

Renewable Energy Sector
Ireland

Complaint SG/G/2014/02

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

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EIB Complaints Mechanism

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The EIB Complaints Mechanism

The EIB Complaints Mechanism provides the public with a tool enabling alternative and pre-emptive resolution of disputes in cases whereby the public feels that the EIB Group did something wrong, i.e. if a member, or members, of the public considers that the EIB has committed an act of maladministration. When exercising the right to bring a complaint against the EIB, any member of the public has access to a two-tiered procedure, one internal – the Complaints Mechanism Division (EIB-CM) - and one external – the European Ombudsman (EO).

If complainants are unhappy with the outcome of the EIB-CM's procedure, a confirmatory complaint can be submitted by the complainant within 15 days of the receipt of the EIB-CM's reply. Complainants who are not satisfied with the outcome of the EIB-CM's procedure and who do not wish to make a confirmatory complaint may also lodge a complaint of maladministration against the EIB to the European Ombudsman.

The EO was "created" by the Maastricht Treaty of 1992 as an EU institution to which any EU citizen or entity may appeal to investigate any EU institution or body on the grounds of maladministration. Maladministration means poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Some examples, as set by the European Ombudsman, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group activities and to project cycle related policies and other applicable policies of the EIB.

The EIB Complaints Mechanism intends to not only address non-compliance by the EIB to 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/cr/governance/complaints/index.htm>

CONTENTS

EXECUTIVE SUMMARY	5
1. COMPLAINT	7
2. BACKGROUND INFORMATION	8
3. APPLICABLE REGULATORY FRAMEWORK.....	9
4. EIB-CM INQUIRY	10
5. FINDINGS AND CONCLUSIONS	13
6. RECOMMENDATION:	14

CONCLUSIONS REPORT

EXECUTIVE SUMMARY

On 18 September 2014, _____ on behalf of Environmental Action Alliance lodged a complaint with the EIB Complaints Mechanism (EIB-CM) concerning EIB financing in the Renewable Energy sector in Ireland.

In his complaint, the complainant alleged that Ireland's National Renewable Energy Plan (NREAP) has never been subject to a legally required process of Strategic Environmental Assessment (SEA) prior to its adoption. Therefore, the complainant took the view that the NREAP had been adopted in breach of EU national law and in breach of the Aarhus Convention.

As a result of the alleged lack of SEA on the NREAP, the complainant considered that by financing projects in the renewable energy sector in Ireland, the EIB is in breach of the EU environmental law and its own standards. The complainant also alleged that the EIB had not carried out a proper assessment of the NREAP and he therefore took the view that the EIB does not conduct proper assessment, in line with the EIB social and environmental handbook and EIB requirements, of projects financed in this sector.

EIB inquiry

The EIB-CM has carried out a review of the complainant's allegations, has examined all relevant documentation and has held internal consultation meetings with the relevant EIB services. The EIB-CM reviewed the process of the EIB project appraisal and the environmental due diligence standards applied on renewable energy projects in Ireland. In addition, the EIB-CM reviewed the complaints concerning compliance of NREAP and in relation with a SEA that had been brought by the complainant and other parties to other EU/international bodies (European Commission, Aarhus Convention Compliance Committee and the European Ombudsman).

Findings and Conclusions

With regard to the alleged non-compliance of the NREAP with EU and national environmental law resulting from the alleged failure to conduct an SEA and non-compliance with the Aarhus Convention: From the allegations, it appears that the complainant assumes that the EIB has the duty to analyse the environmental mitigation measures, the alternatives and costs of the NREAP. In this regard it is important to recall that the NREAP is a national plan issued by the national competent authorities, as required by the Article 4 of Directive 2009/28/EC on renewable energy, to be submitted to the European Commission. Therefore, it is important to emphasise that the NREAP is not a concrete project *per se* that should undergo the EIB appraisal procedure as inferred by the complainant. However, within the framework of EIB financed projects, the EIB may review an SEA for projects resulting from programs or plans when the SEA process is applicable.

Within the framework of the complaints lodged with the European Commission, the EIB-CM takes note of the European Commission's interpretation of the provisions of Directives 2001/42/EC and 2009/28/EC with regard to the NREAP and the SEA. In this context, the European Commission considered that the need for an SEA depended on the specific content of each plan and that due to the general character of the Irish NREAP, the SEA could be carried out at the later stages of implementation when setting the framework for future development consent of projects. Moreover, considering the role of the European Commission as the Guardian of the Treaties, the EIB-CM takes note of the fact that although the complainant had raised his concerns with the European Commission, the latter concluded that there were no grounds to initiate an infringement procedure under article 258 of the Treaty on the Functioning of the European Union (TFEU).

With regard to the findings of the ACCC referred by the complainant, the EIB-CM observes that the ACCC findings emphasise on the European Commission's lack of legislative framework to implement article 7 of the Convention with respect of the adoption of the NREAP by Member states. In addition, the ACCC took the view that the European Commission failed to monitor the implementation of article 7 of the Convention in the adoption of Ireland's NREAP. In

EIB Complaints Mechanism

this context, the EIB-CM takes note that the ACCC is conducting a follow-up on the steps taken by the European Commission, which will inform the ACCC on a regular basis.

In this regard, it is important to highlight that the EIB-CM is not competent to investigate complaints concerning International organisations, Community institutions and bodies and national authorities.

With regard to the alleged EIB's failure to ensure compliance of the EIB financed projects in the renewable Energy sector with the applicable laws and lack of economic appraisal, from the review carried out by the EIB-CM it appears that the EIB financing in the renewable energy sector is no exception to the EIB applicable standards and procedures when conducting its appraisal and due diligence ensuring the compliance of the projects with the applicable laws and standards. The EIB-CM failed to find evidence of the alleged lack of assessment and evaluation for the projects in the contested sector in relation to the allegations made.

In light of the findings above and based on the information available, the EIB-CM concludes that the Complainant's allegations in relation to the EIB financing in the Renewable Energy Sector are not grounded.

Recommendation:

Taking into consideration the information provided by the complainant regarding the ongoing court proceedings at the national level concerning the legitimacy of the NREAP, the EIB-CM recommends the EIB services to follow-up on the developments of the national court proceedings with the European Commission and the competent national authorities with a view to assessing possible impacts, if any, of eventual court decisions on the EIB operations in the sector.

CONCLUSIONS REPORT

Complainant: [REDACTED] Environmental Action Alliance

Subject of complaint: Alleged breach of National EU environmental law and EIB environmental Policies

1. Complaint

- 1.1 On 18 September 2014, [REDACTED] on behalf of Environmental Action Alliance, an NGO based in Ireland, lodged a complaint with the EIB Complaints Mechanism (EIB-CM) concerning EIB financing in the Renewable Energy sector in Ireland.
- 1.2 The complainant stated that the EIB has provided more than one billion Euros in loans for projects to support the National Renewable Energy Action Plan (NREAP). In this regard, the complainant alleged that, contrary to the applicable requirements, the NREAP has never been subject to a legally required process of Strategic Environmental Assessment (SEA) prior to its adoption.
- 1.3 In addition, the complainant referred to the findings of Aarhus Convention Compliance Committee (ACCC) that were issued in June 2012 and endorsed by the UNECE in July 2014 within the framework of a complaint lodged by a citizen regarding Ireland's alleged non-compliance of the NREAP with Aarhus Convention. In this regard the complainant highlighted that the ACCC findings indicate that the European Union does not have in place a proper regulatory framework and/or other instructions to ensure implementation of article 7 of the Convention by its member States.
- 1.5 In this context the complainant took the view that the ACCC decisions and findings are binding and that the "Authorities in the EU and Ireland are refusing to ensure that the renewable program, which the European Investment Bank is funding, complies with the Community and National Legislation on assessment and public participation..."
- 1.6 The complainant stated that in July 2014 a request for access to information regarding an EIB project in the field of Renewable Energy had been submitted by one of the members/associates of his NGO. In this regard, the complainant took the view that the information provided by the EIB confirmed that the Bank's Project Directorate (PJ) had failed to carry out the necessary assessments in line with the EIB Environmental and Social Handbook.
- 1.8 The complainant also referred to the EIB's Energy Lending Criteria and quoted the paragraphs related to the EIB standards and required studies in relation of the cost benefit analysis. In this regard, the complainant alleged that the EIB did not comply with the referred criteria. The complainant stated: *"to put it bluntly, zero analysis has ever occurred of the Irish renewable programme in terms of what environmental protection is being achieved, what the costs are and what alternatives were available. In fact, when analyzed, no such benefit is actually being achieved."*
- 1.9 In light of the above allegations, the complainant requested the suspension of the EIB funding for projects in the renewable energy sector in Ireland until the compliance with the applicable requirements is assured. The complainant requested a compliance review of the EIB financing in the renewable energy sector in Ireland in relation to the raised allegations on the NREAP.
- 1.10 On 8 October 2014, the EIB-CM acknowledged receipt of the complaint. The complainant was informed of the fact that the EIB-CM was carrying out a review of his case as well as of the date by which he might expect a formal reply from the EIB-CM. On 16 December 2014, the complainant submitted further correspondence that was accordingly acknowledged.

- 1.11 On February 2015, the EIB-CM further engaged with the complainant by telephone in order to clarify some of the statements made in the complaint, such as the repetitive use of the term "Renewable Energy Program". In this telephone conversation, the complainant clarified that when using the term "Renewable Energy Program" reference is made to the "National Renewable Energy Action Plans" (NREAP). The complainant also explained that due to the alleged non-compliance of the NREAP, his complaint is challenging the EIB financing in the Renewable Energy Sector in Ireland.
- 1.12 The complainant moreover stated that there are court proceedings ongoing at the national level challenging the legality of the NREAP.

Summary of main Allegations:

- Lack of SEA prior to the adoption of the NREAP leading to alleged non-compliance of the NREAP with the EU environmental law and Aarhus convention
- EIB's non-compliance with EU law, EIB Statute, and Environmental Social handbook when financing renewable Energy projects in Ireland due to the alleged improper NREAP.

2. Background information

2.1 National Renewable Energy Action Plan (NREAP)

2.1.1 Article 4 of Directive 2009/28/EC on the promotion of the use of energy from renewable sources (the renewables Directive) on renewable energy required each Member State to adopt a national renewable energy action plan (NREAP) to be submitted to the European Commission.

2.1.2 The plan provides a detailed road map on how the Member States are expected to reach its legally binding 2020 target for the share of renewable energy in their gross final energy consumption, as required by Article 4 of the Renewables Directive. In the plan, the Member States sets out sectorial targets, the technology mix they expect to use, the trajectory they will follow and the measures and reforms they will undertake to overcome the barriers to developing renewable energy.

2.1.3 The plan demonstrates how the Member States will meet their overall national target established under the Directive. Ireland submitted its National Renewable Energy Action Plan to the European Commission in July 2010. The National Renewable Energy Action Plan (NREAP) in Ireland sets out the Government's strategic approach and concrete measures to deliver on Ireland's 16% target under Directive 2009/28/EC.

2.2 Prior to the complaint lodged with the EIB-CM

2.2.1 The complainant, together with a group of NGO activists and members have been challenging the renewable energy policy and projects in Ireland for approximately the last 5 years. Subjects of their concern include access to information, consultations, SEA and the NREAP. During the last 5 years different Members of the group have lodged complaints with national, EU and international bodies in relation to the renewable energy sector. The EIB had received requests for information from different members that have been dealt with by the Civil Society Unit of the EIB who provided the information requested. In the current complaint with the EIB-CM, the complainant referred to one of the latest requests of information that had been submitted in July 2014 by one of its members. The complainant also referred to the complaint that had been lodged with the ACCC in 2012 by another member of the group.

2.3 Request for information

- 2.3.1 On 2 November 2014 the complainant submitted a letter to the EIB-CM, in his letter the complainant reiterated his concerns that were raised in his initial complaint of 18 September 2014. In addition, the complainant referred to the EIB financed facility loan to ESB in Ireland¹. In this regard, the complainant requested the disclosure of an electronic version of the SEA assessment for the NREAP which according to the complainant is normally required by the Bank. The complainant also requested a copy of the EIB Project Directorate's record of the main national, EU and international legal instruments that are relevant to the ESB project as required by point 52 of the EIB Social and Environmental Handbook, environmental and social practices procedures.
- 2.3.2 In this regard, on 1 December 2014, the EIB-CM informed the complainant that the request for information was transferred to the EIB Civil Society Unit the competent service to deal with requests for information that will provide him with a reply in this respect. The complainant was also informed that the additional information provided in the letter in relation to the initial complaint would be treated within the course of the complaint handled by the EIB-CM.
- 2.3.3 On 9 December 2014, the EIB Civil Society Unit provided the complainant with a reply. With regard to the complainant's request for a copy of the SEA of the NREAP, the complainant was informed that the NREAP was not subject to a SEA and that therefore the Bank does not hold such information.
- 2.3.4 However, the complainant was provided with the EIB web link to the Environmental and Social Data sheet of the project where relevant project information is recorded. In addition, the EIB Civil Society Unit clarified to the complainant that the ESB Project is part of Ireland's Grid Implementation Programme 2011-2016 that underwent a SEA, in accordance with the requirement of the SEA Directive (2001/42/EC). In this context, the complainant was provided with the electronic copy of the Strategic Environmental Assessment which was used by the EIB as part of its assessment of this operation.

3. APPLICABLE REGULATORY FRAMEWORK

3.1 Scope of the EIB Complaints Mechanism

- 3.1.1 The EIB Complaints Mechanism applies to complaints of maladministration² lodged against the EIB Group (article 4.1 of Title II "Principles" of the EIB CMPTR); complaints may concern any alleged maladministration of the EIB Group in its actions and/or omissions (article 4.1 of Title IV "Rules of Procedure" of the EIB CMPTR). In the light of the allegations made by the complainant, it is worth noting that article 2.3 of Title IV "Rules of Procedure" - CMPTR stipulates that the EIB-CM is not competent to investigate complaints concerning International organisations, Community institutions and bodies, national, regional or local authorities.

3.2 EIB Standards

3.2.1 The EIB Statement of Social and Environmental Principles and Standards

The statement stipulates that, *"Within the EU, the EIB assumes that EU environmental and social law has been correctly transposed into national law and that national law is being enforced by the responsible authorities. EIB due diligence focuses particularly on countries and/or specific laws where there is evidence to suggest these assumptions may be false."*

In line with 20 of the EIB Statement, *"Where a project forms part of a program or plan, prepared or adopted by a national, regional or local authority, in the EU a formal Strategic Environmental Assessment (SEA) may be required, in order to judge the environmental acceptability of a project, according to the requirements of the*

¹ ESB and EIB signed a loan facility for €100 million. These funds are aimed at reinforcing and modernising the electricity transmission and distribution networks of Ireland supporting the integration of new power generation resources. Particularly wind, while improving overall safety and reliability of electricity supply, and facilitate the rollout of electric vehicles nationally

² The definition of maladministration provided by the EIB CMPTR includes *inter alia* the EIB's failure to comply with the applicable legislation and/or established policies, standards and procedures.

EIB Complaints Mechanism

SEA Directive²⁵. Outside the EU, for a project that would be subject to the SEA Directive within the EU, the information provided by the promoter should include strategic aspects and have a broad scope. "

3.2.2 Allocation of responsibilities

Pursuant to EIB Social and Environmental Practices Handbook (the Handbook), the EIB is responsible for checking whether the Promoter has fulfilled the following requirements: a full EIA process when applicable (including the public consultation and approvals/planning consent), the identification of the impacts and appropriate measures to avoid, reduce or mitigate these impacts, the consideration of alternatives, the proposed mitigation and compensation measures and associated mitigation plan and public disclosure, while carrying out a due diligence on the assessments carried out by the national authorities.

The EIB verifies that the competent authorities have taken all necessary measures to ensure the compliance of the assessment with the EIB's environmental standards as well as with the relevant community and national legislation. Therefore, the EIB's role is to verify the compliance with its requirements as well as with community and national legislation.

In addition, it is worth emphasising that the Finance Contract incorporates all the key elements constituting the basis of the EIB's decision that had been identified in the discussions between the Bank and the Promoter during the project preparation, appraisal and negotiation. In that regard, the Handbook lays down the Environmental and Social conditions which may be applied to Finance Contracts stipulated by the EIB in order to ensure the environmental acceptability of the project during implementation and operation. The Handbook presents the conditions which are stipulated for disbursement (e.g. environmental conditions which must be fulfilled to the satisfaction of the EIB prior to any fund being disbursed by the EIB on either the whole project or a part of the project). Non-compliance with these conditions might result in a halt to the disbursement of the EIB's loan.

4. EIB-CM inquiry

The EIB-CM carried out a review of the complainant's allegations, examined all relevant documentation and held internal consultation meetings with the relevant EIB services. The EIB-CM reviewed the process of the EIB project appraisal and the environmental due diligence standards applied on renewable energy projects in Ireland. In addition, the EIB-CM reviewed the complaints that were lodged by the complainant and other parties with other EU/international bodies (European Commission, Aarhus Convention Compliance Committee and the European Ombudsman) concerning compliance of NREAP and in relation with a SEA.

4.1 Administrative and legal proceeding

Complaints to the European Commission

- 4.1.1 On 21 February 2010, an activist lodged a complaint with the European Commission that was registered under the CHAP System as CHAP ³(2010)00645. In his complaint, raised several concerns regarding access to information and alleged breaches of EU environmental law as well as of the Aarhus Convention by the European Union and by Ireland. Among the allegations raised, alleged that the NREAP does not comply with the SEA Directive. therefore took the view that the European Union and Ireland were in breach of the Directive.
- 4.1.2 Following a first review of the information provided and a meeting between and the officials of the European Commission (DG ENER), on 6 April 2011, the European Commission (DG ENV) informed that: "we are not in a position to clearly establish any infringement of EU law". On 8 May 2011, submitted further communication to the Commission with a view of pursuing the matter further. On 20 May 2011 the Commission informed the complainant that the further communication provided did not change the Commission's analysis on the matter. Therefore, the Commission (DG ENV) informed the complainant of the closure of the file.

³ the Secretariat General of the European Commission set up a system whereby complaints and enquiries are recorded in a central registry (CHAP)

4.1.3 Within the framework of other complaints lodged with the European Commission by other NGO members regarding alleged lack of SEA and non-compliance of Ireland's NREAP⁴, the EIB-CM takes note that the European Commission considered that the requirement of an SEA depended on the specific content of each plan⁵. Therefore in case a Member State had decided not to include in its NREAP specific mandatory measures, an SEA would not have been required. However, the European Commission took the view that when implementing the NREAP through more specific plans (for instance, national or regional energy programmes); SEAs a need to be carried out. The European Commission took the view that due to the general character of the Irish NREAP, the SEA could be carried out at the later stages of implementation when setting the framework for future development consent of projects.

4.1.4 In March 2012, following the communication of the European Commission's findings, the activist then lodged a complaint with the European Ombudsman regarding the communicated outcome. On 18 October 2014 The European Ombudsman registered the complaint under Ref: 1892/2012/VL. Following the inquiry into the complaint, the Ombudsman concluded that there are no grounds for further inquiries regarding the allegations on the NREAP and the SEA and closed the file on 30 September 2012⁶.

Complaint to Aarhus Convention Compliance Committee (ACCC)

4.1.4 The complainant referred to a complaint that was lodged with ACCC on 15 October 2010 by an Irish citizen, alleging failure by the European Union to comply with its obligations under article 5 and 7 of the Convention on Access to information, public Participation in Decision making and Access to Justice in Environmental matters in relation to the NREAP. In particular, the member of the public alleged that the EU did not comply with the convention by failing to monitor the implementation of EU law related to the Convention by Ireland with respect to Ireland's NREAP.⁷

4.1.5 Following a request for clarification from the ACCC to the European Commission in relation to the lodged complaint, on 28 June 2011, the European Commission submitted its clarifications regarding the raised allegations. In summary, with regard to the alleged non-compliance of the NREAP with the SEA Directive, the Commission clarified that in line with Article 4(2) the Directive 2009/28/EC Ireland submitted its NREAP. The Commission highlighted that the Directive does not provide for the Commission (or any other institution of the Union) to approve these plans. The European Commission may issue recommendations under Article 4(5) regarding the NREAP if necessary. However, the Commission stated that no recommendations were issued in the case of Ireland.

4.1.6 The European Commission also highlighted that the NREAP submitted by Ireland (Point 5.4 read in conjunction with the appendices 5 and 6) sets out in detail the consultation procedure that was carried out prior to the adoption of the NREAP. The Commission stated that a public consultation was carried out from 11 to 25 June 2010 and that 58 submission/comments had been received from several parties. As a result, the European Commission took the view that this fully complies with Article 7 of the Convention and the SEA Directive.

4.1.7 With regard to the EIA Directive in relation to the NREAP, the European Commission stated that the NREAP does not constitute a "project" within the meaning of Article 1(2) of the Directive, and that therefore the Directive is not applicable.

4.1.8 In this context, the European Commission concluded that "...when establishing its NREAP, Ireland committed no breach of any of the three Directives nor did not commit any act or omission of such a nature as to contravene Articles 4,5,6 or 7 of the Aarhus Convention. It follows a fortiori that the Union cannot be in "non-compliance" with these provisions by reason of any involvement in Ireland's NREAP."

4.1.9 On 29 June 2012 the ACCC adopted its findings and conclusions. With regard to the NREAP, the ACCC found that the EU does not have in place a proper regulatory framework and/or clear instructions to implement article 7 of the Convention, the EU had not properly monitored the implementation by Ireland of article 7 of

⁴ On 22 March 2012 a complaint was lodged by an environmental NGO with the European Commission.

⁵ <http://www.ombudsman.europa.eu/de/cases/decision.faces/de/51946/html.bookmark>

⁶ <http://www.ombudsman.europa.eu/de/cases/decision.faces/de/51946/html.bookmark>

⁷ Ref: ACCC/C/2010/54

the Convention in the adoption of Ireland's NREAP. Therefore the ACCC took the view that the EU failed to comply with article 7 and 3 of the Convention.

- 4.1.10 The ACCC recommended the following to the European Commission: the ACCC "Recommends that the Party concerned adopt a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of NREAPs. This would entail that the Party concerned ensures that the arrangements for public participation in a Member State are transparent and fair and that within those arrangements the necessary information is provided to the public. In addition, such a regulatory framework and/or clear instructions must ensure that the requirements of article 6, paragraphs 3, 4 and 8, of the Convention are met, including the maintenance of a reasonable time-frames, allowing for sufficient time for informing the public and for the public to prepare and participate effectively, allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation. Moreover, the party concerned must adapt the manner in which it evaluates NREAPs, accordingly."
- 4.1.11 On 1 August 2013, the European Commission provided its comments on the findings and Conclusions of the Final Report of the ACCC. The European Commission informed the ACCC that it has taken note of the findings and recommendations and that the Commission was preparing letters that will be submitted to all EU Member states, informing them of the findings and reminding them to respect the provisions of the Aarhus Convention on public participation should the need to submit an amended National Energy Plan arise. On 17 August 2013, the European Commission provided the ACCC with a copy of the letter submitted to the Member States.
- 4.1.12 On 18 November the ACCC submitted its draft report on the follow-up of the case. In this regard the ACCC welcomed the efforts made by the Commission in relation to the recommendations. However, the ACCC expressed its concerns as to whether such letters will provide "a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of NREAPs". The Committee also expressed concerns stating that it remains unclear how the Party concerned will "adapt the manner in which it evaluates NREAPs" in accordance with the recommendations of the Committee. The ACCC invited the European Commission to submit to the Committee periodically (in July 2014, July 2015 and July 2016) detailed information on further progress in implementing the recommendations.
- 4.2 EIB appraisal & due diligence
- 4.2.1 As a result of the alleged non-compliance of the NREAP with the applicable laws due to the lack of an SEA, the complainant is challenging the EIB financing in the renewable energy sector in Ireland and its due diligence in the sector rather than challenging a specific EIB financed Project.
- 4.2.2 In this context it appears important to highlight that the Bank's activity in the energy sector is guided by EU policies in energy, climate change, external affairs and development. In addition, certain areas of energy policy are decided by individual Member States. The EIB takes all these into account together with the other objectives in the Bank's business plan in defining its screening and assessment criteria for energy projects.
- 4.2.3 Therefore, it is necessary to further clarify some aspects of the EIB due diligence and allocations of responsibilities between the EIB and the project promoter in relation to the compliance with the applicable environmental laws for EIB financed projects. As reported in 3.2 of this Report and in line with the EIB standards for project finance the EIB is responsible for checking whether the Promoter has conducted a full EIA process for the project when applicable. that includes: (i) the public consultation and approvals/planning consent); (ii) the identification of the impacts and appropriate measures to avoid, reduce or mitigate them; (iii) the consideration of alternatives; (iv) the proposed mitigation and compensation measures and associated mitigation plan and public disclosure. In this context, the EIB carries out a due diligence on the assessments performed by the competent national authorities in order to ensure the compliance of such assessments with the EIB's environmental standards as well as with the relevant EU and national legislation.
- 4.2.4 In addition, in line with Article 19 of the EIB Statute, the EIB has the obligation to request the opinion of the European Commission as well as the Member State concerned before the EIB's Board of Directors approval to finance a project. The opinion of the European Commission is requested so it can express its views on the conformity of EIB's operations with relevant European Union policies and legislation.

- 4.3.5 The EIB applies the above-mentioned standards and respects its obligation of due diligence in its assessment of loan requests by relying on the available evidence, including the necessary authorisations and permits issued in conformity with the appropriate national and European legislation. For projects located in the EU, the EIB applies a presumption of legality and, where appropriate, a presumption that national legislation conforms to EU legislation. To the extent necessary, the EIB verifies compliance in order to ensure that its funds are used in a rational manner. This is based on the necessary authorisations to construct and operate the project and is supported by other available evidence, its own assessment and loan covenants.
- 4.2.6 Subject to local conditions and law, each project must, at least, comply with the principles and standards set by EU policies. For all projects, the promoter is responsible for compliance whilst regulatory and enforcement tasks are the responsibility of the competent authorities. Therefore the EIB may rely on EU Member States or the relevant authorities within the Member States in order to determine compliance with the relevant environmental standards and for the EIB to accept a Member State's documentation as evidence of their compliance. In circumstances where the environmental approval process within the Member State is not yet completed, the appropriate disbursement conditions will be attached to the financing contract.
- 4.3.7 As for the EIB investment projects in several sectors, renewable energy sector investment projects also undergo a cost benefit analysis (CBA) as part of the economic appraisal of the project foreseen for EIB financing. The EIB calculates the economic returns of its projects using internationally accepted methods and in line with the economic appraisal for investment projects of the EIB⁸. Beyond financial viability considerations, it also appraises the socio-economic costs and benefits to make sure that the projects the EIB finances constitute a sound contribution to society at large.

5. Findings and Conclusions

- 5.1 Alleged non-compliance of the NREAP with EU and national environmental law resulting from failure to conduct an SEA and non-compliance with the Aarhus Convention
- 5.1.1 In light of the complainant's allegation reported in 1.8 of this report, it seems that the complainant assumes that the EIB has the duty to analyse the environmental mitigations measures, the alternatives and costs of the NREAP. In this regard it is important to recall that the NREAP is a national plan issued by the national competent authorities as required by the Article 4 of Directive 2009/28/EC on renewable energy to be submitted to the European Commission. Therefore it is important to emphasise that the NREAP is not a concrete project *per se* that should undergo the EIB appraisal procedure as inferred by the complainant. Notwithstanding the above, within the framework of EIB financed projects, the EIB may review an SEA for projects resulting from programs or plans when an SEA process is applicable.
- 5.1.2 Taking into consideration the EIB's allocation of responsibilities reported in 3.2.2 and 4.2.3 of this report, in the case of Ireland's NREAP, it is important to highlight that the decision not to carry out an SEA before the adoption of the NREAP was taken by the national competent authorities.
- 5.1.3 Considering the role of the European Commission as the Guardian of the Treaties, the EIB-CM takes note of the fact that although the complainant had raised his concerns with the European Commission as reported in 1.2.2 of this report, the European Commission had found no grounds to initiate an infringement procedure under article 258 of the TFEU.
- 5.1.4 In addition, the EIB-CM takes note of the European Commission's interpretation of the provisions of Directives 2001/42/EC and 2009/28/EC with regard to the NREAP and the SEA. As reported in 4.1.3 of this report, the European Commission considered that the need for an SEA depended on the specific content of each plan and that due to the general character of the Irish NREAP, the SEA could be carried out at the later stages of implementation when setting the framework for future development consent of projects.
- 5.1.5 With regard to the findings of the ACCC referred by the complainant, the EIB-CM observes that the ACCC findings emphasise on the European Commission's lack of legislative framework to implement article 7 of the

⁸ http://www.eib.org/attachments/thematic/economic_appraisal_of_investment_projects_en.pdf

EIB Complaints Mechanism

Convention with respect of the adoption of the NREAP by Member states. In addition, the ACCC took the view that the European Commission failed to monitor the implementation of article 7 of the Convention in the adoption of Ireland's NREAP. In this context, the EIB-CM takes note that the ACCC is conducting a follow-up on the steps taken by the European Commission in which the European Commission will periodically inform the ACCC on the taken steps.

- 5.1.6 In this context, it is important to highlight that the EIB-CM is not competent to investigate complaints concerning International organisations, Community institutions and bodies and national authorities
- 5.2 Alleged EIB's failure to ensure compliance of the EIB financed projects in the renewable Energy sector with the applicable laws (EIA and SEA) and lack of economic appraisal
- 5.2.1 In light of the information provided in 4.2 of this report and the review carried out, the EIB-CM considers that the EIB financing in the renewable energy sector is no exception to the EIB applicable standards and procedures when conducting its appraisal and due diligence ensuring the compliance of the projects with the applicable laws. In relation to this, the EIB-CM reviewed a sample of EIB financed projects in the renewable energy sector in Ireland. In this respect, the EIB-CM failed to find evidence of the alleged lack of assessment and evaluation of the projects in relation to the allegations made regarding the SEA.
- 5.2.2 In light of the findings above and based on the information available, the EIB-CM concludes that the Complainant's allegations in relation to the EIB financing in the Renewable Energy Sector in Ireland are not grounded.

6. Recommendation:

Taking into consideration the information provided by the complainant regarding the ongoing court proceedings at the national level concerning the legitimacy of the NREAP, the EIB-CM recommends the EIB services to follow-up with the European Commission and the competent national authorities the developments of the national court proceedings with a view to assessing possible impacts of eventual court decision on the EIB operations in the sector.

P.P.

Felismino Alcarpe
Head of Division
Complaints Mechanism
28 May 2015

Omar El Sabee
Complaints Officer
28 May 2015