COMMENTS ON THE REPLY OF THE EIB TO CLIENTEARTH COMMENTS ON THE REVIEW OF THE BANK’S COMPLAINTS MECHANISM POLICY

ClientEarth appreciates the fact that the Bank replied to some of the comments made by the NGOs, among which ClientEarth, which participated in the public consultation on the review of the Bank’s Complaints Mechanism Policy.

ClientEarth provides in this paper further comments on the Bank’s reply to our first round comments and comments made by the Bank during the second round of the consultation held in Brussels on November 9th.

- **On paragraph 4.2 of the matrix**

  We appreciate the fact that the Bank introduced a new paragraph under chapter 4. However, the language of the paragraph is still quite weak as it only provides that “the EIB is committed to raise awareness” and “to organize awareness session”. The paragraph should read “the EIB shall”.

  In addition, the specific location of the awareness sessions with civil society is not specified. The policy only refers to “all areas of activity of the EIB” and to the “regions where the EIB operates”. The Policy should be more specific and ensure that the sessions will take place where the project is going to be carried out and in a location where the population that is going to be the most affected by the project can have access easily. Organizing these sessions only in the capitals of the countries where the EIB operates for example would not fulfill the aim of informing the affected population when the projects concerned are carried out far from the capitals.

- **On paragraph 3.2 of the revised policy**

  The Bank should accept complaints in the language of the communities affected by the projects funded by the Bank and not require the complainants from these communities to provide a copy of the complaint in one of the official language of the EU as this would prevent a very substantial part of the population from complaining against the Bank.

- **On paragraph 10.4 of the revised policy**

  The Bank acknowledged at the second round of the public consultation held in Brussels on November 9th that Regulation 1049/2001 will apply to the Bank in all matters from the entry into force of the Lisbon Treaty which should take place on 1 December 2009. The Complaint mechanism of the Bank in relation to access to documents should therefore comply with the one provided in Regulation 1049/2001. The current procedure is provided under articles 7 and 8 of the Regulation.

Yet, the procedure established by the Policy does not comply with articles 7 and 8 of Regulation 1049/2001.
The confirmatory application should logically not be made to the same service than the one to which
the initial request for documents was made. There is no point making the same request twice to the
same service.

In addition, there should be only two steps in the procedure to request to have access to
information before being able to lodge a complaint before the Ombudsman or the European Court
of Justice. One stage in the complaint mechanism of the EIB in relation to access to information
should therefore be deleted.

The delay for the institutions to reply to requests and confirmatory applications under articles 7 and
8 of Regulation 1049/2001 is 15 days. The following steps are either lodging a complaint with the
Ombudsman or the European Court of Justice. The Complaint mechanism of the Bank extends the
procedures without guaranteeing any positive results.

In any case, after the confirmatory request, the EIB should inform the applicant of the possibility to
lodge a complaint with the Ombudsman or with the European Court in accordance with article 8 (3)

• Access to the European Court of Justice

The Policy does not mention the right of applicants to lodge a complaint with the European Court of
Justice. The Bank’s Public Disclosure Policy provides that the actions of the Bank shall be subject to
judicial appeal before the Court of justice of the EC in particular in accordance with article 237 of the
EC Treaty. However, we would like to draw the attention of the Bank on the fact that the Lisbon
Treaty amends article 230 of the EC Treaty which provides for the conditions under which natural
and legal persons may require the annulment of an act or a decision adopted by EC institutions.
Where article 230 only allowed natural and legal persons other than Member States and institutions
to bring actions before the court against the Commission, Council and Parliament, the new article
introduced by the Lisbon Treaty, article 263, grants the possibility to institute proceedings against
acts and decisions of the EIB.

Indeed, article 263 (1) provides that the Court of Justice shall “also review the legality of acts of
bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.”

Paragraph 4 of the same article provides for the conditions under which natural and legal persons
may institute proceedings before the court against these bodies.

The EIB being a “body” for the purpose of article 263, its acts shall be challengeable by natural and
legal persons before the Court.

It follows that in case of a total or partial refusal of access to information in addition to being able to
make a complaint to the internal mechanism of the Bank and before the Ombudsman, the
individuals or NGOs having made the request shall have the right to institute proceedings before the
Court.
This right should also be granted to individuals and NGOs in case a decision or act of the Bank does not comply with EU law.

This should be mentioned in the policy of the Bank. A paragraph on this right should be added similar to the one on the Ombudsman.

Brussels,
13 November 2009.
COMMENTS ON THE REPLY OF THE EIB TO CLIENTEARTH COMMENTS ON THE REVIEW OF THE BANK’S PUBLIC DISCLOSURE POLICY

ClientEarth appreciates the fact that the Bank replied to some of the comments made by the NGOs, among which ClientEarth, which participated in the public consultation on the review of the Bank’s Public Disclosure Policy.

ClientEarth also appreciates that the Policy acknowledges the need for the Bank to comply with Regulation 1367/2006 in environmental matters. However, the provisions of the Policy still do not reflect thoroughly the content of the Regulation and do not provide for the legal certainty needed by the members of the public as to what information they may have access to.

In addition, the Bank considers that it is subject to Regulation 1049/2001 on access to documents only in relation to environmental matters. However, as explained below, the Lisbon Treaty indirectly extends the scope of Regulation 1049/2001 to all EC institutions, agencies and bodies which will thus apply to the Bank as well as soon as the Treaty will enter into force. The Bank therefore needs to amend its policy accordingly to this change in the law. However, we acknowledge that this has been agreed upon by the Bank during the second round of the consultation held in Brussels on November 9.

ClientEarth provides in this paper further comments on the Bank’s reply to our first round comments and comments made by the Bank during the second round of the consultation.

- On General section of the matrix: disclosure of EIAs and on the publishing of the report required by article 17 of Regulation 1049/2001

The “Access to Environmental Information” document the Bank refers to in its reply to our comments does not provide for the information required in Regulation 1367/2006 and 1049/2001. The “Access to Environmental Information” document only refers to NTS of the EIAs and to “environmental studies” but mentions that the latter will be “available only following consultation with the owner of the information, unless it is clear that the document shall or shall not be disclosed”. However, article 4 of Regulation 1367/20006 provides that EIAs and risk assessments concerning environmental elements or the reference to the place where such information can be requested or accessed shall be made available.

It follows that first, giving the number of projects for which an EIA was required and the number of projects published before the board approval is not enough to comply with article 4 of the Aarhus Regulation. Second, the Bank has the obligation to disclose EIAs carried out by the promoter of the projects not only the NTS. Third, there is no need to consult with the owner of the information before disclosing the EIAs.

In addition, the “Access to Environmental Information” document does not mention the report required by article 17 of Regulation 1049/2001 for the preceding year including the number of cases.
in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register. Yet, the Bank is clearly subject to that obligation. The Bank should therefore start making such a report from now on.

The Bank mentioned during the second round of the consultation that it published such a report. However, we suggest to the Bank that it ensures that the report that is already being published complies with the requirements of article 17 of Regulation 1049/2001 and provides all the requested information and that it can be easily found on the website of the Bank.

• On § 16 of the Matrix: the applicability of Regulation 1049/2001 to the Bank

Regulation 1367/2006 provides very clearly that “Regulation (EC) No 1049/2001 applies to the European Parliament, the Council and the Commission, as well as to agencies and similar bodies set up by a Community legal act. … It is necessary to extend the application of regulation (EC) No 1049/2001 to all other Community institutions and bodies”. It is therefore clear that the Bank as a body is subject to Regulation 1049/2001 in environmental matters but also in other matters. Indeed, even though the applicability of regulation 1049/2001 was extended to other institutions, agencies and bodies allegedly only in environmental matters, this would automatically change once the Lisbon Treaty will enter into force supposedly on 1 December 2009.

The Lisbon Treaty amends article 255 of the Treaty which is the legal basis of Regulation 1049/2001. Indeed, recital 3 of the Regulation’s preamble provides that “the purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty”. Article 255(2) of the Treaty provides that the Council shall adopt the general principles, limits and grounds governing the right of access to documents which the Council did in adopting Regulation 1049/2001. Article 255(1) of the EC Treaty which provides access to documents of the European parliament, Council and Commission has been amended by Article 16A of the Lisbon Treaty to grant access to ‘documents of the Union institutions, bodies, offices and agencies, whatever their medium’. The Bank will therefore definitely be subjected to Regulation 1049/2001 in all matters as soon as the Lisbon Treaty enters into force. That is confirmed in the Explanatory Memorandum of the European Commission’s proposal reviewing Regulation 1049/2001:

“Many respondents to the green paper called for an extension of the scope of the regulation to all EU institutions, bodies and agencies. Such an extension is not possible under the current Treaty, but will be achieved when the Treaty on the Functioning of the Union enters into force.”

The Bank should therefore already apply the requirements of Regulation 1049/2001 without waiting for the entry into force of the Lisbon Treaty which will possibly take place in less than a month. This has been agreed upon by the Bank at the second round of the consultation.

• On § 25, 26, 28 of the Matrix

As demonstrated above, Regulation 1049/2001 on access to documents will apply to the Bank as soon as the Lisbon Treaty will enter into force, the Bank will thus have, in compliance with article 4
of the Regulation, in each cases, to weigh the different interests at stake and demonstrate that there is no overriding public interest justifying disclosure. Stating grounds for the refusal is not considered enough by the regulation and by settled case-law of the European Court of Justice. The Court has already annulled decisions of institutions when the latter had refused to disclose documents without demonstrating the lack of overriding public interest.

- **On § 4.5.16 of Part B of the revised policy**

The procedure of complaint must be the same one than the one provided in Articles 7 and 8 of Regulation 1049/2001. The Policy should state to what service of the Bank the confirmatory application should be made and should logically not be made to the same service than the initial request for document.

In addition, there should be only two steps in the procedure to request to have access to information before being able to lodge a complaint before the Ombudsman of the European court of Justice. The stage of the complaint to the complaint mechanism of the EIB should therefore be deleted.

The delay for the institutions to reply to requests and confirmatory applications under articles 7 and 8 of Regulation 1049/2001 is 15 days. The following steps are either lodging a complaint with the Ombudsman or the European Court of Justice. The Complaint mechanism of the Bank extends the procedures without guaranteeing any positive results.

In any case, after the confirmatory request, the EIB should inform the applicant of the possibility to lodge a complaint with the Ombudsman or with the European Court in accordance with article 8 (3) of Regulation 1049/2001.

- **On §30 of the Matrix**

A provision on environmental and human rights conditions provided in the finance contract should be included in the Policy according to which they will be treated differently from the other provisions of the finance contract. We take the opportunity to recall here the findings of the Aarhus Convention Compliance Committee referred to in ClientEarth comments on the issue.

During the second round of the consultation, the Bank confirmed the fact that non financial provisions of the contracts were going to be disclosed in the future. However, we insist on the fact that as this is important information, this should be made public that is included in the Policy.

- **On §71 of the Matrix**

The Bank should take the initiative to post the EIAs provided by the promoter to the Bank on the Bank’s website.

- **On section 4 paragraph 4.2 of part B of the revised policy**

Now that it is established that the Bank is subject to Regulation 1049/2001, the Bank should also take into account the jurisprudence of the European Court of Justice on the regulation. The Court, in
case C-64/05P makes clear that in case an institution holds a document originating from a third party, notably a Member State, the latter does not have a discretionary right of veto on disclosure of the document.

Indeed, the Court stated that:

“...Article 4(5) of Regulation No 1049/2001 cannot be interpreted as conferring on the Member State a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution, with the effect that access to such documents would cease to be governed by the provisions of that regulation and would depend only on the provisions of national law.

On the contrary, several factors militate in favour of an interpretation of Article 4(5) to the effect that the exercise of the power conferred by that provision on the Member State concerned is delimited by the substantive exceptions set out in Article 4(1) to (3), with the Member State merely being given in this respect a power to take part in the Community decision. Seen in that way, the prior agreement of the Member State referred to in Article 4(5) resembles not a discretionary right of veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present."

The Court further explains that:

“...an institution which receives a request for access to a document originating from a Member State and that Member State must, once that request has been notified by the institution to the Member State, commence without delay a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, while paying attention in particular to the need to enable the institution to adopt a position within the time-limits within Articles 7 and 8 of the regulation require it to decide on the request for access.

Next, if the Member State concerned, following such dialogue, objects to disclosure of the document in question, it is obliged, ...to state reasons for that objection with reference to those exceptions.

The institution cannot accept a Member State’s objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001. Where, despite an express request by the institution to the Member State to that effect, the State still fails to provide the institution with such reasons, the institution must, if for its part it considers that none of those exceptions applies, give access to the document that has been asked for.

Finally, as is apparent in particular from Articles 7 and 8 of the regulation, the institution is itself obliged to give reasons for a decision to refuse a request for access to a document. Such an obligation means that the institutions must, in its decision, not merely record the fact that the Member States concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by the Member State to show that one of the exceptions to the right of access in Article 4(1) to (3) of the regulation applies. That information will allow the person who has

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1 Case C-64/05P, Kingdom of Sweden v Commission, REC-I [2007], paragraphs 75-76.
asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review.  

It follows that first, in the case of a framework agreement concluded between the Bank and a State, the document is not even “originating” from a third party in the meaning of article 4(5) of the regulation since the EIB is a party to the agreement. The agreement of the State party prior to the disclosure of the agreement is therefore not even required by the regulation. The Bank has therefore to make its own assessment on whether the framework agreement should be disclosed or not.

Second, even if the prior agreement of the State party was required, the right of the State to request the Bank not to disclose the agreement without its prior agreement could not be interpreted as a discretionary right of veto to disclosure.

Third, the Bank may decide to disclose the document if it does not agree with the interpretation of the state or considers that none of the exceptions provided by the regulation apply.

Paragraph 4.2 of section 4 of the Policy should therefore be adapted to the case-law of the Court.

- On paragraph 8.4 of the revised Policy: the European Court of Justice

The Policy provides that the actions of the Bank shall be subject to judicial appeal before the Court of justice of the EC in particular in accordance with article 237 of the EC Treaty. However, we would like to draw the attention of the Bank on the fact that the Lisbon Treaty amends article 230 of the EC Treaty which provides for the conditions under which natural and legal persons may require the annulment of an act or a decision adopted by EC institutions. Where article 230 only allowed natural and legal persons other than Member States and institutions to bring actions before the court against the Commission, Council and Parliament, the new article introduced by the Lisbon Treaty, article 263, grants the possibility to institute proceedings against acts and decisions of the EIB.

Indeed, article 263 (1) provides that the Court of Justice shall “also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.”

Paragraph 4 of the same article provides for the conditions under which natural and legal persons may institute proceedings before the court against these bodies.

The EIB being a “body” for the purpose of article 263, its acts shall be challengeable by natural and legal persons before the Court.

It follows that in case of a total or partial refusal of access to information, in addition to being able to make a complaint to the internal mechanism of the Bank and before the Ombudsman, the individuals or NGOs having made the request shall have the right to institute proceedings before the Court.

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2 Case C-64/05P, paragraphs 86-89.
This should be mentioned in the policy of the Bank. A paragraph on this right should be added similar to the one on the Ombudsman.

- **On paragraph 5 of part B**

In relation to providing information to the local population concerned and affected by the projects funded by the Bank on the fact that a project is funded by the Bank and the way to address some issues about the project, we suggest that the Bank draws from the Commission’s practice when funds are provided under the “structural funds regulations”.

In particular, the Bank could inspire itself from Commission Regulation No 1828/2006\(^3\) which sets out rules for the implementation of Regulation No 1083/2006\(^4\) and 1080/2006\(^5\) notably in relation to information obligations. Articles 8 to 10 of Regulation 1828/2006 are particularly relevant as they address the responsibilities of beneficiaries of the funds relating to information and publicity measures for the public, the technical characteristics of information and publicity measures for the operation and provides for the set up of “Community networks” to “ensure exchanges of good practice” and exchanges of experience in implementing the information and publicity measures required.

Similar provisions should be included in the Policy providing practical measures adopted by the Bank at field level such as the ones provided in Regulation 1828/2006.

Brussels,
13 November 2009

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