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To:

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Complaint to the EIB's complaint mechanism - Failure of the European Investment Bank to provide access to documents related to South Tunisian Gas Project

1. This complaint deals with the refusal of the European Investment Bank (EIB) to fully disclose the Results and Measurement Assessment (ReM) Framework related to investment in the ETAP South Tunisian Gas project in breach of the Aarhus Convention¹, Regulation 1367/2006² (the Aarhus Regulation), Regulation 1049/2001³ and its own Transparency Policy.⁴ We consider the EIB's refusal to be an instance of maladministration.
2. Part 1 of this complaint will lay out the background of the document requested, and the details of the requests and replies sent between Bankwatch and the EIB. Part 2 will

¹ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

² Regulation (EC) 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.

³ Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament Council and Commission documents.

⁴ We refer to the EIB's Transparency Policy in force at the time the request was made, dated 2 February 2010

provide the legal arguments according to which the replies from the EIB constitute an instance of maladministration.

1 Facts

1.1 The ETAP South Tunisian Gas project

3. According to the parts of the Results Measurement Framework Assessment which were not redacted, the objective of the project is to: *"connect new natural gas production fields in the South of Tunisia to the existing gas network in the north of the country. The principal components of the project are: production wells; flowlines; a central gas receiving and processing facility in the Nawara petroleum concession area and associated infrastructure; a 370 km gas pipeline from Nawara to Gabes; and a gas treatment plant at Gabes. The project will allow supply of additional volumes of natural gas from indigenous resources, compensating for the decreasing production from existing fields and supporting the utilisation of gas in Tunisia."* The results indicators section states that it is *"estimated that the Tunisian state will receive on average [...] in taxes and royalties (assuming a medium oil price scenaria and [...] via ETAP's shareholding in the project."* This indicates that the economic return by the Tunisian state is an important factor in the decision of whether to fund the project.
4. According to the EIB's web site, the loan agreement for the project was signed on 4 March 2014 following approval of the project by the Bank's Board of Directors.

1.2 Purpose of conducting a Results and Measurement Framework Assessment

5. The EIB can invest in projects outside the EU only to the extent that it is mandated to do so by the European Parliament and Council, the institutions which guarantee such investments. The Results and Measurement Assessment Framework (ReM) was introduced by the EIB in 2012 to replace the Economic and Social Impact Assessment Framework (ESIAF). Its purpose is to allow the Parliament and Council to assess whether the project complies with the principles guiding the EU's external action. Decision No 466/2014/EU of the European Parliament and of the Council of 16 April 2014 granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the Union lays these obligations out in greater detail.
6. Article 3(1) states that the EIB financing operations must support subscribed general objectives, one of which is the development of social and economic infrastructure, including transport, energy, and environmental infrastructure, and information and communication technology. The project in this instance was intended to contribute to the achievement of this objective. Article 3(2) states that EIB financing operations shall also contribute to the general EU interest, in particular the principles guiding Union external action, as referred to Article 21 TEU. According to Article 21(2) TEU, such principles include fostering *"the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty"* and *"help[ing] develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development"*. Article 9 of Decision 466/2014/EU obliges the EIB to adopt the necessary rules and procedures to carry out an ex ante assessment of the environment and social impacts of investment projects to ensure their sustainability and that they contribute to fulfilment of the EU's external policy, as well as monitoring and reporting on the actual results achieved. The ReM Framework is the tool used by the EIB to carry out these obligations.

1.3 Access to documents request and replies

7. On 14 November 2014 Bankwatch submitted its initial request to the EIB for access to a Results Measurement Framework (ReM) Assessment regarding the ETAP South Tunisian Gas project. The EIB responded on 3 December 2014 informing that it would be unable to respect the deadline of 15 working days laid down in Article 7(1) of Regulation 1049/2001 for the reason that it had to consult third parties.
8. A follow-up message was sent by the EIB on 10 December 2015 confirming that the consultation of the third parties involved in the project could not be undertaken within the deadline of 15 working days, but that its initial response would be sent within the extended timeframe of a further 15 working days. The EIB also stated that the ReM Assessment only contained limited environmental information, all of which was available on the EIB's website, and provided six links to the EIB's website in this regard⁵. None of the documents available at these links includes the information that was finally withheld by the EIB.
9. The EIB sent its initial response by email of 12 January 2015, which attached a redacted version of the ReM Assessment. The response stated that the document had been redacted on the basis of the first bullet point of Part A, section 5.2.3 (commercial interests of a natural or legal person) and Part B, section 4.3.1 of the EIB's Transparency Policy, which states that for private sector projects, information cannot be disclosed before approval by the Board of Directors if designated as confidential by the EIB's private sector counterparts. Information regarding individuals in accordance with the second bullet point of Part A, section 5.2.2 of the EIB's Transparency Policy (protection of personal data) was also withheld. The redacted information included the following:
 - a. information on the forecasted designed throughput of the gas pipeline to be funded in Fm3/year;
 - b. the forecasted quantity of gas reserves in Gm3 and liquids in Mboe which the project would enable to be produced;
 - c. The rate of LPG production in Mboe/y and the cumulative production of condensate in Mboe over the project's lifetime;
 - d. The estimated amount of taxes to be received by the Tunisian government from the project.
10. The above list is non-exhaustive as the nature of the redaction made it difficult to identify the type of information that was withheld.
11. Bankwatch submitted a Confirmatory Application in accordance with Article 7(2) of Regulation 1049/2001 on 27 January 2015, asking for full disclosure of the ReM with the exception of personal data.
12. The EIB sent its reply to the Confirmatory Application on 17 February 2015. It confirms the EIB's decision to withhold the redacted information in the ReM assessment for the

⁵<http://www.eib.org/infocentre/register/all/54267108.pdf>
<http://www.eib.org/infocentre/register/all/54267110.pdf>
<http://www.eib.org/infocentre/register/all/49387332.pdf>
<http://www.eib.org/infocentre/register/all/54267106.pdf>
<http://www.eib.org/infocentre/register/all/54267104.pdf>
<http://www.eib.org/infocentre/register/all/54267112.pdf>

reason that its disclosure would, at this stage of the project, undermine the commercial interests of its counterparts.

2 Arguments

13. Bankwatch acknowledges the right of the EIB to redact personal information on the grounds of Article 4(1)(b) of the Regulation and section 5.4.b of the latest edition of the EIB's Transparency Policy.
14. However, the EIB's failure to disclose the information redacted from the ReM Framework Assessment on the basis that its disclosure will harm the commercial interests of the EIB's counterparts in the project (first bullet point of section 5.5 of the latest edition of the EIB's Transparency Policy) breaches the Aarhus Convention, the Aarhus Regulation and Regulation 1049/2001 and the EU's founding Treaties.
15. First, the EIB has failed to establish that disclosure of the information would undermine the protection of the commercial interests of the EIB's counterparts. Second, the EIB has failed to carry out its duty under Regulation 1049/2001 and the Aarhus Regulation to consider whether there is an overriding public interest in disclosing this information that outweighs any potential harm to the commercial interests of the Bank's counterparts.

2.1 Relevant provisions of EU law

16. Article 15(1) TFEU provides that: *"In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible."*
17. Specifically with regard to access to documents, Article 15(3) states that *"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...General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure."* The general principles and limits to this right were have been detailed in Regulation 1049/2001.
18. With regard to the EIB, Article 15(3) states that it shall be subject to the rules on access to documents *"only when exercising their administrative tasks."* Given the purpose of the ReM Framework Assessment, i.e. as a tool to aid the EIB in its reporting duties to the European Parliament and the Council as guarantors of its investment activities outside the EU, this activity falls firmly within the exercise of its administrative tasks. Therefore, Regulation 1049/2001 applies to the information redacted from the ReM Framework Assessment requested by Bankwatch. Indeed, the EIB's Transparency Policy in force at the time that the request was made states that *"the Bank takes account and commits to comply with the EU policy and initiatives and legislative framework on transparency and public disclosure of information notably with the principles laid down by Regulation (EC) No 1049/2001."*
19. It is also important to recall that the Treaty on European Union requires the institutions to act transparently and to involve EU citizens in their decisions. Article 10(3) TEU states that *"Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen"*. Article 11

TEU adds that "[t]he institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society".

20. The ReM Framework Assessment, including the redacted information, meets the definition "environmental information" in several sub-paragraphs of Article 2 of the Aarhus Regulation, which includes information on factors, such as substances, emissions and discharges or other releases into the environment, affecting or likely to affect the air and atmosphere; measures (including administrative measures) likely to affect these factors; and cost-benefit and other economic analyses used within the framework of the measures. Given that the object of the project is to allow gas reserves to be exploited, the ReM Framework Assessment carried out to ensure that the Bank's decision to finance the project meets the requirements of the Treaties, clearly falls within this definition. Again, the Bank's Transparency Policy states that it complies with the Aarhus Regulation.
21. In its refusal to grant access to the requested information, the Bank refers only to its Transparency Policy. Specifically, it relies on Part A, section 5.2.3 which stated that *"unless there is an overriding public interest, access to information shall also be refused where disclosure would undermine the protection of...commercial interests of a natural or legal person"*, and Part B, section 4.3., which states that the proposal from the Management Committee to the Board of Directors for financing a project is not to be released before approval by the Board of Directors. Specifically, *"[f]or private sector projects, information designated by the Bank's private sector counterparts as confidential cannot be disclosed."* Given that the Board of Directors must have approved the project before the loan agreement was signed in March 2014, only the exceptions in Regulation 1049/2001 and the Aarhus Regulation can justify a refusal to disclose information. Neither Regulation allows the EIB to categorically refuse access to information simply because the Bank's private sector counterparts have designated it as confidential. Article 4(4) of Regulation 1049/2001 provides that *"as regards third-party documents, the institution shall consult third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed"*. The Bank must therefore carry out its own assessment as to whether an exception applies. Indeed, this was highlighted during the process leading to the revision of the EIB's Transparency Policy and does not appear in the latest edition published in March 2015.

2.2 Failure to establish that disclosure would undermine the protection of commercial interests

22. The EIB's initial reply of 12 January 2015 simply states that the information has been redacted *"in line with the exceptions provided for in the first bullet point of Part A section 5.2.3 and Part B section 4.3.1 of the Bank's Transparency Policy"*. As explained above, the reference to Part B section 4.3.1 is irrelevant since the request for documents was made after the Board of Directors had approved the project. Therefore, we concentrate on the argument on the protection of commercial interests.
23. In its response to the confirmatory application, the EIB confirms that the information would undermine the commercial interests of the Bank's partners in the project:

"The information contains details of the Bank counterparts' forecasts and production parameters of the investment project, being related to the business strategy, including potential revenues, costs, price fluctuations, financing sources and profit margins of

the Bank's counterparts. If released in the public domain, this information could be used by competitors to undermine the commercial interests of the Bank's counterparts."

24. From the information provided, it is impossible for us to tell whether the redacted information indeed contains the details claimed by the Bank. With regard to the production parameters of the project, the information on emissions disclosed in the Environmental and Social reports⁶ already gives an indication of the scale of the project. It is difficult to see how information on the estimated throughput of gas and the estimated volume of gas and liquid reserves that the project will enable to be produced could further damage the commercial interests of the companies concerned in this respect. Similarly, we cannot see how this information together with the estimated revenues to be received by the Tunisian state during the exploitation of the gas could possibly give competitors an idea of the companies' individual costs, price fluctuations, financing sources and profit margins. For such information to be deduced, the redacted information would have to be very detailed indeed, including a breakdown by company involved. If this is not the case, the disclosure of such aggregated information would not allow competitors to undermine their commercial interests. However, in the case that the redacted information is of this level of detail, at the very least, the EIB should have redacted the information in such a way that it is possible to ascertain the nature of the information and the level of detail it contains.
25. The response also emphasised that the information redacted is based on forecasts originating from the promoter at the time of appraisal, i.e. December 2013, and that the estimates had changed in the meantime due to market volatility. Therefore, their disclosure would create a false perception of commercially critical and sensitive data, thus harming the commercial interests of the promoter.
26. This argument is erroneous. The public is not incapable of understanding that the ReM Framework is an ex ante assessment, and therefore necessarily containing forecasts and estimates. The public is also capable of understanding that forecasts and estimates based on a market as volatile as that for fossil fuels may change over time. Indeed, the possibility of change is the very nature of both forecasts and estimates. Contrary to the EIB's argument, the fact that the redacted information is constituted of estimates and forecasts which have since changed is all the more reason for its disclosure not to undermine the protection of commercial interests, since specific factual information is still unknown.
27. Finally, the Bank states that due to the participation of a publicly listed company in the project, *"any false interpretation of company and/or project data as well as the release and dissemination of misleading data have to be thoroughly avoided in order to ensure compliance with the respective capital market provisions."* However, the disclosure of the estimates and forecasts in the ReM Framework could not lead to knowing specific data on the publicly listed company participating in the project, given that the information also covers other companies involved in the project. Therefore, it would not lead to any false interpretation of the company and/or project data.
28. The EIB's reply clearly lacked motivation in breach of Article 253 TFEU.
29. According to Regulation 1049/2001 and the Aarhus Regulation, even if it can be established that the redacted information would undermine the protection of commercial

⁶ See for example the EIB's Carbon Footprint Exercise in the Environmental and Social Data Sheet t <http://www.eib.org/infocentre/register/all/49387332.pdf>

interests in this specific case, it must still be disclosed if there is an overriding public interest.

30. In its initial reply the EIB completely failed to discharge its duty under Regulation 1049/2001 and the Aarhus Convention to consider whether there was an overriding public interest in disclosing the requested information. In its response to the confirmatory application, the EIB noted that the confirmatory application *"fails to explain how the potential benefit of disclosing this information would outweigh the harm that such a disclosure would constitute to the interests of the Bank's counterparts commercial interests, taking into account that some of this information, such as details of fiscal payments to the Government of Tunisia, can be disclosed at a later stage of the project's implementation"*, and simply concluded that *"the EIB does not see an overriding public interest in line with section 5.2.3 Part A of the EIB's Transparency Policy for this information to be disclosed."*
31. In fact Bankwatch did explain the overriding public interest in disclosing the information. It stated *"I would like to emphasise that the Bank is obliged to report on development impacts of the projects [it] financed as this constitute important public information and it is in the public interest that the Bank's operations have positive development impacts."*
32. As explained in section 1.2 above, the very purpose of the ReM Framework Assessment is to report back to the EIB's guarantors on whether the investment complies with the EU's external action objectives regarding their social and environmental impacts as set out in the Treaties. EU tax payers are the ultimate guarantors of EIB investments outside the EU. As such, there is a strong interest in knowing whether EIB investments comply with the EU's objectives in the interests of transparency and accountability of EU institutions.
33. In addition to this, this project presents a real and pressing need for the public to have access to the redacted information. In enabling more fossil fuels to be burned into the atmosphere, this project has a negative impact on the environment, which is at odds with the EU's external objectives as set out in Article 21(2) TEU. Therefore, for the project to be approved, the EIB must consider its impact on the EU's other objectives, such as eradicating poverty or integration Tunisia into the world economy, to outweigh this harm. This decision must be open to scrutiny by the public. Therefore, citizens need to have access to precisely the information that was redacted in order to assess for themselves whether the project is balanced and, overall, complies with the EU's objectives. The information on revenues to be received by the Tunisian state is an important indication of whether the extraction of globally scarce natural resources in Tunisia will provide benefits to its state and whether the project will have positive developmental impact what is the ultimate objective of the EIB's financing for any project outside the EU. In addition, access to the information on total gas reserves and revenues allows civil society organisations, such as Bankwatch, to compare the revenues with gas production and to measure how this project stands in comparison to others and how it contributes to economic and social development of a country. In order to promote open and accountable management of natural resources a global transparency standard on extractive industries was established (the Standard). Extractive Industries Transparency Initiative (EITI) is a multi-stakeholder coalition of governments, companies, investors, civil society organisations and partner organisations which oversees the implementation of the Standard. The European Investment Bank has endorsed the EITI and is a party of the multi-stakeholder coalition. The EITI Standard is based on the assumption that natural resources, such as oil, gas, metals and minerals, belong to a country's citizens. Extraction of these resources can lead to economic growth and social development. The Standard and multi-stakeholder coalition were created as a response to poorly managed

extraction which has too often lead to corruption and even conflict. More openness around how a country manages its natural resource wealth is necessary to ensure that these resources can benefit all citizens. Countries implementing the EITI disclose information on tax payments, licences, contracts, production and other key elements around resource extraction. Generally it is recognised that transparency in extractive sector means that revenues generated from the extraction of natural resources are available for the public to see. Therefore the EITI Standard is considered to be the best international transparency standard in the extractive sector.

34. As explained in the point 8.6 of the EIB Transparency Policy, the EIB is convinced that combatting corruption through improved transparency and accountability in the extractive industries is an essential element for underpinning economic development and poverty reduction and for political stability in resource rich countries. Having endorsed the Extractive Industries Transparency Initiative (EITI), the EIB is committed to support the initiative's work in resource-rich countries outside the EU in which the Bank operates, in particular by working with its project sponsors to introduce greater transparency and consistency in reporting on payments at a project level. At the same time, the EIB will continue to promote the initiative in its contacts with governments and national authorities and encourage them to adopt the EITI principles for reporting and publishing extractive industry revenues. Within the context of the EIB's endorsement of EITI, by failing to disclose requested information, the EIB committed an instance of maladministration.
35. Having access to the information at an early stage in the project's implementation would allow citizens to mount effective opposition to the project if they deem the environmental disadvantages to outweigh the social and economic benefits of the project. Such action could include brining the issue to the attention of their elected representatives in the European Parliament so that an investigation can be initiated into whether the guarantee should be provided. Such action would be less effective, even pointless, once the project is completed.
36. The EIB's failure to take this into account and carry out its duty to balance the public interest against the potential harm to commercial interests is an instance of maladministration.

3 Conclusion

37. We urge the Complaints Mechanism to call upon the EIB to disclose the information redacted from the ReM Framework Assessment requested by Bankwatch in line with its obligations under EU law.
38. We also call on the Complaints Mechanism to remind the EIB of Article 4 of the Aarhus Regulation, which provides for the obligation to actively disseminate environmental information in accordance with Articles 11(1) and (2) and 12 of Regulation 1049/2001 to provide access to a public register of documents. The EIB should systematically publish its ReM Framework Assessments following signature of the loan agreement.

On behalf of CEE Bankwatch Network

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