



**bankwatch  
network**



**CLIENTEARTH**  
JUSTICE FOR THE PLANET

**To: The Secretary-General**  
**From: CEE Bankwatch and ClientEarth**  
**Re: Refusal of the EIB to organise a public consultation on the review of its  
Transport Lending Policy**  
**Date: 7 November 2008**

### **1) Facts of the complaint**

On February 8<sup>th</sup> 2008, the Green Ten, a group of environmental NGOs active at EU level, sent a letter to Philippe Maystadt, the President of the European Investment Bank (the Bank), welcoming the publication of the Bank's revised transport policy. At the same time, they expressed regret about the fact that the Bank did not consider the broader involvement of different stakeholders before issuing this policy. They argued that, according to article 9 of EC Regulation n°1367/2006 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 (Regulation n°1367/2006), the Bank should provide early and effective opportunities for public participation in the preparation of its policy. They therefore asked Philippe Maystadt to commit the staff of the EIB to organizing a participative review of the Bank's transport lending policy, starting with a stakeholders' consultation and using the published policy as a first draft.

On February 27<sup>th</sup> 2008, the Communication Department of the EIB replied to the request of the Green 10. The Head of Division and the Senior Communication Officer replied that they did "not believe it appropriate to embark on a formal consultation process" regarding the transport lending policy of the Bank without justifying any further its decision.

We consider that the EIB, by refusing, in a discretionary manner, to provide a formal public participation procedure on its renewed policy for lending to the transport sector, has infringed Article 9 of Regulation n°1367/2006. We therefore require the Bank to reconsider its decision and to organise a public participation procedure in line with the requirements encompassed within article 9 of Regulation n°1367/2006.

## **2) Legal background**

Regulation n°1367/2006 requires Community institutions and bodies to enable the public to participate in the adoption and review of plans and programmes relating to the environment.

Article 9 (1) of the Regulation provides that:

*“Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when all options are still open. ...”.*

Article 2 paragraph (e) of Regulation n°1367/2006 defines plans and programmes relating to the environment as follows:

*“Plans and programmes relating to the environment means plans and programmes,*

*(i) which are subject to preparation and, as appropriate, adoption by a Community institution or body.*

*(ii) which are required under legislative, regulatory or administrative provisions; and*

*(iii) which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down in the Sixth Community Environment Action Programme, or in any subsequent general environmental action programme.*

*General environmental action programmes shall also be considered as plans and programmes relating to the environment”.*

This definition provides the following exceptions:

- Financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets,
- Internal work programmes of a Community institution or body, or
- Emergency plans and programmes designed for the sole purpose of civil protection.

We will demonstrate that the “policy” for EIB lending to the transport sector is a plan or a program relating to the environment in the meaning of article 2 paragraph (e) of Regulation n°1367/2006 and that the Bank was therefore under the obligation to organize a public consultation on its review. We stress the point that the fact that the Bank qualifies its strategy paper on lending to the transport sector a “policy” does not entail any legal consequences. As demonstrated in this paper, the strategy of the Bank is a plan or a programme under Regulation n°1367/2006.

Moreover, even though the programme of the Bank was to be considered as a “policy”, the Bank should still “endeavour to provide opportunities for public participation in the preparation of policies relating to the environment” as required by article 7 of the Aarhus Convention and by paragraph 17 of Regulation n°1367/2006’s preamble.

### **3) The qualification of the lending transport document of the EIB as a plan or programme relating to the environment**

#### ***a) The EIB lending transport document: a plan or a programme as defined by Regulation n°1367/2006***

##### **➤ A plan or a programme**

It is clear from the wording of the public participation provisions of the Aarhus Convention and of Regulation n°1367/2006 (article 2(e)) that the Bank adopted a plan or a programme relating to the environment.

However, the Bank states in its reply dated February 27, that “The EIB conducts comprehensive stakeholder consultations on policies which concern all its operations, such as the Public Disclosure Policy, Anti-Fraud Policy, and Environmental and Social Policy Statement...These consultations in principle include two rounds before the submission of a final draft policy to the Board of Directors. For sectorial policies, the Bank engages in a lighter form of dialogue. Accordingly, whilst we would be happy to discuss the Bank’s updated transport lending policy with you and take your comments on board for its future review, we do not believe it appropriate to embark on a formal consultation process in this regard, at the present time”.

Yet, the implementation guide of the Aarhus Convention states that “plans and programmes relating to the environment may include land-use and regional development strategies, and **sectoral planning in transport**, tourism, energy, heavy and light industry, water resources, health and sanitation, etc., at all levels of government”.

Hence, it is clear that sectoral policies, plans and programmes are subject to the provisions of the Aarhus Convention and of Regulation n°1367/2006 on public participation and that the strategy for EIB lending to the transport sector is also subject to them. Indeed, Regulation n°1367/2006 does not limit, in any way, the obligation of the EC institutions and bodies to allow the public to participate in the decision-making process of general programmes only. The Regulation does not make any distinction between the types of plans and programmes relating to the environment that should be subject to public scrutiny. On the contrary, it defines them in a broad way, and does not exempt sectoral planning from the public participation procedure.

As a consequence, the Bank cannot make a distinction between its “policies which concern all its operations, such as the Public Disclosure Policy, Anti-Fraud policy, and Environmental and Social Policy Statement” and its sectoral policies, such as the transport one, according to which it engages in a proper public-consultation for the first category and in only “a lighter form of dialogue” for the second one. The Bank has no discretion as regards which topic or which type of plans/programmes/policies on which it is appropriate to organise a public consultation. The Aarhus Convention and Regulation n°1367/2006 make it compulsory to consult the public on sectoral programmes as well.

The Bank cannot therefore refuse to organise a public participation procedure for its sectoral plans and programmes without breaching article 9 of Regulation n°1367/2006.

Moreover, the Bank’s document is much more precise than a “policy” as it sets out “operational selection criteria that establish priority between projects for the individual sectors<sup>1</sup>” and recommends a “course of action on appropriate ways for EIB to achieve a stronger focus toward projects with lower greenhouse gas impacts<sup>2</sup>”.

➤ ... relating to the environment

The Aarhus Convention implementation guide further explains that “whether a particular plan or programme relates to the environment should be determined with reference to the implied definition of “environment” found in the definition of “environmental information” (art. 2, paragraph 3)<sup>3</sup>”.

Article 2 paragraph 3 of the Aarhus Convention provides that:

“environmental information” means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, **policies**, legislation, **plans and programmes**, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

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<sup>1</sup> EIB, A renewed policy for EIB lending to the transport sector, October 2007, p. 17.

<sup>2</sup> EIB, Ibid, p.5.

<sup>3</sup> Economic Commission for Europe, The Aarhus Convention, An implementation guide, Page 115.

The EIB programme on lending to the transport sector has been adopted specifically to take into account climate change concerns; the document makes it very clear that the bank reviewed its lending guidelines and selection criteria relating to the transport sector in order to take into consideration climate change. The document states in the introduction that “in the present context of heightened attention to climate change EIB is committed to a review of its lending approach in the transport sector to ensure that its support for the sector remains sustainable”. It also affirms that it is “in order to reinforce the EIB’s contribution to the transport sector while taking into account global warming concerns” that “the Board of Directors endorsed the adoption of the following guiding principles and project selection criteria”. The Bank emphasises throughout the document the multidimensional approach it takes as regards lending to the transport sector in integrating climate change in its activity. The background note to the document on “global warming and transport” is also of high relevance.

The Bank’s programme clearly relates to the environment in accordance with the implied definition of the “environment” provided in article 2 paragraph 3 of the Aarhus Convention.

***b) A plan or a programme subject to preparation and adoption by a Community institution or body***

Article 2 (c) of Regulation n°1367/2006 defines Community institutions and bodies “*as any institution, body, office or agency established by, or on the basis of, the Treaty [...]*”.

The EIB is established under article 266 of EC Treaty which provides that “the European Investment Bank shall have legal personality”.

Article 1 of the EIB Statute states that “*The European Investment Bank established by Article 266 of this Treaty [EC Treaty] is hereby constituted; it shall perform its functions and carry on its activities in accordance with the provisions of this Treaty and of this Statute.*”<sup>4</sup>

The EIB therefore falls within the definition of a community body under Regulation n°1367/2006. Consequently, the EIB lending policy is subject to preparation and adoption by a community body as required by article 2 paragraph (e) (i) of Regulation n°1367/2006.

***c) A programme required under legislative, regulatory or administrative provisions***

The programme is required under the Sixth Community Environment Action Programme (EAP)<sup>5</sup>.

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<sup>4</sup> European Investment Bank, Statute and other provisions version dated 1 January 2007

<sup>5</sup> Decision n°1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme.

According to article 2 paragraph 4 of the Sixth Environment Action Programme, “the Programme shall promote the full integration of environmental protection requirements into all Community policies and actions by establishing environmental objectives and, where appropriate, targets and timetables to be taken into account in relevant policy areas”.

Article 3 paragraph 3 of the EAP states that “further efforts for integration of environmental protection requirements into the preparation, definition and implementation of Community policies and activities in the different policy areas are needed. Further efforts are necessary in different sectors including consideration of their specific environmental objectives, targets, timetables and indicators. This requires:

- ...
- Consideration, prior to their adoption, of whether action in the economic and social fields, contribute to and are coherent with the objectives, targets and timeframe of the Programme;
- ...
- Further integration of environmental criteria into Community funding programmes without prejudice to existing ones;
- ...
- That the objectives of the Programme should be taken into account in future financial perspective reviews of Community financial instruments”.

Most importantly, article 3 paragraph 7 of the EAP provides that one of the means to pursue the objectives set out in the Programme is “to support environmental integration in the financial sector. This requires: calling on **the European Investment Bank** to strengthen the integration of environmental objectives and considerations into its lending activities in particular with a view to supporting a sustainable development of Candidate Countries”.

Finally, as explained in paragraph d) of this paper, the EAP (article 5 paragraph 2(iii)) also requires priority actions to be taken in order to curb climate change and particularly in the transport sector. The Bank is therefore required under the EAP to adopt plans and programmes integrating environmental criteria in its lending activity; reducing GHG emissions is one of the fundamental criteria applicable.

***d) A programme which contributes to the achievement of the objectives of Community environmental policy***

The decision of the Bank to review its guidelines and criteria on lending to the transport sector contributes to the achievement of the objectives of community environmental policy as laid down in the Sixth Community Environment Action Programme, but also as laid down in subsequent general environmental action programmes.

- *A program in line with the Sixth Community Environment Action Program*

As already demonstrated, the review of the Bank's lending transport programme aims at integrating climate change concerns along reinforcing the EIB's contribution to the transport sector. And climate change is one of the priority area the EAP identifies (article 1 paragraph 4).

Indeed, article 2 paragraph 2 of the EAP provides that:

*“the programme aims at emphasizing climate change as an outstanding challenge of the next 10 years and beyond and contributing to the long term objective of stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system....”*

Moreover, article 5 of the EAP sets out the objectives and priorities areas on tackling climate change. Paragraph 2 of article 5 provides the means and, inter alia, the priority actions by which these objectives shall be pursued, and reducing greenhouse gas emissions in the transport sector is one of them (article 5 paragraph 2(iii)):

“(iii) Reducing greenhouse gas emissions in the transport sector:

- (a) identifying and undertaking specific actions to reduce greenhouse gas emissions from aviation if no such action is agreed within the International Civil Aviation Organisation by 2002;
- (b) identifying and undertaking specific actions to reduce greenhouse gas emissions from marine shipping if no such action is agreed within the International Maritime Organisation by 2003;
- (c) encouraging a switch to more efficient and cleaner forms of transport including better organisation and logistics;
- (d) in the context of the EU target of an 8 % reduction in greenhouse gas emissions, inviting the Commission to submit by the end of 2002 a Communication on quantified environmental objectives for a sustainable transport system;
- (e) identifying and undertaking further specific action, including any appropriate legislation, to reduce greenhouse gas emissions from motor vehicles including N<sub>2</sub>O;
- (f) promoting the development and use of alternative fuels and of low-fuel-consuming vehicles with the aim of substantially and continually increasing their share;
- (g) promoting measures to reflect the full environmental costs in the price of transport;
- (h) decoupling economic growth and the demand for transport with the aim of reducing environmental impacts.”

The Bank's guidelines and selection criteria applicable to the transport sector clearly aim at carrying out these priority actions. Indeed, the Bank identifies two main strategies for EIB involvement in transport projects, one of them being to continue giving the priority to environmentally friendly modes of transports<sup>6</sup>.

The EIB programme therefore contributes to the achievement of the Community's environmental policy objectives such as laid down in the Sixth Community Environment

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<sup>6</sup> EIB, p.14.

Action Programme and therefore fulfils the requirement of article 2 paragraph (e) (iii) of Regulation n°1357/2006.

- A programme in line with the Community action plan on climate change

The document of the Bank derives directly from the action plan adopted by the European Council of 8/9 March 2007 committing EU to achieve at least a 20% reduction of GHG emissions by 2020 compared to 1990, endorsing at the same time a binding minimum target of 10% for the share of biofuels in the petrol and diesel transport fuel pool<sup>7</sup>. The decision of the Bank to give the priority to environmentally friendly modes of transport is fundamentally going to contribute to the reduction of GHG emissions within the EU. The Bank integrates the European environmental policy on energy and climate change in its lending activities.

- A programme in line with the Community action plan on transport

The programme of the Bank on transport lending also derives from the conclusions of the Council meeting of 6/8 June 2007 on transport, considering both the issue of securing energy supplies for a critical sector for European growth, and the environmental constraints which the sector must respect<sup>8</sup>.

***e) Neither a financial, budget nor an internal work programme***

Article 2 (e) (iii) of Regulation n°1367/2006 provides that “this definition shall not include financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets, internal work programmes of a Community institution of body (...)”.

The Bank’s programme does not pertain to either of these two categories of plans or programmes.

The Bank’s programme does not set out the way particular projects should be financed, the available budget for transport sector, the amount of the loans that are going to be granted or the modalities of these loans. Instead, the programme sets out “guiding principles and selection criteria” for intervention: “the new transport policy sets the guiding principles and selection criteria that will reinforce the Bank’s contribution to this sector, in particular taking into account climate change concerns”. It thus focuses on which criteria a project has to comply with in order to be financed by the Bank.

Indeed, the Bank’s document states that “this paper starts with an examination of the existing lending objectives of the Bank, EU policy framework for lending to the sector as well as the Bank’s activities in the sector (section 2). This leads to a recommended course of action on appropriate ways for EIB to achieve a stronger focus toward projects with

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<sup>7</sup> EIB, p.1 and 8.

<sup>8</sup> EIB, p.8.



lower greenhouse gas impacts (section 3). The paper concludes with some final comments on the way forward (section 4)” (page 5). It is the Bank’s “transport policy” as the document states.<sup>9</sup>

The EIB lending programme on transport is a general plan or programme which does not address financial and budgetary issues and therefore does not fall within the scope of the exceptions set forth by article 2(e)(iii) of Regulation n°1367/2006.

Furthermore, the Bank’s programme cannot be considered as an internal work programme. The programme does not address internal matters of the Bank, it is not aimed at being applied merely at an internal level. Instead, it is directed towards the public at large since it sets out a hierarchy among different transport modes and, as such, will have a direct significant impact on the environment. The programme is also addressed to the potential projects promoters/borrowers likely to carry out projects in the transport sector in order to inform them of the applicable selection project criteria so they may anticipate the type of projects that will be financed by the Bank.

**Conclusion:** The Bank’s lending transport document constitutes a plan or a programme relating to the environment adopted by an EC body and which contributes to the achievement of the Community’s environmental policy objectives in the meaning of article 2 paragraph (e) of Regulation n°1367/2006. The Bank should have therefore organised a public participation procedure further to article 9 of Regulation n°1367/2006 and comply with the procedural requirements this provision enshrines.

#### **4. The procedure applicable under article 9 of Regulation n°1367/2006**

On September 27<sup>th</sup> 2007, the Board of Directors of the Bank adopted its “Transport Lending Policy”. The EIB provides a significant financial support to the transport sector in the European Union, the adopted principles and criteria will therefore significantly influence the modes of transports used within the EU. There is no doubt that this policy, when preparing, should have been subject to public scrutiny. However, this was not the case. Indeed, the Bank did not:

- announce it was going to revise its Transport Lending Policy ;
- invite Civil Society Organisations or other interested parties, even the ones the Bank is in contact with, to submit comments on the draft of the policy ;
- publish the draft policy for commenting and did not provide the tools, opportunities for submitting inputs on the draft policy (for example online form, email address, consultation meetings dates and places where the meetings would take place) ;

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<sup>9</sup> EIB, p.5.

- establish clear and timely process of consultation with clear deadlines for public input.

The Bank's document mentions that "it should be underlined that the new policy environment will be dynamic. The Bank will welcome comments on this policy document, and the policies presented will be subject to periodic review."<sup>10</sup>The Bank also mentions in its reply to Bankwatch that they "would be happy to discuss the Bank's updated transport lending policy with you [Bankwatch] and take your comments on board for its future review..."

However, in the view of the requirements provided by article 9 of Regulation n°1367/2006, welcoming comments from the public is not enough.

Indeed, paragraph 1 of article 9 of the Regulation provides that "Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans and programmes relations to the environment when all options are still open."

In addition, paragraphs 3, 4, 5 of article 9 provide that:

"Community institutions and bodies shall ensure that the public [...] is informed, whether by public notices or other appropriate means, such as electronic media where available, of:

- (a) the draft proposal, where available;
- (b) the environmental information or assessment relevant to the plan or programme under preparation, where available; and
- (c) practical arrangements for participation, including:
  - (i) the administrative entity from which the relevant information may be obtained,
  - (ii) the administrative entity to which comments, opinions or questions may be submitted, and
  - (iii) reasonable time-frames allowing sufficient time for the public to be informed and to prepare and participate effectively in the environmental decision-making process.

4. A time limit of at least eight weeks shall be set for receiving comments. Where meetings or hearings are organised, prior notice of at least four weeks shall be given.

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<sup>10</sup> EIB, p.2.

Time limits may be shortened in urgent cases or where the public has already had the opportunity to comment on the plan or programme in question.

5. In taking a decision on a plan or programme relating to the environment, Community institutions and bodies shall take **due account of the outcome of the public participation**. Community institutions and bodies shall inform the public of that plan or programme, including its text, and of the reasons and considerations upon which the decision is based, **including information on public participation** ”.

Moreover, article 9 paragraph 2 requires the Community institutions and bodies to “identify the public affected or likely to be affected by, or having an interest in, a plan or a programme of the type referred to in paragraph 1, taking into account the objective of the Regulation”. The Aarhus Convention implementation guide considers that “the most reasonable interpretation of this provision, ...., is that the Convention places a responsibility on the public authority to make efforts to identify interested members of the public and, while not bound to accept every expression of interest, should be as inclusive as possible. In any case, the strategy for identification of the public should be transparent and accessible<sup>11</sup>.”

The Bank’s willingness to consider Bankwatch comments in a future review of the lending policy obviously does not comply with the requirements of article 7 of the Aarhus Convention transposed in article 9 paragraph 2 of Regulation n°1367/2006. Failing to identify the public interested or likely to be interested by the Bank’s programme makes the strategy of the Bank inaccessible. Accepting the comments of certain NGOs, but failing to share them publicly with other potentially interested groups is not transparent.

The Bank has adopted its plan unilaterally without taking into consideration the potential public input. But there is a real need for public discussion on the guidelines and selection criteria applicable to the transport sector set out by the Bank.

Complainants CEE Bankwatch Network and ClientEarth support the stated aim of the EIB’s Transport Policy: to take into account the climate change impact of the sector. In our view, however, the Policy fails in significant ways.

Had the Bank followed the required procedure and organised a public consultation, the public including Bankwatch would have offered relevant and substantive comments. These comments would have helped the Bank develop the Policy in needed ways including the following:

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<sup>11</sup> Economic Commission for Europe, Ibid, p.118

- The Policy as drafted fails to ensure that the EIB no longer finances projects with high climate impacts.
- The EIB needs to develop criteria in the Policy for excluding projects on climate impact grounds as well as establishing the methodology for assessing the climate impact of financed projects.
- The Policy does not make any commitment to reduce support for roads and aviation, which account for more than half of the Bank's transport investments in energy-intensive modes of transport. Sustainable transport modes must be given a fair chance for development in the Bank's Policy.
- The Bank should also take stronger account of the economic viability of climate intensive projects.
- The Policy should refer to and adopt the aim of the EU Sustainable Development Strategy and of the 6<sup>th</sup> Environmental Action Plan.
- The Policy should include selection criteria to ensure reduction in transport growth, biodiversity loss and health protection.
- Finally, the obligation to comply with the EIA, SEA, Habitats and Water Framework Directives before project approvals should be stated among Policy's principles and criteria.

## CONCLUSION

The Bank's decision not to embark **on a formal consultation process regarding the transport lending programme of the Bank** is thus clearly in breach of the procedural requirements on public participation enshrined in article 9 (1)(2)(3)(4)(5) of Regulation n°1367/2006.

Climate change is progressing and has become one of the priorities of the EU. The EC bodies, such as the EIB, cannot therefore refuse or even postpone public scrutiny of its programmes relating to climate change concerns. The public discussion has got to occur now before it is too late. The proposal of the Bank to take Bankwatch's comments on board for review of the programme at some indefinite date in the future cannot therefore be accepted.

**We therefore respectfully invite the Secretary-General of the Bank to reconsider the decision taken on February 27, and to organise a formal public consultation on its**

**transport lending plan or programme in accordance with article 9 of Regulation n°1367/2006, taking the document adopted by the Bank as a first draft.**