



## **ETAP South Tunisian Gas Complaint SG/A/2016/01**

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

# **CONCLUSIONS REPORT**

**30 July 2018**

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Prepared by

Complaints Mechanism

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on behalf of CEE Bankwatch Network

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## The EIB Complaints Mechanism

The EIB Complaints Mechanism intends to provide 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 they consider that the EIB committed an act of maladministration. When exercising the right to lodge a complaint against the EIB, any member of the public has access to a two-tier procedure, one internal – the Complaints Mechanism Division (EIB-CM) - and one external – the European Ombudsman (EO).

Complainants that are not satisfied with the EIB-CM's reply have the opportunity to submit a confirmatory complaint within 15 days of the receipt of that reply. In addition, complainants who are not satisfied with the outcome of the procedure before the EIB-CM and who do not wish to make a confirmatory complaint have the right to lodge a complaint of maladministration against the EIB with 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 to provide 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/accountability/complaints/index.htm>

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## CONCLUSIONS REPORT

### EXECUTIVE SUMMARY

On 28 December 2015, [redacted] on behalf of CEE Bankwatch Network (the "Complainant"), lodged a complaint with the EIB Complaints Mechanism ("EIB-CM") concerning the EIB's decision to refuse full disclosure of the Results Measurement Framework ("ReM") of the ETAP South Tunisian Gas project (the "Project"). The Complainant alleged that the EIB's decision amounted to an instance of maladministration and claimed that the Bank should (i) disclose the full ReM of the Project and (ii) establish a general practice of publishing ReMs following signature of the loan agreements.

The Complainant had submitted an application for disclosure of the above-mentioned ReM in November 2014 and had made a confirmatory application in January 2015. The Bank decided to partially disclose the ReM assessment, thus granting access to the requested information while protecting the commercial interests of the Bank's counterparts.

The EIB-CM launched an inquiry into the case. Based on its inquiry, it appears that the ReM falls outside the scope of the Bank's "administrative tasks". Furthermore, the information which the EIB did not disclose concerned commercially sensitive information communicated pursuant to the confidentiality agreement between the Bank and the Promoter.

The EIB-CM noted that the EIB had not disclosed all environmental information contained in the ReM. The EIB-CM carried out an assessment of the rationale behind the decision to consider the redacted environmental information as confidential. Regarding the Bank's refusal to disclose commercially sensitive environmental information, the EIB-CM found that the Bank correctly balanced the public interests concerned by the case (the transparency of environmental information and the protection of the legitimate economic interests of the Promoter). These findings are based on the type of information requested (unpublished production scenarios). If disclosed, this information could generate misleading signals affecting the price of shares of the private sector Promoter. In addition, the Complainant did not provide a convincing argument about how the disclosure of the requested information would enhance the participation of citizens in the environmental decision-making process, beyond the environmental information already available in the EIA as well as in the other project documentation published by the EIB or disclosed to the complainant (Environmental and Social Data Sheet, Proposal of the Management Committee to the EIB Board of Directors).

The Complainant considers that the public interest in verifying the compliance of the Project with EU policy objectives outweighs the protection of commercial interests of the Promoter. The inquiry of the EIB-CM showed that although the Bank had redacted some quantitative indicators in the ReM, it had disclosed the sections of the document rating the Project with respect to attainment of EU policy objectives and explaining the estimated short and long-term development impacts, as well as other project documentation (Proposal of the Management Committee to the EIB Board of Directors) containing additional information about the rationale of the Bank's support to this project and its contribution to the EU Policy objectives. The Complainant did not specify how the urgency of disclosure of the redacted indicators would outweigh the protection of legitimate economic interests of EIB counterparts. The general principle of transparency, as such and without further clarification, cannot

prevail over exceptions based on the applicable regulatory framework as those aiming at the protection of commercial interests.

The inquiry showed that environmental information concerning the technical capacity of the gas transmission pipeline was considered as confidential and was not disclosed, despite the fact that the Project's EIA, published on the Bank's website in September 2014, contained the same information. As the Project EIA had already conveyed the requested environmental information to the Complainant, prior to her application to access the ReM, the EIB-CM considers that no further action is needed by the Bank.

The EIB-CM concluded that the Bank complied with the EIB Transparency Policy and the applicable EU acquis when it granted partial access to the ReM. As a result of the EIB-CM's inquiry, the relevant EIB services followed up the statement, made in the EIB's reply to the confirmatory application, about the possibility to disclose some of the redacted information, as well as data on fiscal revenues reported to the Bank, at a later stage of the Project's implementation. While observing that the Project had not started commercial operation at the time of this Conclusions Report, the Bank agreed to disclose the available information on fiscal revenues as part of its reply to the present complaint. The Bank also indicated the possibility to disclose information on annual fiscal payments upon a request submitted by the Complainant, when this information is available and in line with the EIB Transparency Policy.

With regard to the claim that the Bank shall publish ReMs upon signature of all finance contracts, the EIB-CM notes that the ELM Decisions do not set specific rules of pro-active transparency applying to the ReMs. The EIB-CM observes that although some parts of the ReMs may contain environmental information subject to the obligation to disclose upon request, upon signature of finance contract ReMs do not contain environmental information falling under the obligation of proactive transparency, as claimed by the Complainant. Furthermore, and particularly in the case of private sector counterparts, ReMs may contain commercially sensitive information, which should be thoroughly assessed on a case-by-case basis, with a view to protecting the legitimate economic interests of the Bank's counterparts.



## CONCLUSIONS REPORT

Complainant: Ms. Anna Roggenbuck, on behalf of CEE Bankwatch Network

Date received: 28 December 2015

Subject of complaint: The Bank's refusal to grant full access to the Results Measurement Framework (ReM) assessment pertaining to the ETAP South Tunisian Gas Project

### Claim

- to disclose the full ReM assessment of the Project
- to establish a practice of publishing ReM assessments following signature of the loan agreements.

## 1. THE COMPLAINT

1.1 On 28 December 2015, Ms. Anna Roggenbuck, on behalf of CEE Bankwatch Network (the "Complainant"), lodged a complaint with the EIB Complaints Mechanism ("EIB-CM") concerning the EIB's decision to refuse to fully disclose the Results and Measurement Framework ("ReM") for the ETAP South Tunisian Gas project (the "Project"), following the Complainant's initial and confirmatory applications. The Complainant considered that the EIB's decision amounted to an instance of maladministration in that it breached the EU's founding treaties, the Aarhus Convention, Regulation (EC) No 1367/2006 (the "Aarhus Regulation"), Regulation (EC) No 1049/2001 and the EIB's Transparency Policy.

1.2 The Complainant stated that the purpose of the ReM, introduced in 2012 to replace the Economic and Social Impact Assessment Framework, is to allow the Parliament and the Council to assess whether projects, benefitting from an EU guarantee, comply with the principles guiding the EU's external action. The Complainant referred to the ReM as the tool used by the EIB to fulfil the obligation under article 9 of Decision No 466/2014/EU ("External Lending Mandate" or "ELM Decision"), i.e. to adopt the necessary rules and procedures to carry out an ex ante assessment of the environmental and social impacts of investment projects to ensure their sustainability, their contribution to the fulfilment of the EU's external policy as well as monitoring and reporting on the actual results achieved.

1.3 A review of the correspondence between the Complainant and the EIB concerning the initial and the confirmatory applications is provided in §2.2 of this report. The Complainant took the view that the redacted information, amongst others, included:

- a. Information on the forecasted designed throughput of the gas pipeline to be funded;
- b. The forecasted quantity of gas reserves and liquids which the project would enable to be produced;
- c. The rate of LPG production and the cumulative production of condensate over the project's lifetime;
- d. The estimated amount of taxes to be received by the Tunisian government from the project.

1.4 The Complainant highlighted that the EIB's reply to her confirmatory application confirmed the EIB's decision to withhold the redacted information insofar as its disclosure would, at this stage of the project, undermine the commercial interests of its counterparts.

1.5 The Complainant invoked Article 15(1) TFEU and Article 15(3) TFEU and highlighted that the general principles and limits to the right of access to documents are detailed in Regulation (EC) No 1049/2001. She considered that, given the purpose of the ReM, it fell firmly within the exercise of EIB's administrative tasks. Furthermore, the Complainant noted that the EIB's Transparency Policy in force at the time of her application stated the Bank's commitment to comply with EU policy, initiatives and legislative framework on transparency and public disclosure of information notably with the principles laid down by Regulation (EC) No 1049/2001. The Complainant also recalled provisions of the Treaty of European Union, such as Articles 10(3) and 11 TEU.

1.6 The Complainant pointed out that the EIB's Transparency Policy states its compliance with the Aarhus Regulation; she then considered that the undisclosed information contained in the ReM meets the definition of "environmental information" mentioned in Article 2 of the Aarhus Regulation. The Complainant concluded that *"given that the object of the project is to allow gas reserves to be exploited, the [ReM] carried out to ensure that the Bank's decision to finance the project meets the requirements of the Treaties"*, clearly falls within the definition of environmental information.

1.7 According to the Complainant, in its refusal to grant access to the requested information the Bank only referred to its Transparency Policy and in particular to Part A, § 5.2.3 and Part B, § 4.3.1. Given that the relevant loan agreement had been signed in March 2014 and that her application was submitted after Board's approval, the Complainant concluded that the reference to Part B § 4.3.1 is irrelevant and that only the exceptions in Regulation 1049/2001 and the Aarhus Regulation could justify a refusal to disclose information. The Complainant stated that none of the above regulations allows the EIB to categorically refuse access to information simply because its private sector counterparts have designated it as confidential. In that regard, she stressed that Regulation 1049/2001 establishes the institution's duty to consult third parties with a view to assessing whether an exception is applicable, unless it is clear that the document shall or shall not be disclosed. The Complainant concluded that the Bank must carry out its own assessment as to whether an exception applies.

1.8 The Complainant alleged that the EIB had failed to establish that full disclosure of the ReM would undermine the protection of the commercial interests of the EIB's counterparts. The Complainant argued that, insofar as information on emissions disclosed by the EIB already gave an indication of the scale of the Project, it was difficult to establish how the disclosure of the redacted information could further damage the commercial interests of the companies concerned or could possibly give competitors an idea of the companies' individual costs, price fluctuations, financing sources and profit margins. In this regard, the Complainant alleged that, for such information to be deduced, the redacted information would have to be very detailed, including a breakdown by company involved. The Complainant concluded that, if the redacted information was aggregated information, its disclosure would not allow competitors to undermine the commercial interests while, if the redacted information was very detailed, the EIB should have redacted it in such a way that it is possible to ascertain the nature of the information and the level of detail it contains.

1.9 With regard to the explanation concerning the type of information redacted<sup>1</sup>, which had been provided in the EIB's reply to the confirmatory application, the Complainant took the view that such explanation further justified the disclosure of the redacted information as the latter could not undermine the protection of commercial interests, since specific factual information is still unknown. As regards the participation of a publicly listed company in the project and the need to ensure compliance with capital market provisions, the Complainant argued that the disclosure of the

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<sup>1</sup> In particular that the information redacted is based on forecasts originating from the promoter at the time of appraisal and that estimates had changed in the meantime due to market volatility in a way that their disclosure would create a false perception of commercially critical and sensitive data, to the detriment of commercial interests of the promoter.



estimates and forecasts could not lead to knowing specific data on the publicly listed company, given that the information also covers other companies involved in the project. Therefore, the disclosure would not lead to any false interpretation of the company and/or project data. Finally, the Complainant stated that the EIB's reply lacked motivation in breach of Article 253 TFEU (sic).

1.10 The Complainant also alleged that, in breach of Regulation 1049/2001 and of the Aarhus Regulation, in its reply to the initial application the EIB had failed to carry out its duty to consider whether there is an overriding public interest in disclosing the redacted information. The Complainant considered she had sufficiently explained the overriding public interest in disclosing the redacted information and contested EIB's conclusion that her confirmatory application had failed to do so. The Complainant added that, given the purpose of the ReM assessment and since EU tax payers are the ultimate guarantors of EIB investments outside the EU, there is a strong interest in knowing whether EIB investments comply with the EU's objectives. The Complainant stressed that, in enabling more fossil fuels to be burned into the atmosphere, this project has a negative impact on the environment and that citizens need to have access to the redacted information in order to assess whether the project is balanced and, overall, complies with the EU's objectives<sup>2</sup>. According to the Complainant, the EIB's failure to carry out its duty to balance the public interest against the potential harm to commercial interests constituted an instance of maladministration.

1.11 Finally, referring to § 8.6 of the 2015 EIB Group Transparency Policy<sup>3</sup>, the Complainant recalled the EIB's endorsement of the Extractive Industries Transparency Initiative (EITI) and its commitment to support EITI work in resource-rich countries outside the EU, in particular by working with its project sponsors to introduce greater transparency and consistency in reporting on payments at project level. As a result, she alleged that within the context of its endorsement of EITI, the EIB's failure to disclose the requested information constituted an instance of maladministration. The Complainant concluded by urging the EIB-CM (i) to call upon the EIB to disclose the information redacted and (ii) to remind the EIB of the obligation to actively disseminate environmental information in accordance with the applicable regulatory framework<sup>4</sup>, while claiming that the EIB should systematically publish its ReM following signature of the loan agreement.

## **2. BACKGROUND INFORMATION**

### **2.1. The Project**

2.1.1 The Project consists of the construction of infrastructure for gas and associated liquids discovered in Southern Tunisia (Nawara concession) to be delivered to the existing national gas grid in the Northern part of the country at Gabes. The principle components of the project comprise the construction of production wells, flowlines, a gas receiving and processing facility, 370 km gas pipeline from Nawara to Gabes and a gas treatment plant at Gabes to produce commercial propane, butane and LPG.

<sup>2</sup> In this regard, the Complainant considered the information on revenues to be received by the Tunisian state as an important indication of whether the project will provide benefits to the state or will have a positive developmental impact. Similarly, the Complainant highlighted that access to information on total gas reserves and revenues would enable the civil society 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. The Complainant emphasized that access to the information at an early stage in the project's implementation would allow citizens to effectively oppose the project if they deem the environmental disadvantages to outweigh the social and economic benefits of the project as such opposition would be pointless, once the project is completed.

<sup>3</sup> The disclosure request was submitted by the Complainant, and handled by the Bank, when the EIB Transparency Policy of 2010 was in force. Therefore the EIB Transparency Policy of 2010 applies for this complaint. See also: §3.4. of this report.

<sup>4</sup> The Complainant referred to article 4 of the Aarhus Regulation.

2.1.2 The project is a joint venture of Entreprise Tunisienne d'Activités Pétrolières (ETAP), a Tunisian public entity, and OMV Aktiengesellschaft (OMV AG), an international oil and gas company whose shares are listed on the Vienna stock exchange. OMV AG also has the role of project implementation manager. The Project had not commenced operation at the time of finalisation of this report.

2.1.3 In 2014 the Bank signed two separate loan agreements with ETAP and OMV AG relating to the Project. Accordingly, the Project comprises a public sector and a private sector component. The public sector component benefits from a European Union guarantee, while the private sector element is EIB own risk financing.

2.1.4. In 2014 the Bank published the Environmental and Social Data Sheet (ESDS) and the project's EIA on its webpage.<sup>5</sup>

## *2.2 Previous exchanges of correspondence between the Complainant and the EIB*

2.2.1 On 14 November 2014, the Complainant requested the EIB to have access to the ReM of the Project and asked whether the EIB had considered the systematic publication of the ReM along with the project summary assessments on its website. On 3 December 2014, the EIB concerned services informed the Complainant that an extension of timeframe for processing her request would be needed.

2.2.2 The Complainant replied on 5 December 2014, and insisted on disclosure of the requested document within 15 working days, given that (i) consultation was not required on EIB's own documents, that (ii) the document requested should be available in the public register as information related to the environment and that (iii) the extension of the timeframe of processing a request due to the involvement of third parties did not constitute a valid reason, in the light of the EIB's Transparency Policy and EU law. On 10 December 2014, the EIB concerned services explained that, even though the ReM was drawn-up by the EIB, it contained information originating directly from third parties whose interests could potentially be impacted and that as such the Bank had to consult with them, in line with Part A § 5.2.7 of the EIB Transparency Policy. The EIB concerned services informed the Complainant that they had consulted externally and expected to conclude the assessment shortly. The EIB concerned services also stated that the ReM only contained very little environmental information and that the latter was entirely available on the EIB's public register (the Complainant was provided with links to the EIB register).

2.2.3 On 12 January 2015, the EIB released a redacted version of the ReM. The Bank's response stated that the document had been redacted based on the following exceptions: protection of commercial interests of the Bank's counterparts (Part A § 5.2.3, first bullet point and Part B § 4.3.1<sup>6</sup>) and protection of personal data (Part A § 5.2.2, second bullet point). On 27 January 2015, the Complainant submitted a confirmatory application asking for the full disclosure of the ReM with the exception of personal data. The Complainant considered that the EIB had not explained why the disclosure of the requested information would undermine the commercial interest of the Bank's counterparts. She highlighted that it is in the public interest that the Bank's operations have positive development impacts and pointed out that some information withheld by the Bank was already publicly available.

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<sup>5</sup> <http://www.eib.org/projects/pipelines/pipeline/20120053>

<sup>6</sup> This provision concerns the disclosure of the Proposal from the Management Committee to the Board of Directors for financing a project; for private sector projects, it excludes the disclosure of information designated as confidential by the EIB's private sector counterparts.

2.2.4 In its reply of 17 February 2015, the Bank confirmed its decision to withhold the redacted information and explained why its disclosure would, at this stage of the Project, undermine the commercial interests of the Bank's counterparts<sup>7</sup>. The EIB also explained that the publication of similar type of information in the past for other projects<sup>8</sup> did not constitute a sufficient reason to disclose the ReM in this case, because the other project mentioned by the Complainant in her confirmatory application had been completed at the time of the release of the information and, as a result, the information was no longer considered commercially sensitive. The EIB also informed the Complainant that some of the information redacted from the document will cease to be commercially sensitive as the project progresses and that, as part of their contractually agreed reporting requirements, the promoters will annually report to the Bank details of the fiscal payments from this project to the Government of Tunisia, which could also be published at that time.

2.2.5 The EIB indicated that it could not confirm the Complainant's statement that some of the information withheld was already publicly available and stated that, even if this was case, it could not be ascertained that the publicly available information is indeed accurate and consistent with the redacted information, the latter being part of the Bank counterparts' defined price scenarios under a volatile market situation.

2.2.6 Finally, the EIB agreed that the project aims at contributing to the development of the economic and social infrastructure of Tunisia and took the view that a significant share of relevant information related to the project's economic and social impact was already disclosed to the Complainant in the Bank's initial reply. However, the EIB deemed that the confirmatory application had failed to explain how the potential benefit of disclosing the redacted information would outweigh the harm that such a disclosure would constitute to the commercial interests of the Bank's counterparts, taking into account that some of the redacted information can be disclosed at a later stage of the project's implementation. The EIB concluded that it did not see an overriding public interest in line with §5.2.3 Part A of the EIB's Transparency Policy for the redacted information to be disclosed and that all environmental/social information as well as a major share of information related to the project's contribution to social and economic infrastructure of Tunisia had been disclosed.

### 3. REGULATORY FRAMEWORK

#### 3.1 *The EIB Complaints Mechanism*

3.1.1 The EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure ("CMPTR") apply to complaints regarding maladministration by the EIB Group.<sup>9</sup> "Maladministration" refers to instances where the Bank fails to act in accordance with the applicable legislation and/or established

<sup>7</sup> The EIB explained that the redacted information contained details of the Bank counterparts' forecasts and production parameters of the investment project related to the business strategy, including potential revenues, costs, price fluctuations, financing sources and profit margins of the Bank's counterparts. The EIB concluded that, if released, this information could be used by competitors to undermine the commercial interests of the Bank's counterparts. The EIB also explained that the information concerned is based on forecasts originating from the promoter at the time of appraisal and that, as these forecasts and estimates had changed in the meantime, due to the volatile market situation, their publication would create a false perception of commercially critical and sensitive data and would therefore harm the commercial interests of the promoter. The EIB explained that, as one of the promoters is a listed company, internationally rated and subject to Austrian capital market regulations, any false interpretation of company and/or project data as well as any release and dissemination of misleading data had to be avoided in order to ensure compliance with the respective capital market provisions. The EIB highlighted that some of the information withheld also related to specific financial conditions of the loan agreement between the Bank and a private sector counterpart.

<sup>8</sup> Notably in the 2013 Annual Report on the ReM.

<sup>9</sup> CMPTR, Title II, Article 4.1.

policies, standards and procedures, fails to respect the principles of good administration or violates human rights<sup>10</sup>.

3.1.2 In the context of the handling of admissible complaints and pursuant to Article 4.2 of Title III, the EIB-CM gathers and reviews existing information on the subject under complaint, conducts appropriate inquiries with a view to assessing whether the EIB Group's policies and procedures have been followed and fosters the adherence to the EIB Group's policies, in particular those regarding good administration, disclosure and transparency.

### 3.2 EU Treaties

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

3.2.2 Although the Complainant refers to article 253 TFEU, it appears that the latter is not relevant for the present case as it relates, *inter alia*, to the independence and qualifications of the Judges and Advocates-General of the Court of Justice as well as their appointment. From a review of the EU Treaties, the EIB-CM understands that the Complainant wished to refer to article 296 TFEU (ex article 253 of the Treaty Establishing the European Community) which stipulates that *"[l]egal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties."* However, again, this provision does not appear to be relevant in a case concerning access to documents<sup>11</sup>. A provision of the primary sources of EU law which – on the contrary – applies to the present case is that spelled out by article 41 (2) of the Charter of Fundamental Rights, i.e. the obligation of the EU administration to give reasons for its decisions.

### 3.3 Aarhus Regulation<sup>12</sup>

3.3.1 The Aarhus Regulation implements the Aarhus Convention<sup>13</sup> for EU institutions and bodies. Article 1 of the Aarhus Regulation guarantees *"the right of public access to environmental information received or produced by Community institutions or bodies and held by them"* as well as obliges the Community institutions and bodies to ensure that *"environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination"*.

3.3.2 Article 2(1)(d) defines environmental information as *"any information in written, visual, aural, electronic or any other material form on*

*(i) the state of the elements of the environment [...]*

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<sup>10</sup> CMPTR, Title II, Article 1.2.

<sup>11</sup> Similarly, it appears that the reference to Article 11 of the TEU is not pertinent in the present case.

<sup>12</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, page 13)

<sup>13</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ L 124, 17.5.2005, page 1–3)



- (ii) *factors such as substances, energy, [...] emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment [...];*
- (iii) *[...] activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) [...];*
- (iv) *[...]*
- (v) *cost-benefit and other economic analyses and assumptions used within the framework of the [...] activities referred to in point (iii) [...]*<sup>14</sup>

3.3.3 Regarding the collection and dissemination of environmental information, article 4.1 states that *"Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public [...] They shall make this environmental information progressively available in electronic databases that are easily accessible to the public through public telecommunication networks. To that end, they shall place the environmental information that they hold on databases and equip these with search aids and other forms of software designed to assist the public in locating the information they require."* The information that shall be made available includes, inter alia, *"data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment"* (Article 4.2).

3.3.4 As regards the ground to refuse access to environmental information, Article 6 of the Aarhus Regulation refers to the exceptions identified in Regulation (EC) No 1049/2001 (including the protection of commercial interests). In this regard, it is worth highlighting that Recital (15) of the Aarhus regulation states that *"[t]he term 'commercial interests' covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity."* Article 6 establishes that *"[...] an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment"*. The same provision stipulates that *"[...] the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment."*<sup>15</sup>

3.3.5 The disclosure of *"environmental information"* requires balancing between the public interest in the transparency of environmental information and the commercial interest protected through the relevant exceptions. It is worth mentioning that, according to the EU judicature, the mere invocation of the general principles underlying the Aarhus Regulation (e.g. transparency or better participation of citizens in the decision-making process), without further clarification of the reasons why the application of those principles represents, in the particular circumstances, a matter of particularly pressing concern, cannot prevail over legitimate reasons to refuse the disclosure of environmental information. An overriding public interest in the disclosure of the information request cannot be inferred from the mere fact, even if it is proved, that the information at issues constitutes environmental information.<sup>16</sup>

<sup>14</sup> This provision implements Article 2.3 of the Aarhus Convention.

<sup>15</sup> In this regard, article 4.4 of the Aarhus Convention provides that *"[a] request for environmental information may be refused if the disclosure would adversely affect: [...] (d) the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed; [...] (g) the interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; [...]. The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment. [...]"*

<sup>16</sup> Case T-245/11 (Judgement of the General Court of 23 September 2015), paragraph 193-194.



### 3.4 EIB Transparency Policy<sup>17</sup>

3.4.1 The EIB Transparency Policy sets forth the EIB's commitment to *"achieving the highest possible level of transparency in all its activities towards external and internal stakeholders"* (Part A § 1.1). § 1.4.2 stipulates that the EIB is committed to *"giving stakeholders access to the information that will enable them to understand its governance, strategy, policies, activities, practices, performance, impacts and outcomes with a view to allow stakeholders to take their actions and decisions on an informed basis"*. Against this background, the EIB also has to *"maintain the confidence and trust of its clients, co-financiers and investors"* especially with regard to the treatment of confidential information in order to ensure their willingness to work with the Bank (§ 1.6).

3.4.2 As per § 5.1, *"all information held by the Bank is subject to disclosure upon request, unless there is a compelling reason for non-disclosure"*. Exceptions from disclosure cover information typically forming part of the Bank's confidential relationship with its business partners. §5.2.3 provides that *"unless there is an overriding interest, access to information shall [...] be refused where disclosure would undermine the protection of commercial interests of a natural or legal person; [...] an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment"*. In line with § 5.2.6, *"[t]he grounds for refusal as regards access to environmental information should be interpreted in a restrictive way, taking into account public interest served by disclosure and whether the information requested relates to emissions into the environment"*. The EIB Transparency Policy clarifies that *"[t]he term 'commercial interest' covers confidentiality agreements concluded by the Bank."* As per §4.1.4. *"[t]he exceptions will only apply for the period during which protection is justified on the basis of the content of the document."*

3.4.3 With specific reference to third-party documents, § 5.2.7 establishes that *"the Bank shall consult with the third party whether the information in the document is confidential, according to this policy, unless it is clear that the document shall or shall not be disclosed"*. Pursuant to § 5.2.11, a request for disclosure may result in granting either full/partial access to the document requested or total refusal. The EIB has a duty to communicate the grounds for total or partial refusal to disclose.

3.4.4 The application of an exception to disclosure may be justified only if the Bank has previously assessed whether access to the document could specifically and actually undermine the protected interest. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical.<sup>18</sup> Moreover, it is necessary to base the application of such exception on a balancing of the opposing interests in a given situation<sup>19</sup> and thus weigh the potential risk of harm to commercial interests against prospective overriding public interests.

3.4.5 Part B §4.5.10 stipulates that *"If, for reasons of confidentiality, the Bank is unable to divulge the information requested, in full or partially, the reason(s) why such information cannot be provided shall be stated and the applicant will be informed of the right to make a voluntary confirmatory application or lodge a complaint"*.

3.4.6 Part B §4.1.1. provides that *"within the limits imposed by applicable laws and regulations, the final determination as to what information may be released to the public shall rest with the Bank who*

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<sup>17</sup> The Complainant's application was processed pursuant to the former EIB Transparency Policy, approved by the EIB Board of Directors on 2 February 2010. Section ii.8 of the EIB's Transparency Policy stipulates that *"[...] the Bank takes account and commits to comply with the EU policy initiatives and legislative framework on transparency and public disclosure of information notably with the principles laid down by Regulation (EC) N° 1049/2001 [...] The Transparency Policy shall be interpreted in accordance with the provisions of Regulation (EC) N° 1049/2001 and the Aarhus Regulation whenever they are applicable. In the event of divergence, the provisions of Regulation (EC) N° 1049/2001 and the Aarhus Regulation shall prevail, to the extent they apply to the Bank"* [emphasis added]

<sup>18</sup> Case T-516/11 (Judgment of the Court of 9 September 2014), paragraph 50.

<sup>19</sup> Case C-365/12 P (Judgment of the Court of 27 February 2016), paragraph 63.

*shall also decide which documents to publish, through its website and/or in paper form, and which documents are available on request only."*

3.4.7 Recalling its endorsement of the Extractive Industries Transparency Initiative ("EITI"), Part B § 8.2.4 provides that *"the EIB is committed to support EITI'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."* The EITI does not impose specific rules of transparency on the EIB but it aims to ensure that implementing countries commit to a minimum level of transparency in company reporting of revenues paid and government reporting of receipts as related to the field of extractive industries.

### 3.5 ELM Decision

3.5.1 Decision 1080/2011/EU<sup>20</sup> ("former ELM Decision") established an EU budgetary guarantee to the EIB against losses under EIB financing operations for projects outside the Union signed during the period from 1 February 2007 to 31 December 2013. Article 1(5) provided that if, on expiry of that period, the European Parliament and the Council have not adopted a decision granting a renewed EU guarantee to the EIB for its financing operations outside the Union, that period shall be automatically extended by six months. Decision 466/2014/EU ("new ELM Decision") was adopted on 16 April 2014.<sup>21</sup> The new ELM Decision granted an EU guarantee for projects signed during the period from 1 January 2014 to 31 December 2020,<sup>22</sup> and provided that the Commission and the EIB shall sign a guarantee agreement laying down the detailed provisions and procedures relating to the EU guarantee.<sup>23</sup> According to the guarantee agreement implementing the new ELM Decision, the EU guarantee covers EIB operations signed from 1 July 2014 to 31 December 2020.

3.5.2 The Bank appraised the Project - including the preparation of the ReM -, and signed the finance contract with the public sector Promoter (March 2014), while the former ELM Decision was in force. The finance contract with the private sector Promoter was concluded at the Bank's own risk financing, i.e. without EU budgetary guarantee. Therefore the former ELM Decision sets the applicable regulatory framework for the Project.

3.5.3 As regards the Bank's duties relating to the appraisal of operations financed under the external lending mandate, the former ELM Decision stipulates that the EU guarantee shall be granted for EIB financing operations that support, inter alia, the development of social and economic infrastructure, including energy infrastructure.<sup>24</sup> Operations supported under the former ELM Decision shall contribute to the general principles guiding Union external action, as referred to in Article 21 TEU and shall contribute to the implementation of international environmental agreements to which the Union is a party.<sup>25</sup>

3.5.4 In accordance with Article 7.3 of the former ELM Decision, *"[t]he EIB shall submit to the Commission annual reports assessing the estimated development impact of the operations financed during the year"*. This provision also stipulates that *"the Commission shall present the development*

<sup>20</sup> Decision 1080/2011/EU of the European Parliament and of the Council of 25 October 2011 granting an EU guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Union and repealing Decision No 633/2009/EC (OJ L 280, 27.10.2011, page 1–16).

<sup>21</sup> Decision 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 (OJ L 135, 8.5.2014, p. 1–20).

<sup>22</sup> Article 1.5 of the new ELM Decision.

<sup>23</sup> Article 14 of the new ELM Decision.

<sup>24</sup> Article 3.1 of the former ELM Decision.

<sup>25</sup> Article 3.2 of the former ELM Decision.

reports of the EIB to the European Parliament and to the Council [...] and make them publicly available so that interested stakeholders, including civil society and recipient countries, are also able to express their views on the matter.” In this context, article 11.1 specifies that “the report shall include an assessment of EIB financing operations at project, sector, country and regional levels, as well as an assessment of the contribution of those financing operations to the fulfilment of Union external policy and strategic objectives” in order to provide “an overview of ongoing projects at an aggregated level”. Pursuant to article 11.7, the EIB shall also make publicly available such information “in general terms and excluding any confidential information”.<sup>26</sup>

### 3.6 European and national law on market abuse

3.6.1 Regulation (EU) 596/2014 on market abuse<sup>27</sup> (“Market Abuse Regulation” or “MAR”) prohibits unlawful behaviour in the financial markets, which encompasses three types of illicit conduct: insider dealing, unlawful disclosure of inside information and market manipulation.

3.6.2 Pursuant to Recital 14, “[...] the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information, should be appraised on the basis of the ex ante available information. Such an assessment has to take into consideration the anticipated impact of the information in light of [...] the reliability of the source of information and any other market variables likely to affect the financial instruments [...]. Recital 15 adds that “[e]x post information can be used to check the presumption that the ex ante information was price sensitive, but should not be used to take action against persons who drew reasonable conclusions from ex ante information available to them.”

3.6.3 Article 12 of the MAR determines that market manipulation shall comprise, inter alia, “disseminating information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, [...] or secures, or is likely to secure, the price of one or several financial instruments [...] at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading”.<sup>28</sup> Article 15 stipulates that “a person shall not engage in or attempt to engage in market manipulation”.

3.6.4 Similarly, the 1989 Austrian Stock Exchange Act, as amended by Federal Law Gazette 150/2015, identifies and prohibits certain types of conduct related to stock exchange markets. In particular, the law prohibits the manipulation of markets which is defined, inter alia, as “[t]he dissemination of information via the media including the Internet or through other channels that send or could send false or misleading signals with respect to the financial instruments, among other things, by disseminating rumors and false or misleading news if the person who disseminated this information

<sup>26</sup> With regard to public disclosure of information, it is worth recalling that Article 12.1 of the new ELM Decision refers to the EIB Transparency Policy and the EU’s principles on access to documents.

<sup>27</sup> Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1–61).

<sup>28</sup> Pursuant to Recital 47, “[t]he spreading of false or misleading information can have a significant impact on the prices of financial instruments in a relatively short period of time. It may consist in the [...] knowingly inaccurate reporting of information. That form of market manipulation is particularly harmful to investors, because it causes them to base their investment decisions on incorrect or distorted information. It is also harmful to issuers, because it reduces the trust in the available information related to them. A lack of market trust can in turn jeopardise an issuer’s ability to issue new financial instruments or to secure credit from other market participants in order to finance its operations. Information spreads through the market place very quickly. As a result, the harm to investors and issuers may persist for a relatively long time until the information is found to be false or misleading, and can be corrected by the issuer or those responsible for its dissemination. It is therefore necessary to qualify the spreading of false or misleading information, including rumours and false or misleading news, as being an infringement of this Regulation. It is therefore appropriate not to allow those active in the financial markets to freely express information contrary to their own opinion or better judgement, which they know or should know to be false or misleading, to the detriment of investors and issuers.”

*knew or should have known that the information was false or misleading” (§ 48a para. 1/1/c). In accordance with § 48c, any person committed in such manipulation “shall be deemed to commit an infraction of administrative law and shall be punishable by the [Financial Market Authority] by a fine of up to EUR 150,000”.*

#### 4. EIB-CM INQUIRY

4.1 The EIB-CM reviewed the applicable regulatory framework, the relevant project documents, the full version of the ReM as well as the correspondence between the Bank and the relevant external stakeholders (Complainant and the Promoter). The EIB-CM liaised with the EIB concerned services so as to clarify the background of the contested decision of the Bank. The information gathered during the investigation enabled the EIB-CM to reach findings and conclusions on the allegation that are presented in the sections below.

#### 5. FINDINGS

##### 5.1. The Results Measurement Framework (ReM) <sup>29</sup>

5.1.1 The ReM was introduced in January 2012 in order to correspond to specific parameters laid down in the former ELM decision. (See §3.5.3). The framework is designed to show how EIB inputs (e.g. loan, technical advice) generate outputs (e.g. an electricity transmission line, a training programme), which enable outcomes (e.g. quantity of energy produced, improved institutional capacity) and, over time, lead to impacts (development of economic infrastructure, regional integration) which are in line with the Bank's mandate objectives.

5.1.2 The ReM requires the preparation of several quantitative and qualitative indicators and forecasts during the appraisal of a project, in order to capture the expected results with regard to three pillars: consistency with EIB mandate objectives, EU priorities and country development objectives (Pillar 1); the results and the ability of the promoters to achieve these objectives (Pillar 2) and the EIB's inputs beyond what local markets can offer (Pillar 3).<sup>30</sup> Pillar 2 provides quantitative expected and actual indicators on financial, economic, environmental and social sustainability (e.g. whether the Borrower can deliver the project to cost and on time, implement the EIB environmental and social standards). Pillar 3 measures EIB inputs into the project that cannot be provided by a market alternative (e.g. EIB standards and assurances, market leverage).

5.1.3 These (operation-specific) indicators in the ReM rate whether a project meets each pillar on a 4-point scale. It is prepared at the project appraisal stage, when the baselines and targets are set. Performance against the benchmarks is monitored throughout a project's lifetime. The ReM is updated

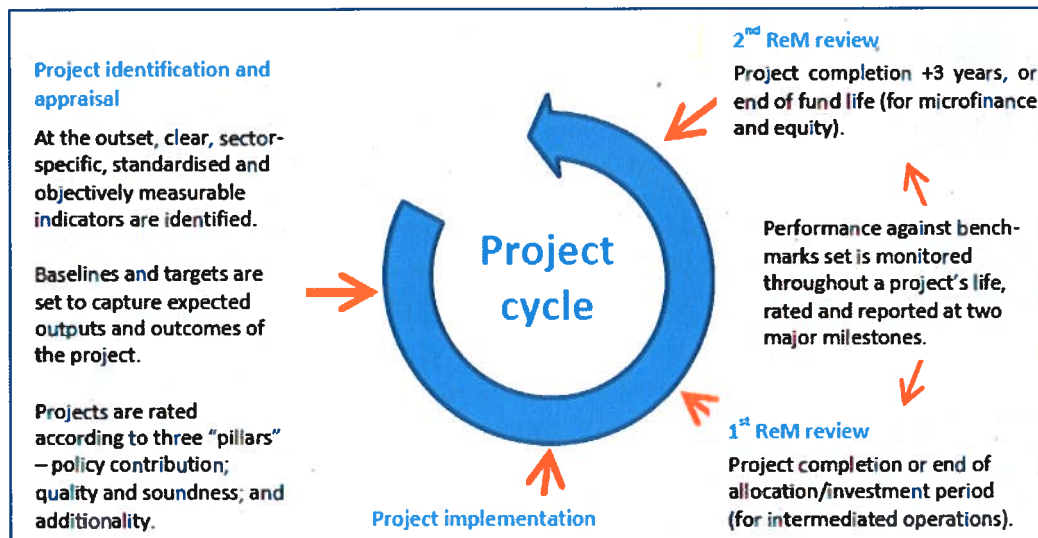
<sup>29</sup> The sections below describe the ReM preparation process at the time of the appraisal of the ETAP project, and mirror the information published in the EIB's note "The Results Measurement (ReM) framework methodology (March 2016)". The EIB updated the note in September 2017, to reflect changes adopted by the Bank in the ReM methodology. The note entitled "The Results Measurement (ReM) framework methodology (September 2017)" is available at: [http://www.eib.org/attachments/rem\\_framework\\_methodology\\_en.pdf](http://www.eib.org/attachments/rem_framework_methodology_en.pdf). (accessed on 9 March 2018). An example of the ReM sheet was published as part of the European Commission's report on the EIB external activity in 2012. See: European Commission (2013): "Commission Staff Working Document accompanying the document Report from the Commission to the European Parliament and the Council on 2012 EIB External Activity with EU Budgetary Guarantee" (Brussels, 28.11.2013; SWD(2013) 484 final), page 44 et seqq.

<sup>30</sup> The EIB has changed the denomination of the three pillars in the ReMs in the meantime. The currently applied titles are (1) Contribution to EU policy; (2) Quality and soundness of the project; (3) EIB Technical and Financial Contribution to the Project.



twice: upon project completion (or end of allocation or investment period) and after project completion (+ 3 years or the end of fund life for microfinance and equity). The ReM informs the Bank's decisions and it accompanies all financing proposals submitted for approval to the EIB Board of Directors under the External Lending Mandate.

Table 1 – the ReM assessment process<sup>31</sup>



5.1.4 Whereas the ReM uses the results of the Bank's own analysis to consider certain social, environmental, economic and financial aspects of a project as required under the ELM, contributing to the Bank's decision whether to provide its financial assistance, it appears that **the ReM does not fall within the scope of "administrative tasks" of the Bank**. In this regard, it is worth recalling that the new ELM Decision designates the EIB Transparency Policy and the EU's principles on access to documents (and not Regulation (EC) No 1049/2001) as the applicable regulatory framework (See footnote 28).

5.1.5 Regarding the type of information in ReMs, it appears that these documents may contain environmental information subject to the obligation to disclose upon request (§3.3.2 and §3.3.4). From the inquiry, it appears that ReMs may only contain environmental information falling under the obligation of proactive transparency (§3.3.3) at a later stage of the project cycle (project completion and after), as opposed to the stage identified by the Complainant (upon signature of the contract). It is also worth recalling that the same environmental information falling under the obligation of proactive transparency eventually contained in updated ReMs should be captured in the Environmental and Social Completion Sheets (ESCS), proactively published by the Bank. Furthermore, ReMs may also contain commercially sensitive information.

<sup>31</sup> See "The Results Measurement (ReM) framework methodology (March 2016)", at page 2.



## 5.2. The ReM of the project

Table 2: Information contained in the project's ReM and the extent of redaction by the Bank

REF.	INFORMATION	DISCLOSED
	<b>COVER PAGE</b>	
	Project identification data (project name, operation number, mandate, country, sector, subsector, project cost, amount of EIB financing)	Y
	project's rating per pillar (Rating 1-4)	Y
	Personal data	N
	<b>PILLAR 1 - CONTRIBUTION TO EIB MANDATE OBJECTIVES &amp; EU PRIORITIES</b>	
	<b>Eligibility under the mandate objectives</b> (Is the project in line with EIB mandate objectives and regional priorities? How?)	Y
	<b>Outputs</b>	Y
	<b>Outcomes</b>	
1a	technical capacity of the gas transmission pipeline (Gm3/year),	N
1b	initial plateau rate of gas throughput (Gm3/year) and the rate of LPG production (Mboe/year)	N
1c	volume of gas (Gm3), liquids (Mboe) and condensate (Mboe) that will be enabled to be produced during the lifetime of the Project.	N
1d	Tunisia's expected revenues out of taxes and royalties and the expected revenues via ETAP's shareholding in the Project.	N
	<b>Impacts</b>	
	Sectoral	Y
	Macroeconomic	Y
	<b>Contribution to EU priorities and country development objectives</b>	Y
	<b>Pillar 1 rating and comment</b>	Y
	<b>PILLAR 2 - RESULTS INDICATORS</b>	
	<b>Pillar 2 rating and comment</b>	Y <sup>32</sup>
	<b>Soundness of the project</b>	
	Project delivered to cost	Y
	Project delivered on time	Y
	Governance	Y
	<b>Financial &amp; Economic Sustainability</b>	
2a	Economic Rate of Return (ERR) (%)	N
2b	Financial Rate of Return (IRR) (%)	N
	<b>Environmental and social sustainability</b>	
	Environmental safeguards assessment (E-rating)	Y
	Social safeguards assessment (S-rating)	Y
	<b>Outputs</b>	
	Oil or Gas production capacity (boe/y)	Y
	Gas or oil pipelines constructed or upgraded (km)	Y

<sup>32</sup> The rating was disclosed. The comment reiterated the redacted information in Pillar 1(a)-(d), and the comment was redacted accordingly.

2c	<b>Outcomes</b>	
	national savings made from import reduction/export gains (M EUR/y)	Y
	proved reserves (boe)	N
	quality of energy transported/storage utilization (GWh/yr)	Y
	<b>Core results indicators</b>	
	Employment - during construction (person-years)	Y
	Employment – additional direct jobs during operation (FTE)	Y
	Energy efficiencies realized (energy saved MWh and %)	Y
<b>REF.</b>	<b>INFORMATION</b>	<b>DISCLOSED</b>
	Carbon footprint absolute (CO2 tonnes equivalent)	Y
2d	Fiscal revenues private sector (M EUR)	N
3a	<b>Pillar 3 – ADDITIONALITY</b>	
	<b>Financial instrument</b>	
	Loan maturity	N
	Local currency funding (share of project cost %)	Y
	Grant element through blending (in % of EIB financing)	Y
	Innovative or products non available in the relevant market	Y
	<b>Technical and sector contribution</b>	
	project preparation (Rating 1-4)	Y
	project implementation support (Rating 1-4)	Y
	sector support and operations (Rating 1-4)	Y
	technical assistance provided (Rating 1-4)	Y
	<b>Standards and assurance</b>	
	Demonstration effect (Rating 1-4)	Y
	Leadership in structuring a bankable project (Rating 1-4)	Y
	Lead role in mutual reliance initiative or other enhanced cooperation (Rating 1-4)	Y
	Contribution to raise ESG and procurement standards (Rating 1-4)	Y
3b	Total leverage	N
	Catalytic effect	Y

### 5.3. Environmental information in the redacted parts of the ReM

5.3.1 The general rule under the EU *acquis* is that the public has access to the documents of the EU institutions and bodies and refusal of access is the exception to that rule. In the present case, the Bank justified the partial disclosure of the requested document on the basis of the exception relating to the protection of commercial interests of a legal person (see §§ 3.4.2-3.4.4. of this report). To review the compliance of the Bank's decision with the applicable regulatory framework, it is necessary to examine whether – in addition to the general disclosure regime under the Bank's Transparency Policy – the special disclosure regimes established by the Aarhus Regulation for "information which relates to emissions into the environment" and "environmental information" apply to the present complaint. Accordingly, the below findings are limited to the present case and an *ad hoc* assessment is required when verifying whether other ReMs do contain environmental information.

5.3.2 A review of of the ReM in question shows that Pillar 1(a) displays the technical capacity of the pipeline, which generally denotes the maximum flow, expressed in normal cubic meters per time unit or in energy unit per time unit under normal operating conditions. It is noted that the Project

underwent a formal environmental impact assessment (EIA) in accordance with the EIA Directive,<sup>33</sup> since the Project involves activities with a likely significant impact on the environment (gas refining and liquefaction; gas extraction for commercial purposes and gas transmission).<sup>34</sup> The EIA Directive requires that the EIA study supplies information on, *inter alia*, the description of the production units and processes, the quantity of energy and natural resources used, the volume of emissions and residues generated.<sup>35</sup> Accordingly, technical capacity is a criterion that enables to capture the Project's likely impacts on the environment and human health.

5.3.3 It follows that the technical capacity of the pipeline represents environmental information (see §3.3.2), in accordance with article 2 (1) (d) (iii) of the Aarhus Regulation. In fact, the EIA of the Project, published by the Bank on its website on 8 September 2014, had indicated the technical capacity of the pipeline (10 million m<sup>3</sup>/day):

*"The main Pipeline will include:*

- *370 km of 24", 111 bar design pressure, Carbon steel pipeline; the pipeline is designed for a capacity of 10 MSCMD with an arrival pressure of 35 bars at Gabes GTP inlet."*<sup>36</sup>

5.3.4 Based on the above information, it appears that the redacted information in Pillar 1(a) constitutes environmental information that had already been disclosed in the EIA of the Project by the time the Complainant submitted her application. Accordingly, the technical capacity of the pipeline included in the ReM in question cannot be construed as commercially sensitive information, covered by the confidentiality agreement between the Bank and the Promoter.

5.3.5 The information in Pillar 1(b)-(c) displays the expected production volume of raw gas and refined products, which matches the concept of "energy" or "substances" affecting or likely to affect the environment, i.e. a type of environmental information under the Aarhus Regulation (see § 3.3.2).

5.3.6 The information in Pillar 2(a) - the ERR - serves as a benchmark for the EIB to determine whether or not a project is worth undertaking, after taking into account all the costs and benefits of a project.<sup>37</sup> Generally, the EIB's economic analysis considers non-financial criteria (e.g. the cost of environmental externalities), since the indications of financial profitability do not necessarily provide reliable estimates of the value of a project from a "social" or "European" point of view.<sup>38</sup> This Project involves activities with a likely significant impact on the environment, thus it appears that Pillar 2(a) falls into the category of environmental information under the Aarhus Regulation, i.e. "*cost-benefit and other economic analyses used within the framework of the measures and activities [affecting or likely to affect the environment]*" (see: §3.3.2).

<sup>33</sup> In projects for which the Bank requires a formal EIA, the EIA process and content must be consistent with the requirements of the EIA Directive, and include a timely public disclosure of relevant information. See: EIB Statement of Environmental and Social Principles and Standards (2009), page 13, paragraph 18; page 17, paragraph 42., available at: <http://www.eib.org/infocentre/publications/all/environmental-and-social-practices-handbook.htm> (accessed on 9 March 2018)

<sup>34</sup> Directive 2011/92/EU, Annex I, points 1, 14, 16.

<sup>35</sup> The EIA Directive sets quantitative thresholds for gas extraction and gas transmission activities with a view to decide whether an EIA is needed or a screening is sufficient. To allow a decision on the breadth and depth of the EIA, project developers shall describe the gas volumes earmarked for extraction (in volume per day basis) and the technical parameters of the gas pipeline. See: Directive 2011/92/EU, article 4(1)-(2), Article 5, Annex I. points 14, 16; Annex IV.

<sup>36</sup> OMV: Environmental impact assessment of the gas pipeline construction project (PK52-PK370). Nawara Concession Development Project. STGP-TESCO-PMT-0805-HS-REP-0001, Annex 2'-POD (5 May 2013), page 7, available at the EIB's public register: <http://www.eib.org/projects/pipelines/pipeline/20120053> (accessed on 9 March 2018)

<sup>37</sup> See: The Economic Appraisal of Investment Projects at the EIB (April 2013), page 15, 19, available at: [http://www.eib.org/attachments/thematic/economic\\_appraisal\\_of\\_investment\\_projects\\_en.pdf](http://www.eib.org/attachments/thematic/economic_appraisal_of_investment_projects_en.pdf) (accessed on 9 March 2018)

<sup>38</sup> Ibid., page 16.



5.3.7 The indicators in Pillar 1(d), Pillar 2 (b)-(d), Pillar 3 assess the financial performance of the Project that do not fall into any category of environmental information under the Aarhus Regulation.

5.3.8 It appears that the redacted sections of the ReM do not contain “information on emissions into the environment”, although some of the redactions contain environmental information. The EIB-CM’s inquiry indicates that **the Bank’s response to the Complainant’s confirmatory application erred in declaring that “all environmental and social information requested had been disclosed in full”** (See §2.2.6 of this report).

#### 5.4. The commercial sensitivity of the redacted information

5.4.1 The Bank informed the Complainant that the information in the redacted sections of the ReM fell under the confidentiality agreement concluded between the Bank and the Promoter. Except for Pillar 1(a), it appears that the statement of the Bank is validated by the facts of the case, as follows:

- Pillar 1(b)-(c): the estimated output levels generally consist of forecasts which are based on specific economic scenarios, and that may change due to the volatile situation of the gas market. In this context, the EIB-CM observes that the EIA revealed information on estimated gas, condensate and liquid production volumes, in an appendix dated 5 May 2013.<sup>39</sup> The ReM, prepared in November 2013, uses different figures than the EIA as the Bank prepared the ReM performance indicators based on unpublished forecasts of the Promoter. It is further noted that the shareholding structure of the joint venture enables a breakdown of the aggregated data per company. Therefore Pillar 1 (b)-(c) contains commercially sensitive information.
- Pillar 1(d) and 2(d): the estimated taxes and fiscal revenues are calculated from the confidential production forecasts indicated in Pillar 1(b)-(c).
- Pillar 2(a)-(b): the ERR and the IRR are calculated by the Bank from, inter alia, confidential technical and economic data provided by the Promoter.
- Pillar 2(c): “proven reserves” are those quantities of petroleum which, by analysis of geological and engineering data, can be estimated with reasonable certainty to be commercially recoverable, from a given date forward, from known reservoirs and under current economic conditions, operating methods, and government regulations.<sup>40</sup> Oil and gas undertakings whose financial instruments are publicly traded publish information on company-level proven reserves, as it constitutes inside information under the MAR. Based on the above and in order to interpret the exception to disclosure referring to the protection of commercial interests (§ 3.4.2), it appears that project-level proven reserves in the ReM fall into the category of commercially sensitive information.
- Pillar 3 (a)-(b) relates to specific financial conditions of the EIB vis-à-vis its counterparts (loan maturity) as well as to the allocation of funding sources between the EIB and its counterparts (leverage ratio). This information represents financial terms specific to this undertaking and poses distinct and foreseeable risks with regard to the competitiveness of the involved parties.<sup>41</sup>

5.4.2 The Bank’s response to the confirmatory application concluded, inter alia, that the disclosure of the redacted information could lead to a breach of capital market regulations which represented a

<sup>39</sup> OMV: Environmental impact assessment of the gas pipeline construction project (PK52-PK370). Nawara Concession Development Project. STGP-TESCO-PMT-0805-HS-REP-0001, Annex 2'-POD (5 May 2013), available at: at the EIB’s public register: <http://www.eib.org/projects/pipelines/pipeline/20120053> (accessed on 9 March 2018)

<sup>40</sup> Society of Petroleum Engineers-World Petroleum Council (March 1997): Petroleum Reserves Definitions

<sup>41</sup> In this regard, it is worth recalling that the ECJ explicitly stated that “precise information relating to the cost structure of an undertaking constitutes business secrets, the disclosure of which to third parties is likely to undermine that undertaking’s commercial interests” Case T-380/04, Terezakis v Commission, Judgment of the Court (January 2008), paragraph 95.

foreseeable harm to the commercial interests of the private sector Promoter (see §2.2.4). To review whether the Bank acted in compliance with the EIB Transparency Policy when withholding the redacted information, the EIB-CM's analysis followed the methodology referred to in §3.4.4. In this context, market abuse laws (§3.6) facilitated the interpretation of the risk of harm associated with the information disclosure under the EIB Transparency Policy, i.e. a review whether the redacted ReM indicators can likely influence investor behaviour.

5.4.3 As mentioned in §5.1.4 of this report, the Bank creates ReMs at the beginning of the project cycle and the documents are not updated until project completion. In contrast, the viability of petroleum projects constantly changes due to, *inter alia*, the geological complexity surrounding natural resource exploration and exploitation, volatile commodity market trends, and technological development that may enhance resource recovery. As a result, by disclosing the economic and financial performance indicators of Pillar 1 (b)-(d), Pillar 2 and Pillar 3 of the ReM before project completion, the Bank may create a false or misleading appearance about the Project. Furthermore, the redacted ReM indicators stem from the Bank's evaluation of confidential information supplied by the Promoter, and investors perceive the ratings issued by the Bank as independent and objective. Therefore it is reasonable to assume that the Bank's evaluation may influence the assessment made by investors about the financial and economic viability of a project, and hence the investors' decision about the financial instruments issued by the Promoter. The paragraphs above indicate that the disclosure of the redacted information could foreseeably create false or misleading signals as to the supply of, demand for, or price of, a financial instrument (See § 3.6 of this report). **It appears that the publication of the indicators presented in Pillar 1 (b)-(d), Pillar 2 and Pillar 3 could undermine the protection of commercial interests of the EIB's private sector counterpart.**

5.4.4 Pillar 1(b)-(c) and 2(a) contain commercially sensitive environmental information. Therefore the protection of commercial interests of the Promoter is weighed against the overriding public interest in environmental protection. It appears that the Complainant has not demonstrated precisely in what way disclosure of the Project's ReM would enhance the protection of the environment and would prevail in the present case over the protection of commercial interests including the prohibition of market manipulation (see §§ 3.3.5 and 3.4.2.-3.4.4. of this report). **Hence, the EIB-CM finds that, by partially disclosing Pillar 1(b)-(c) and 2 (a) of the ReM, the Bank complied with the requirement to interpret the relevant exception to disclosure in a restrictive way, and correctly balanced the public interest in transparency of environmental information and the interest in protecting the legitimate economic interests of the Promoter.** Furthermore, it is to be noted that the Bank stated that some of the redacted indicators of the ReM would cease to be commercially sensitive as this Project progresses.

5.4.5 Pillar 1(d), Pillar 2(b)-(d) and 3 contain commercially sensitive information. Therefore, the protection of commercial interests is weighed vis-à-vis the public interest relied on by the Complainant. The Complainant submitted that the public interest in verifying the consistency of EIB-financed projects with EU policy objectives justifies the disclosure of the ReM indicators upon signature of the finance contracts. The EIB-CM notes that, although the Bank redacted the quantitative indicators in the ReM, it disclosed the remaining sections of the document that (i) rate the Project on a 4-point scale as regards the attainment of the EU policy objectives, with a narrative explanation and (ii) explain the estimated short term and long term development impacts (see Pillar 1 and 2 of the redacted ReM). Furthermore, it is to be noted that the EIB provided the Complainant with a copy of the project's Board Report, including the Bank's value added assessment of the project, containing more information about the rationale of the Bank's support to this project and its contribution to the Bank's mandate. It is also recalled that (i) EIB operations financed under the ELM Decisions are subject to the EU multi-lateral governance (Commission, Council and the Parliament) and (ii) the "EIB outside the EU" Reports are annually published on the Bank's website to inform the public about the



contribution of financed projects to EU policy objectives (See: § 3.5.5.) Against this background and in the light of the information provided in §3.4.2 and §3.4.4 of this report, **it appears that the Complainant failed to identify any apparent public interest that would be served by the urgency of disclosure of the indicators in Pillar 1(d), Pillar 2 (b)-(d), outweighing the protection of legitimate economic interests of EIB counterparts.**

5.4.6 Concerning the allegation that the Bank's decision not to disclose the requested information constituted an instance of maladministration in the light of its endorsement of EITI, the EIB-CM notes that the EITI does not set any transparency obligation for the EIB and that EITI reporting concerns actual effective revenues as opposed to forecasts and potential ones. In addition, Tunisia is not an EITI implementing country, although the government maintains an open data portal for the disclosure of contracts and production levels<sup>42</sup>, as part of its intentions to join the EITI.<sup>43</sup> Finally, the EIB-CM notes that in its response to the Complainant's confirmatory application, **the EIB foreshadowed the possibility that information on relevant fiscal payments could be made available in due course (See §2.2.4). The EIB-CM is not aware of further correspondence on the topic between the Bank and the Complainant after the reply to the confirmatory application.**

5.4.7 As a result of the EIB-CM's inquiry, the relevant EIB services followed up the statement, made in the EIB's reply to the confirmatory application, about the possibility to disclose some of the redacted information, as well as data on fiscal revenues reported to the Bank, at a later stage of the Project's implementation (§2.2.4.). While observing that the Project had not started commercial operation at the time of this Conclusions Report, the Bank agreed to disclose the available information on fiscal revenues as part of its reply to the present complaint and indicated the possibility to disclose information on annual fiscal payments upon a request submitted by the Complainant, when this information is available and in line with the EIB's Transparency Policy.

5.4.8 Regarding the allegation about the Bank's failure to state the reasons for its decision to refuse full access to the ReM, the EIB-CM finds that **the Bank complied with the obligations referred to in §§3.2.2 and 3.4.5 of this report.** Although the Complainant rightly pointed out that the Bank's response to the initial application also invoked an irrelevant exception (Part B, §4.3.1. of the EIB Transparency Policy), the EIB-CM notes that the Bank's response to the confirmatory application rectified the reasons for its decision, and provided the Complainant with sufficient information to make it possible to determine whether the decision was well founded. Given the Complainant's statement that the EIB should not have involved third parties in its assessment, besides the information contained in § 3.4.3, it is worth recalling that both the ELM Decision and the Aarhus Convention foresee the concurrence of third parties in the disclosure of confidential information (See § 3.5.4 and footnote 14 of this report).

5.4.9 Reflecting upon the Complainant's submission that the Bank shall establish a general practice whereby ReMs are published upon signature of the relevant finance contracts, the EIB-CM notes that the ELM Decision does not set specific rules of pro-active transparency applying to the ReMs, which would derogate from the applicable regulatory framework identified in §§3.3-3.4 of this report. Furthermore, the EIB-CM's inquiry (§5.1.5) indicates that upon signature of finance contract ReMs do not contain environmental information falling under the obligation of proactive transparency as claimed by the Complainant. At a later stage of the project cycle (project completion and after) ReMs may contain environmental information falling under the obligation of proactive transparency which is to be captured in the Environmental and Social Completion Sheets (ESCS), proactively published by the Bank.

<sup>42</sup> <http://data.industrie.gov.tn/> (accessed on 9 March 2018)

<sup>43</sup> <https://eiti.org/news/tunisia-commits-to-natural-resource-transparency-through-eiti> (accessed on 9 March 2018)

Table 3 – Summary of the compliance review

Ref.	Redacted Information	Environmental information	Commercially sensitive	Refusal justified
1a	technical capacity of the gas transmission pipeline	Yes	No	No
1b-c	expected production volumes	Yes	Yes	Yes
1d	expected fiscal revenues	No	Yes	Yes
2a	economic rate of return (ERR)	Yes	Yes	Yes
2b	financial rate of return (IRR)	No	Yes	Yes
2c	proven reserves	No	Yes	Yes
2d	fiscal revenues private sector	No	Yes	Yes
3a	loan maturity	No	Yes	Yes
3b	total leverage	No	Yes	Yes

## 6. CONCLUSIONS

6.1 The EIB-CM found that the Bank's refusal to disclose information on the technical capacity of the gas transmission pipeline (Pillar 1(a)) cannot find support in the protection of commercial interests in the present case. However, the Bank's decision did not have a material effect on the transparency of this information, because the Project EIA, which the EIB had published on its website, had already conveyed the same environmental information to the public, prior to the Complainant's request to access the ReM.

6.2 Although the EIB-CM observed that the EIB had erred in declaring that all environmental information contained in the ReM was disclosed in full, the present report provides the Complainant with a thorough assessment of the rationale behind the decision to consider the redacted environmental information as confidential. In particular, concerning the Bank's refusal to disclose commercially sensitive environmental information (Pillar 1 (b)-(c) and Pillar 2(a)) and commercially sensitive information (Pillar 1(d), Pillar 2 (b)-(d) and Pillar 3), the EIB-CM concludes that the Bank complied with the EIB Transparency Policy and the applicable EU *acquis* when it granted only partial access to the ReM.

6.3 The EIB-CM also noted that the Bank agreed to disclose the available information on fiscal revenues in its reply to this complaint. The Bank also indicated the possibility to disclose information on annual fiscal payments upon a request submitted by the Complainant, when this information is available and in line with the EIB Transparency Policy.

6.4 As regards the Complainant's submission that the Bank shall establish a general practice whereby ReMs are published on signature of all finance contracts, the EIB-CM concludes that the ELM Decision does not depart from the existing rules of transparency and access to information that apply for the EIB, therefore no action is needed by the Bank.

Head of Division  
Complaints Mechanism  
30.07.2018

**ABBREVIATIONS**

Boe	Barrel of oil equivalent
Bpd	Barrel per day
CMPTR	Complaints Mechanism Principles, Terms of Reference and Rules of Procedure
CO <sub>2</sub> e	Carbon-dioxide equivalent
ECJ	European Court of Justice
EIA	Environmental impact assessment
EIB	European Investment Bank
EITI	Extractive Industries Transparency Initiative
ELM	External lending mandate
ERR	Economic rate of return
ESIAF	Economic and Social Impact Assessment Framework
ETAP	Entreprise Tunisienne d'Activités Pétrolières
EU	European Union
Gm3	Billion cubic meter of gas
IRR	Internal rate of return (financial rate of return)
LPG	Liquefied petroleum gas
M	million
Mboe	Million barrels of oil equivalent
MSCMD	Million standard cubic meters per day
OMV AG	OMV Aktiengesellschaft
POD	Plan of development
Ref.	Reference number
ReM	Result Measurement framework
scm	standard cubic meter
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

