 27 February 2018, para. 119). It may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose (Court of First Instance, (Fourth Chamber), Case T-264/04, 25 April 2007, para. 37). Accordingly, the statement of reasons for refusing access to documents must contain, for each category of documents at least, the specific reasons why the institution in question considered that disclosure of the documents falls within the scope of one of the exceptions to disclosure (General Court, (Fourth Chamber), Joined cases T-109/05 and T-444/05, 24 May 2011, para. 84).

¹⁰ Institutions are under no obligation to consult the third party concerned if it is clearly apparent that the document should or should not be disclosed. In all other cases, the institutions must consult the relevant third party. Consultation of the third party is, as a general rule, a precondition for determining whether the exceptions as to the right of access are applicable in the case of third party documents (General Court, Second Chamber, Case T-245/11, 23 September 2015, para. 222).

¹¹ European Court of Justice, First Chamber, Case C-266/05 P, *Sison v Council*, 1 February 2007, para. 35.

¹² Ibid., para. 36.

¹³ Ibid., para. 37.

¹⁴ Case C-350/12, Judgment of 3 July 2014, paras. 52 and 64.

¹⁵ General Court, (Second Chamber), Case T-301/10, 19 March 2013, paras. 109-110.

overriding public interest in disclosure”¹⁶. Article 5.8 of the TP states that “*The grounds for refusal, in particular as regards access to environmental information/documents should be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment*”.

3.4.11 Article 5.14 of the TP stipulates that “*the exceptions may apply for a maximum period of 30 years [after which] a document becomes subject to review for public archiving. In the case of documents covered by the exceptions relating to the protection of personal data or commercial interests of a natural or legal person including intellectual property, the exceptions may, if necessary, continue to apply after this period.*”

3.4.12 Under Article 5.15 of the TP, “*All requests for disclosure of specific information/documents shall be handled promptly by the Bank, which will either grant full or partial access to the document requested (if only parts of a requested document are covered by any of the constraints above, information from the remaining parts shall be released) and/or the grounds for the total or partial refusal shall be stated.*” In this regard it is worth recalling that the CJEU established that the examination of partial access to a document must be carried out in the light of the principle of proportionality¹⁷ and that the institutions are entitled to refuse partial access in cases where it would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant¹⁸.

3.4.13 Article 5.31 of the TP stipulates that unsatisfied applicants may submit a confirmatory application asking the Bank to reconsider its position or, alternatively, lodge a complaint with the EIB-CM.

3.4.14 In cases where the Bank is unable to divulge the requested information in full or partially, Article 5.25 obliges the Bank to state reasons¹⁹. In this regard, it is worth noting that, according to the jurisprudence of the CJEU²⁰, from the statement of reasons it should be possible to ascertain whether (a) the document requested does in fact fall within the scope of the exception relied on and (b) the need for protection relating to that exception is genuine.

4. THE EIB-CM INQUIRY

4.1 In order to address the Complainant’s allegation, the EIB-CM reviewed the applicable regulatory framework, the correspondence between the Bank and the Complainant and the documents, exchanges and information pertaining to the application.

4.2 During its inquiry, the EIB-CM liaised with the Complainant and the Bank’s services. The information reviewed during the investigation enabled the EIB-CM to reach findings and conclusions on the allegations as presented in the section below.

¹⁶ It is for the party requesting access to refer to specific circumstances to establish an overriding public interest which justifies the disclosure of the documents concerned (European Court of Justice, Second Chamber, case C-612/13 P, 16 July 2015, para. 90; European Court of Justice, Second Chamber, Case C-127/13 P, 2 October 2014, para. 128). Considerations of general nature, without further and in-depth considerations on how refusal to disclose certain documents would undermine them, are not sufficient to establish that there is an overriding public interest capable of prevailing on the reasons justifying the refusal to disclosure (*Ibid.*, para. 93). An overriding public interest in the disclosure of information cannot be inferred from the mere fact, even if it is proved, that the information at issue constitutes environmental information (General Court, Second Chamber, Case T-245/11, 23 September 2015, para. 196).

¹⁷ General Court, First Chamber, Case T-852/16, 7 February 2018, para. 110

¹⁸ Court of First Instance, Fifth Chamber, Case T-204/99, 12 July 2001, para. 69

¹⁹ In case of refusal to access, the institution must clearly explain, on a case-by-case basis (General Court, Second Chamber, Case T-611/15, 24 February 2018, para. 31) how disclosure of that document could specifically and actually (not merely hypothetically) undermine the interest protected by the exception (General Court, First Chamber, Case T-307/16, 27 February 2018, para. 105).

²⁰ General Court, Fourth Chamber, Joined Cases T-109/05 and T-444/05, 24 May 2011, para. 83.

5. FINDINGS AND CONCLUSIONS

5.1 The EIB-CM takes note that in the case at hand, the applicant did not revert to the EIB with a request for review of its reply to the initial application. The EIB-CM notes that the complaint provides additional explanations on the public interest for disclosure due to allegedly significant environmental and social impacts of the mine.

5.2 The EIB-CM takes note that, at time of initial application, the EIB identified documents of relevance that dated back to the late eighties/early nineties. From the review carried out by the EIB-CM, it results that the documents include environmental information; the subject matter has already been generally described in the EIB's refusal letter. The EIB-CM further observes that the EIB's decision not to release any (parts) of those documents is based on the exception that the disclosure would undermine international relations. The EIB-CM recalls that under EU law when that exception is applied, the interests protected by it cannot be overridden.

5.3 The review of the EIB-CM shows that, as part of the handling of the initial application, the EIB services had:

- reviewed a number of news reports related to the suspension of MIDROC's Lega Demi gold-mining licence following protests vis-à-vis the environmental impact and health implications of operations in the area and correlated issues; and
- consulted the Government of Ethiopia on redacted versions of the documents at issue.

Following the Government of Ethiopia's opinion that disclosure would complicate the dispute resolution process in progress between the Ministry of Mines and licence holder, the EIB decided to refuse partial disclosure of the documents.

5.4 The EIB-CM notes that the EIB's reply to the applicant contains the reasons for the refusal. In this respect, the EIB-CM acknowledges the clear links between public protests against the activities of MIDROC vis-à-vis the environmental impact and health implications of their operations in the area and the government's decision to suspend the project's mining license, which led to the establishment of the amicable dispute resolution process. However, the EIB-CM notes that, at time of initial application, some of the documents identified as being relevant to the request dated back to more than 30 years and that the EIB's decision to refuse partial disclosure was based on the exception as regards international relations, which is not referred to in article 5.14 of the TP.

5.5 In line with the applicable regulatory framework above, the EIB-CM considers that:

- **with regard to documents dating back to more than 30 years at time of initial application**, the EIB should have exclusively assessed (i) how disclosure of the documents could specifically and actually undermine the interests protected by the exceptions referred to in article 5.14 of the TP and (ii) how the risk of the interests being undermined was reasonably foreseeable and not purely hypothetical.
- **with regard to documents dating back to less than 30 years at time of initial application**, the EIB established clear links between public protests vis-à-vis the environmental impact and health implications of the mine and the government's decision to suspend the project's mining license, which led to the amicable dispute resolution process. In this context, the EIB-CM wishes to recall the margin of appreciation referred to in paragraph 3.4.9 of this report.

5.6 In addition, an inspection of the EIB archives by the EIB-CM reveals that at least one document, which was not identified by the EIB services at time of initial application, is directly relevant to the initial application.

5.7 For the above reasons, the EIB-CM concludes that:

- the EIB's decision to refuse partial disclosure of the requested information/documents dating back to more than 30 years at time of initial application was based on an exception which is not referred to by article 5.14 of the TP and, as such, does not comply with the applicable regulatory framework.
- the EIB's decision to refuse partial disclosure of the requested information/documents dating back to less than 30 years at time of initial application appears to comply with the applicable regulatory framework, considering the margin of appreciation recognised by the EU judicature when it comes to the protection of the public interest as regards international relations.
- when dealing with the initial application, the EIB did not identify a document which belongs to the concerned operation's file and is directly relevant to the Complainant's initial application.

6. RECOMMENDATIONS AND SUGGESTION FOR IMPROVEMENT

6.1 The EIB-CM recommends that:

- the EIB initiate — in line with article 5.14 of the TP — the process of declassification of documents dating back to more than 30 years at time of initial application and provide partial disclosure of these documents to the Complainant; and
- the EIB assess — in line with the TP — the disclosure of the additional document in the concerned operation's file, which is directly relevant to the Complainant's initial application.

6.2 With regard to the documents which dated back to less than 30 years at the time of initial application, the EIB-CM suggests that, in line with article 5.14 of the TP, once they are more than 30 years old, the EIB initiate the process of declassification and provide partial disclosure of these documents to the Complainant.

6.3 The EIB-CM will monitor the implementation of its recommendation within 3 months of report issuance.

Complaints Mechanism
25 May 2021

ACRONYMS

ACCC	Aarhus Convention Compliance Committee
CJEU	Court of Justice of the European Union
EIB	European Investment Bank
EIB-CM	EIB Group Complaints Mechanism
TFEU	Treaty on the Functioning of the European Union
TP	EIB Group Transparency Policy