

## CONCLUSIONS REPORT

### Complainants:

\_\_\_\_\_ (CEE Bankwatch) and \_\_\_\_\_ (Client Earth Justice for the Planet)

### Subject of complaint:

On 7 November 2008, \_\_\_\_\_ and \_\_\_\_\_ (hereinafter, the Complainants) lodged a complaint with the EIB internal complaints mechanism regarding the EIB's refusal to organise a public consultation on the review of its Transport Lending Policy. The complaint at stake raises three main issues:

- o the alleged failure to comply with EC Regulation 1367/2006 insofar as the EIB refused to launch a public consultation on its Transport Lending Policy;
- o the alleged consequent failure to comply with Aarhus Convention; and
- o the alleged failure to motivate the rejection of the request to launch a public consultation by the competent services of the EIB

The EIB Complaints Office (CO) acknowledged the complaint on 17 November 2008 in accordance with article 11.7.1 of the EIB Complaints Mechanism Policy. In the acknowledgment of receipt, the Complainants were informed of the fact that the CO was carrying out a review of the complaint as well as of the date by which they may expect an official reply from the EIB.

Following a preliminary analysis on the admissibility of the complaint, the CO deemed appropriate to carry out further inquiries with a view to gathering additional information on the complaint. In this context, the CO thoroughly reviewed all pertinent documents and carried out inter-services consultations with a view to form an opinion as well as finding ways to address the concerns raised by the Complainants.

### Inquiry:

#### 1. Legal analysis and compliance issues

The legal services of the Bank have provided the following opinion:

#### Public Consultation under Aarhus Regulation

1.1 The Aarhus Regulation, which applies as from 28 June 2007 to the EU institutions and bodies, including the EIB, aims at implementing at Community level the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. The EC has been a party to the Aarhus Convention since 2005.<sup>1</sup>

1.2. Pursuant to Article 9 of the Aarhus Regulation, Community institutions and bodies are required to provide an opportunity for the public to participate in the preparation, modification or review of plans and programmes relating to the environment. Article 9 also provides some guidance and establishes the basic requirements regarding the manner in which the participation process should be carried out.

<sup>1</sup> The requirements of the Convention have been transposed into national legislation of the EC Member States through Community directives. As directives are addressed to the Member States and not to the EC institutions and bodies, it was considered necessary to have a specific European Parliament and Council regulation on the application of the provisions of the Convention to the said institutions and bodies.

1.3. As regards public participation in the preparation of environmental policies, by stipulating that, to the extent appropriate, opportunities should be provided for such participation, the Aarhus Regulation (Recital 17) leaves some margin to the Community institutions and bodies to decide whether and under what conditions they finally do so. However, given that in practice it may be difficult to draw a line between plans, programmes and policies, and also that the contents of a specific document are decisive for its qualification and not its title (i.e. a document may be called a plan although in reality it is a policy or vice versa), it would be advisable that the EIB adopts a prudent approach whereby it would not exclusively rely on its own understanding of the conceptual nature of the document (plan v. policy) when considering whether the document should or should not be subject to a public consultation.

1.4. Article 2(1)(e) of the Regulation defines plans and programmes which should be open to a public consultation as those plans and programmes which among other things i) *are required under legislative, regulatory or administrative provisions* and which ii) *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*. Article 2 also provides for specific exceptions. Thus, for instance, 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, are excluded from the scope of the public consultation.

1.5. As a financing arm of the EU, the EIB contributes through its lending activity to the attainment of Community environmental objectives. To this end; it may sponsor initiatives relating to the environment or issue policy papers reflecting and reaffirming EU environmental policy. It is not excluded that in some cases this type of action could be considered as providing significant contribution to that policy, meaning that they would thus partly meet the criteria established in the above Article 2(1)(e) for the definition of plans and programmes.

1.6. However, given that the EIB's statutory role is (1) limited to providing loans and guarantees and (2) does not involve public administrative functions in the environmental field, the above type of policy actions, even if they only set a framework for future financing of specific projects, should still be considered as falling under the general concept of financial plans and programmes and thus be excluded from the public consultation requirements.

1.7. Consequently it would not be unreasonable to conclude that the sector specific lending policies in the transport and waste sectors, which the EIB has prepared in its *statutory capacity of a fund provider* and which reflect its contribution to wider EU policy objectives with which it is in total alignment, would not need to be submitted to a formal public consultation process in the meaning of the Aarhus Regulation. Otherwise, stricter standards would apply to the EIB than to banking institutions performing similar functions at national level which are exempted from the obligation to consult the public on financial plans and programmes falling under the SEA Directive 2001/42.

1.8. Furthermore, The EIB would have difficulty in considering, like the CEE Bankwatch seems to do, that the EIB sector specific lending policy papers would be explicitly required under the Sixth Community Environment Action Programme and would thus meet one of the conditions mentioned above under point 5 for the definition of a plan and programme. Although the EIB is called upon in the Action Programme to support the integration of environmental objectives and considerations into its lending activities this does not create as such any specific legal, regulatory or administrative requirement for the EIB to prepare the separate sector lending policy papers in the form and manner which they have been prepared now.

1.9. The EIB could obviously decide on its own initiative to seek input from the public during the preparation of its specific lending policies relating to the environment. This would mean, in practice, that it would need to identify the public (including relevant NGOs) affected or likely to be affected by, or having an interest in the envisaged EIB initiative. Public notices or other appropriate means (such as electronic media) should be used to this end. The Aarhus Regulation could be usefully relied on for the guidance on the specific procedures to be followed

#### Public consultation under the Aarhus Convention

1.10. As regards the question of the possible direct application of the Aarhus Convention to the EIB, the EIB Services have already been confronted with this issue in the context of a complaint lodged against the EIB before the Aarhus Compliance Committee for the alleged non-compliance by the EIB with certain provisions of the Aarhus Convention in relation to a financing of the Vlora thermal power plant project in Albania.

1.11. In this context the EIB Services supported the view that the Aarhus Convention should not be directly and fully applicable to it, mainly because the EIB would not qualify as a public authority in the meaning of the Convention and that, in any event, within the EU at least the EIB already complies with its provisions by applying the Aarhus Regulation, to the extent that these provisions have been implemented in the Regulation.

1.12. The European Commission agrees that the EIB does not itself have the obligation under the Aarhus Convention to carry out public participation in relation to *financing decisions on specific projects*. On the other hand, until now the Commission has not taken a position as to whether it considers that the EIB would have such an obligation concerning sector lending policy documents on the basis of the Convention provisions which require, like the Aarhus Regulation, that public should be allowed to participate during the preparation of plans and programmes relating to the environment.

1.13. The issue is relevant because unlike the Aarhus Regulation, the Convention does not define "plans and programmes" which means that it does not provide either an explicit exclusion of financial plans and programmes from its scope nor does it qualify plans and programmes to include only those plans and programmes which are required by legal, regulatory or administrative provisions (cf. Art. 2 of the Aarhus Regulation). Nevertheless, for the reasons explained above (i.e. EIB acting solely in its statutory capacity of a fund provider and the Aarhus Regulation being a *lex specialis* transposing at Community level the Convention), sector lending policy documents prepared by the EIB should *a priori* be exempted from public consultation requirements under the Aarhus Convention.

1.14. Given that both the Aarhus Regulation and the Aarhus Convention are relatively new instruments without well-established jurisprudence, it cannot be excluded that the CEE Bankwatch would decide to test legally before a court, the Aarhus Compliance Committee or the Ombudsman the EIB's compliance with these instruments. However, under the current circumstances there is no specific legal obligation to accommodate the CEE Bankwatch's request for a formal public consultation on the EIB's sector lending policies (without prejudice to the EIB's eventual voluntary decision to engage in such a consultation).

#### Legal conclusions

1.15. Taking into account the EIB's statutory role which is limited to providing loans and guarantees for the benefit of wider Community objectives, and also that the EIB does not act as an EU institution charged with public administrative functions in the environmental field, there are reasonable grounds to conclude that the EIB sector specific lending policies in the transport and waste sectors fall under the concept of financial plans and programmes in the meaning of the Aarhus Regulation and that therefore they are excluded from the formal public participation process under that regulation.

1.16. The above would not prevent the EIB, if it wished to do so, from consulting the public during the preparation of its lending policy papers. The Aarhus Regulation could be usefully relied on for the guidance on the specific procedures to be followed to this end.

1.17 Pending the outcome of the complaint before the Aarhus Compliance Committee on the Vlora project and considering the tenor of the recent discussions the EIB Services have had with the Commission on the applicability of the Aarhus Convention to the EIB's activities, there is currently some uncertainty as to what extent the Convention would apply to the EIB in addition to the Aarhus Regulation, in particular outside the EU. Nevertheless, the EIB would sustain that sector lending policy documents prepared by the EIB should *a priori* be exempted from public consultation requirements under the Aarhus Convention.

## 2. Further considerations

As a complement to the legal opinion, the CO carried out an analysis of the impact of the compliance review performed by the ACCC to date as well as an analysis of additional insights from a Corporate Responsibility point of view in (1) ensuring EIB's transparency and stakeholder engagement, (2) fostering compliance with the applicable regulatory framework and (3) minimising to the utmost the reputational risks related to the review procedures at stake.

Moreover, the present complaint is to be examined in conjunction with communication ACCC/C/2007/21 lodged by the Albanian NGO "Civic Alliance for the Protection of the Bay of Vlore" with the Aarhus Convention Compliance Committee (ACCC) regarding the Vlore Thermal Power Plant project. This complaint, which is not addressed directly against the Bank but rather challenges the European Community as a Party to the Aarhus Convention for alleged breach of the latter, is the first communication before the ACCC challenging the activities of the Bank.

### Alleged failure to comply with EC Regulation 1367/2006

2.2. Article 2 of the Regulation provides for specific exceptions to the application of the provisions on public consultation: (i) plans laying down how particular projects or activities should be financed; (ii) plans related to the proposed annual budgets; (iii) internal work programmes of a Community institution or body; (iv) emergency plans and programmes designed for the sole purpose of civil protection.

2.3. The renewed EIB policy for EIB lending to the transport sector clearly indicates that it sets the guiding principles and selection criteria for EIB financing in this sector. A large number of these criteria are of an environmental nature. This could support a view that it represents a decision on the modalities of implementation of the 6<sup>th</sup> Environment Action Programme and not merely a financial decision (although taken by the EIB in its statutory capacity of fund provider). On the other hand, would the lending policy not exist and would their principles being incorporated in each individual lending proposal, the exception will clearly apply. The fact that the EIB is called upon in the Action Programme to support the integration of environmental objectives and considerations into its lending activities, does not create as such any specific legal, regulatory or administrative requirement for the EIB to prepare the separate sector lending policy papers in the form and manner which they have been prepared now. However, it appears appropriate to emphasise that, although the EIB is not obliged to implement the Action Programme in any specific way, its implementation is *per se* mandatory and the EIB could not refuse to acknowledge it in its sector policies.

### EIB compliance with Aarhus Convention

2.4. With regard to the alleged failure to comply with the Aarhus Convention previous communication with the Aarhus Convention Compliance Committee (ACCC) show that:

- o The EIB is subject to the Aarhus Convention insofar as communications alleging the European Community's failure to comply with the Convention for actions or omissions of the EIB are admissible before the ACCC;
- o The EIB might be called upon to consider further reviewing the practices and mechanisms of the Public Disclosure Policy; in particular, the ACCC took the view that the EIB could make an explicit reference to the fact that exceptions to the Convention should be applied restrictively by the EIB's staff;
- o The Committee seems to agree that the EIB has not a direct duty to carry out public consultation with regard to the projects it finances.

2.5. Moreover, Article 7 of the Convention applies to policies (although allowing certain flexibility when considering public consultation on these documents) and does not set up provisions excluding financial plans or budgets from its application. It results that the exclusion laid down by the Regulation should be interpreted restrictively as banking institutions performing similar functions at national level, when operating within a State which has signed the Convention, have, indeed, stricter standards than the EIB whereas they could be bound by the Convention's provisions on public participation. (Within the EU, the impact of the Strategic Environmental Assessment Directive, which excludes financial plans and programmes from public consultation requirements, needs also to be considered.)

2.6. Minimum requirements by the Aarhus Regulation in terms of public consultation which can be usefully relied upon are as follows:

- o To inform the public concerned - affected, likely to be affected, or having an interest in - of the draft policy, of relevant environmental information (when available) and of the practical arrangements.
- o The practical arrangements must include: definition of the administrative entity from which the relevant information may be obtained and to which comments, opinions or questions may be submitted; and provision of reasonable timeframes allowing sufficient time for the public to participate.
- o Time limits are of at least eight weeks for receiving comments and at least four weeks notice in case of public meeting/hearings being organised.

Alleged failure to motivate the rejection of the request to launch a public consultation

2.7. The complainants refer to the fact that, in its reply of 27 February 2008 to the request of the Green 10, the Communication Department of the EIB replied that it did "*not believe it appropriate to embark on a formal consultation process*" regarding the transport lending policy of the EIB. The complainants allege that the services of the EIB did not justify any further this decision. According to the "European Code of Good Administrative Behaviour" and to the EIB own "Code of Good administrative behaviour for the staff of the EIB in its relation with the public", the reply should have explained that its decision is based on the fact that neither the EIB's Guidelines on public consultation nor the Aarhus Regulation foresee any public consultation for sector lending policies.

Conclusions:

The EIB has until now engaged in three public consultations. For two of them (Public Disclosure Policy and Anti-Fraud Policy) there was no arguable legal obligation, and the EIB did it with a view to pro-actively assuming its responsibilities towards its stakeholders.

Following the declaration of admissibility of a communication by the ACCC and therefore the recognition of the possibility to indirectly challenge the EIB before the ACCC for breach of the Convention, it does not seem feasible any more to exclude *in toto* the applicability of the Convention to the EIB. The above considerations suggest to adopting a cautious approach when restrictively interpreting the application of the Regulation and/or of the Convention to the EIB.

Engaging in public consultation on its lending policy papers will further strengthen the image of the EIB as a pole of best "Corporate Responsibility". Moreover and beyond any legal consideration, a number of reasons support the advice that the EIB should pro-actively and on its own volition decide to consult the public during the preparation/review of its lending policy papers, with a potentially high environmental impact.

Such a decision by the EIB will reinforce the credibility of the EIB internal complaints mechanism and the relevant policy approved by the Management Committee. Indeed, it will show the EIB's willingness to reconsider its position when seriously challenged by its stakeholders within a well defined framework.

The rationale in this case is (i) the existence of an arguable, although not proven, legal obligation to launch a public consultation (ii) a possible breach of both the European and internal Codes of Good Administrative Behaviour in the EIB's reply and (iii) the willingness of the Bank to demonstrate its responsibility towards its stakeholders ensuring a high level of Transparency.

**Complaints Office Recommendations:**

The Complaints Office proposes to the Bank's Management Committee that the Bank engages in a formal process of public consultation regarding its Transport Lending Policy, as well as other Bank's sector lending policies with a high potential environmental impact. This consultation could be of a lighter form than the previous public consultations made by the Bank, but must be compliant with the Aarhus Regulation. Informal forms of consultation, which are not compliant with Aarhus Regulation, would not be appropriate.

Furthermore, the Complaints Office considers that it would be appropriate for the EIB to establish guidelines for Public Consultation that could define the different levels of voluntary public engagement.

F. Alcarpe  
Head of Division  
16/12/2008

E. de Kruijt  
Head of the EIB Complaints Office  
16/12/2008