
As a general comment, the Bank does not seem to integrate in its Policy the requirements and criteria imposed by Regulation 1049/2001. The Bank is subject to the provisions of Regulation 1049/2001 and cannot adapt the applicable criteria in a way which would give a more restrictive access to documents. Indeed, the language of the policy is once again much too vague and leaves to the discretion of the Bank decisions to refuse public access to some documents without providing the public the reasons underlying its decision (see for example paragraphs 32 and 33). The Bank has to bear in mind that it is not free from all constraint and that each time a member of the public request to have access to one of the Bank’s documents, the latter has to apply the criteria provided by Regulation 1049/2001 in conjunction with Regulation 1367/2006.

If other rules provided in other pieces of legislation apply to the EIB as a bank, the Policy should refer to them.

- **Paragraph 6**

  The Bank is accountable to the citizens of the EU not only through the Member States but on its own as any other EU bodies. An evidence of that is that the Bank is subject to the remit of the European Ombudsman and to the jurisdiction of the European Court of Justice. The Policy states also in paragraph 12 that the EC Treaty provides the Bank “with operational and financial autonomy”. The Bank is therefore accountable to the EU citizens. The Bank is also accountable to the citizens of the countries where projects are funded by the Bank.

- **Paragraph 13**

  The policy should mention the standards and practices applicable to the banking and financial community the Bank takes into account.

- **Paragraph 16**

  Indent 12 of Regulation 1367/2006 provides 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.” In addition, article 3 of Regulation 1367/2006 provides that “for the purposes of the Regulation, the word ‘institution’ in Regulation (EC) No 1049/2001 shall be read as ‘Community institution or body’”. Regulation 1049/2001 therefore applies to the EIB. It is therefore not only “a key reference for the Bank’s disclosure policy” but the regulation by which the EIB is legally bound. Yet, the Bank seems to make a distinction between
Regulation 1367/2006 and Regulation 1049/2001 and states that “the Public Disclosure Policy shall be interpreted in accordance with the provisions of that regulation (the Aarhus regulation) whenever the latter are applicable”. The Policy should make clear that it shall also be interpreted in accordance with the provisions of Regulation 1049/2001.

• **Paragraph 28**

Article 4 paragraph 3 second indent provides that “access to documents containing opinions for internal use as part of deliberations and preliminary consultations shall be refused … if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure”. The Bank cannot therefore just decide to refuse to disclose these documents. It has to weigh the different interests in balance and demonstrate that there is not any overriding public interest in disclosure. This is also in line with the jurisprudence of the European Court of Justice in the *Turco case* in which the Court decided that the legal advice held by the Council should be made public. The same reasoning should thus apply to the Bank as well. Any refusal by the Bank that would not demonstrate the lack of overriding public interest in disclosure would thus be illegal.

• **Paragraph 30**

This paragraph provides that the Finance Contract between the Bank and one or more of its business partners is “part of the Bank’s confidential relationship” and therefore not subject to disclosure.

This provision does not comply with the Aarhus Convention, Regulation 1049/2001, and Regulation 1367/2006.

Article 2 (1) (d) of Regulation 1367/2006 which implements the Aarhus Convention to the European institutions and bodies provides that the definition of environmental information “shall not include financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets, …” However, this provision does not apply to financial contracts concluded by the Bank. First, contracts are not plans or programmes. Second, even if the financial contracts were to be considered as financial or budget plans and programmes, the sections on environmental and human rights obligations of the financial contracts concluded by the Bank would not constitute plans or programmes laying down how particular projects or activities should be financed or would not relate to annual budgets. These parts of the contracts should therefore be made public.

The Aarhus Convention Compliance Committee confirmed this argument in deciding in relation to the financing agreement entered into by the Bank that:

“financing agreements, even though not listed explicitly in the definition [of “environment information” provided under article 2 paragraph 3] may sometimes

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1 Joined cases C-39/05 and C-52/05, *Sweden and Turco v Council and others* [2008] ECR I-0000.
amount to ‘measures .. that affect or are likely to affect the elements of the environment’. For example, if a financing agreement deals with specific measures concerning the environment, such as the protection of a natural site, it is to be seen as containing environmental information. Therefore, whether the provisions of a financing agreement are to be regarded as environmental information cannot be decided in a general manner but has to be determined on a case-by-case basis.”

Notwithstanding the fact they are decisions to finance projects, the EIB’s decisions thus may clearly amount to decisions in environmental matters subject to the provisions of the Aarhus Convention provided they contain measures concerning the environment.

Moreover, article 4 (6) of Regulation 1049/2001 provides that “[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.” The courts have held that documents must be examined individually to make this determination. For example, in the Association de la Presse Internationale case, the Court ruled that “an assessment of documents by reference to categories, rather than on the basis of the actual information contained in the documents, is in principle insufficient since the examination required by any institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents.”

Likewise, in the Technische Glaswerke case, the Court stated that “[o]nly a concrete individual examination, as opposed to an abstract overall examination, can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of [the] Regulation.”

The Bank apparently recognises this requirement, as it is noted in paragraph 37 of the Policy: “If only parts of a requested document are covered by any of the constraints above, information from the remaining parts shall be released.” But this requirement seems to be contradicted by paragraph 30, which categorically provides that all finance contracts will be withheld. By generally identifying all finance contracts as a category of documents that the Bank will not release, the Bank effectively disregards the requirements of Article 4(6) of the Regulation and the judicial interpretation of that Regulation.

The finance contract is the legally binding mechanism by which the Bank’s loan projects are implemented, and it is therefore a critically important document for understanding the Bank’s activities. The public has a right to know the terms of the contracts relating to environmental and social obligations imposed on the promoter by the Bank. Only by reviewing the terms of the contract can the public see, for example, if the Bank is meeting

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2 Aarhus Convention Compliance Committee, Draft findings and recommendation with regards to compliance by the European Community with the obligations under the Aarhus Convention in relation to decision-making by the European Investment Bank, Communication ACCC/C/2007/21, paragraph 29(b).
the commitments it has made in its Statement of Environmental and Social Principles and Standards.5

Finally, we would like to draw the attention of the Bank on the fact that the World Bank discloses its financial contracts. There is therefore no reason for the EIB to refuse doing so.

Any finance contracts covered by an application for access will need to be independently examined. To the extent that certain portions of the finance contract might truly be confidential, those portions can be withheld pursuant to Article 4(6) of Regulation 1049/2001.

• **Paragraphs 32**

The Bank cannot possibly satisfy itself with such a vague formulation. There needs to be a transparent procedure according to which the Bank decides to disclose or not to disclose information on projects. The Bank cannot discretionary decide not to disclose information on a specific project without stating any reasons or relying on applicable EC regulations. Regulation 1049/2001 and Regulation 1367/2006 apply. What is confidential and what is not confidential has to be decided in compliance with article 4 of Regulation 1049/2001 and article 6 of Regulation 1367/2006. When there are commercial interests, the Bank still needs to consider and demonstrate, to be able not to disclose the requested information, that there is not any overriding public interest.

• **Paragraph 33**

In this paragraph the Bank makes clear that it wants to avoid any public discussion and transparency on certain projects that would be considered as controversial. The Bank should rather engage in discussions with the interested public and demonstrate its will to increase its transparency and accountability. All projects should be published before Board approval and there is even less justification to refuse to disclose information after Board approval.

• **Paragraph 71**

The Policy should provide the time limits within which the Bank should post on its website information on a specific project. The Policy should also state what “compelling reasons” could justify a later release.

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• **Paragraph 78**

The Bank should set some more precise criteria as “considerable public interest” is a totally subjective concept and leaves the decision to publish a TPB to the discretion of the Bank without establishing any transparent and reliable procedure.

The policy should also describe what information the TPB will contain.

• **Paragraph 80**

This information should be systematically disseminated on the Bank’s website.

The Bank should disseminate more information through its website instead of requiring members of the public to make requests, in accordance with Article 4 of Regulation 1367/2006. The regulation imposes “an active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology in accordance with articles 11(1) and (2), and 12 of Regulation 1049/2001”. Whilst the Bank’s website indexes many documents, it does not seem to have a register, and the Policy does not mention a register. The Bank should create such a register on its website and describe the register in the Policy. Among the information that is to be made available through this means are “authorizations with a significant impact on the environment and environmental agreements; environmental impact studies and risks assessments concerning environmental elements”. Both are documents held by the Bank.

In addition, article 17 of Regulation 1049/2001 provides that “each institution (and bodies) shall publish a report 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”. The Bank should commit in the Policy to publish such a report on a yearly basis.

• **Paragraph 88**

The policy should mention that the request can be made “in one of the languages referred to in Article 314 of the EC Treaty” (article 6 of Regulation 1049/2001). The Policy should mention all these languages.

• **Paragraph 100**

Article 10 (1) of Regulation 1049/2001 provides that copies of less than 20 pages, and direct access in electronic form, shall be free of charge. Paragraph 100 of the Policy should be revised to reflect that such access is free of charge.
• **Paragraph 103 and 105**

The appeal mechanism does not comply with Regulation 1049/2001. In the event of a refusal from the Bank, the Bank shall inform the applicant of the remedies open to him or her in accordance with article 8(3) of Regulation 1049/2001 that is instituting court proceedings or making a complaint to the Ombudsman.

The Bank’s policy creates an additional step to the procedure established by the Regulation. It thus makes it longer and more cumbersome not only for the applicant but also for the Bank without making it more efficient. On the contrary, this additional internal procedure risks dissuading applicants to resort to the remedies provided by Regulation 1049/2001 which are the ones that the Bank must communicate to the applicant.

For example, requests for documents to the European Commission are dealt first by the relevant DG and then the confirmatory request is dealt with by the Secretary-General of the Commission. In case of refusal to grant access to the requested documents the Secretary-General informs the applicant that he or she may institute proceedings or make a complaint to the Ombudsman in accordance with article 8(3) of Regulation 1049/2001.

It is hard to understand what the confirmatory request to the Bank will add to the first request as it seems that the confirmatory request will be dealt with by the same department of the Bank. Indeed, the Policy does not mention the department of the Bank to which the confirmatory request must be made.

The procedure should thus only contain two steps that is a first request, a confirmatory request to the Secretary-General of the Bank and then the possibility for the applicant to lodge a complaint to the Ombudsman or to the Court.