Submission to the public consultation of the European Investment Bank on the review of the Bank’s anti-fraud and anti-corruption policy

TO: The European Investment Bank
CC: EIB Executive Directors

18th April 2007

Introduction

The undersigned organisations welcome the opportunity to contribute to the review of the EIB anti-fraud and anti-corruption policy at a crucial stage in the development of new international strategies to tackle corruption worldwide, including the definition of specific responsibilities for public financiers involved in North-South financial flows. We regard the consultation process set up on this occasion as a positive improvement in EIB practice in its dealings with civil society and other interested stakeholders.

Some of our organisations began the process of raising suggestions to improve the current draft of the EIB anti-fraud and anti-corruption policy during the consultation meeting which took place in Brussels on 30th March 2007. We believe that meeting was an important first opportunity for dialogue with the Bank on the anti-corruption provisions and mechanisms necessary to align the EIB with European and international commitments in the fight against bribery and fraud and with international best practices already followed by other international financial institutions.

General Recommendations and Remarks on the Draft Policy

The bulk of NGO recommendations on the EIB’s Anti-Corruption Policy are contained in the notes below, but it is also possible to make a few general points. We welcome EIB’s commitment in the preamble of the policy to the principle of not tolerating corruption, fraud or other illegal acts in any of its activities or operations. However, we believe that the Bank’s policy as it stands does not go anything like far enough. The Bank must be much more proactive in combating corruption, acting earlier to pre-empt illegal acts and more aggressively to root them out after they occur. In the spirit of the agreement signed in Singapore in September 2006 with
other International Financial Institutions and Regional Development Banks, the EIB should commit
to a pro-active fight against fraud and corruption in the financial and economic world, which goes
far beyond the limited scope of the loan agreements that the Bank signs.

The Bank should aim to take full advantage of having both EU law and international
best practice to guide it, and try to avoid using its unique adherence to both regimes as an excuse
for inaction. Significant strides have been made recently both in legal regimes and in IFI practices.
The scandal of the Lesotho Highlands Water Project—of which the EIB was a key public
financier—and the work of the prosecutors in Lesotho led the US Congress to approve
unprecedented legislation, making US participation in all Multilateral Development Banks
conditional on the banks’ implementation of rigorous anti-corruption policies. At the same time,
both the International Finance Corporation (IFC) and the European Bank for Reconstruction and
Development (EBRD) have recognised the corruption risks arising from lack of financial
transparency in the oil, gas and mining sectors, and have adopted a requirement that sponsors of
such projects must disclose project payments to host governments and (in the case of IFC) also
disclose key agreements of public concern. We urge the EIB to adopt not only the letter of these
new laws, but also the spirit, and to adopt innovative and flexible approaches to maximise anti-
corruption mechanisms in its lending.

The Brussels meeting showed the complexity of the issues and the need for more detailed
discussions. Therefore, we request that after collecting a first round of comments on its draft policy
and procedure, the EIB engage in a second round of in-depth discussion with stakeholders. We
would also encourage the Bank to include in the draft policy more explicit and detailed reference
to the provisions of EU legislation upon which it relies, in order to make the understanding of the
text easier for non-European entities to which the Bank relates. Finally, given ongoing
improvements in EU legislation, best practice and international law on corruption and fraud issues,
we deem it appropriate that the Bank commits to regular ongoing review of its policy every three
years with all stakeholders in this review process, in order to learn concrete lessons from the
implementation of the policy.

Detailed Comments on the Background Documents

In this section we summarise our main concerns regarding the current draft of the “Policy and
Guidelines on Fighting Corruption, Fraud, Money Laundering and the Financing of Terrorism”, and
the related “Procedures for the Conduct of Investigations by the Inspectorate General of the EIB –

a. Prevention measures to be strengthened

Broadly speaking, we consider that preventative and pre-emptive measures need to be
significantly strengthened in the current draft policy in order to give EIB a more pro-active role in
combating corruption before illegal acts occur. At this stage, investigative mechanisms can be
triggered only by the filing of complaints, either by EIB internal staff or external entities. Such a set
up is too reactive and does not expedite the early detection and prevention of illegal acts by EIB.

More specifically, criteria creating obligations on staff to report “reasonable” suspicion or
allegation of fraud and other illegal acts are unclear: criteria defining “reasonable” suspicions need
to be clarified. While the staff of the EIB have filed several reports of corruption in recent years,
whistleblower protection measures need to be strengthened in order to guarantee adequate
protection to all staff taking significant risk in reporting allegations of fraud, corruption or other illegal acts.

At this early juncture, we would like to pose to the Bank the idea of the duty of care. At what point can the Bank, as a publicly funded institution, be said to owe a duty of care to its members or investors in their uses of EU public funds? Conversely, at what point does the EIB consider its member states and/or borrowers to owe a corresponding duty of care to the Bank, once corruption allegations have been raised? These will be useful questions to consider at our next consultation.

b. The issue of representation agreements and agents’ commissions is not considered at all

The main deficiency in the draft policy is the lack of any reference to the controversial issue of representation agreements, through which corporations contract with agents to act on their behalf in securing project contracts. Agents’ commissions have long been recognised as a common vehicle for the payment of bribes. Often agents’ commissions are included as a percentage of the overall contract price, payable when the contract has been successfully awarded to the agent’s principal. Thus financiers can be made to underwrite commission payments.

If the EIB does not ask questions about agents’ commissions and undertake appropriate due diligence on the commission, it is likely to be construed as deliberately denying itself information that would enable it otherwise to assess whether bribery is taking place in projects it supports. The experience of the Lesotho Highlands Water Project shows how this practice has to be tackled upfront and comprehensively in order to prevent bribery.

The OECD Guidelines on Multinational Enterprises, supported by all EU Member States, specifically state that companies must ensure that remuneration to agents is “appropriate and for legitimate services only”. The Guidelines also say that “where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities”. The International Chambers of Commerce Rules of Conduct on Bribery also state that companies should make available for inspection records of the names and terms of employment of agents (“upon specific request by appropriate, duly authorized governmental authorities under conditions of confidentiality”).

Best practice on agents’ commissions is represented by the UK Export Credits Guarantee Department’s (ECGD) procedures introduced in May 2004 (subsequently modified), including:
- Requiring details of agents’ commission (including the name and address of the agent) on all contracts and any related agreements whether supported by ECGD or not;
- Requiring customers to state whether affiliates, such as a joint venture partner, parent company, sister company or subsidiary had employed an agent, and if so requiring details of commission paid to such agents as well as to agents employed by the customer directly;
- Requiring customers to give an explanation if commission was paid outside of the country where the project took place;
- Requiring customers to state what the purpose of the commission was;
- Requiring customers to state if there was any relationship between the agent and the buyer.

The EIB should carefully consider this issue and include in its new policy clear requirements for the disclosure of agents’ commission on all transactions, including commissions paid by any third party involved in the transaction (regardless of percentage of contract, and regardless of whether the commission is included in the contract price or not).
c. Procurement procedures

We welcome the extension of the Procurement Guide to all EIB operations, including those outside of the EU. For extra-EU lending, we particularly welcome the introduction of a Covenant of Integrity as an additional instrument to commit contractors not to act illegally.

However, we consider that this is not enough to prevent corruption. The EIB should become more pro-active by implementing a detailed corporate screening of both promoters and contractors, including analyses of the integrity systems in place within companies. It is unclear how the EIB is cooperating with other EU institutions and the European Commission in the exchange of sensitive information included in its archive about contractors’ behaviour and their records. We understand that the EIB internal compliance office is playing a role in this regard and request that the Bank strengthens this function and related instruments.

Specific attention should be paid to the registration of promoting and contracting agencies in tax havens. While the EIB is already implementing EU law in this respect, we would recommend the adoption of a pro-active policy that vigorously encourages companies to avoid this practice, which clearly originates from reasons of tax avoidance.

Most importantly, it should be mandatory that the Bank and the promoter will automatically suspend any decision on awarding a contract if the investigation unit is evaluating an allegation or if an investigation has been opened on the case.

d. Continuing duty to monitor respect of integrity commitments

We regard as a positive step the inclusion of integrity commitments by the borrower/promoter as contractual clauses fully covenanted in the finance contracts. At the same time we urge the EIB to take a proactive stand in monitoring adherence to these commitments. The current draft of the policy does not specify which monitoring mechanisms are in place in order to fulfil the EIB’s continuing duty to prevent illegal acts.

It should be noted that the EIB does not make the clauses included in the finance contracts public (point 28 of the EIB Public Disclosure Policy lists Finance Contracts as ‘Information typically forming part of the Bank’s confidential relationship with its business partner […]’). We strongly recommend that at least the integrity commitments made public. Such disclosure would particularly benefit the public in host countries: the lack of transparency around these agreements prevents the involvement of local civil society, which has proved to be a key actor in supporting the anti-corruption fight in the context of IFI-backed operations.

e. Global loans

We understand that the new policy will apply to all EIB operations, inside and outside the EU. We welcome this comprehensive approach, but would like to see it considerably extended. In particular, we would very much like to see specific transparency procedures put in place in the assessment of global loans. It is now widely acknowledged that the use of ‘financial intermediaries’ and chains of financial disbursement are key factors in the efflorescence of corruption. Given that the Bank apparently includes specific clauses in the sub-agreements signed together with the global loans, it would be appropriate to mention and detail this specific procedure in the text of the new policy.
Furthermore, the EIB should develop a specific corporate screening for those private financial institutions who receive the global loans, in order to understand what is their record in past operations, their internal integrity systems, and their anti-fraud and anti-corruption policies, and to allow a close monitoring of the financial intermediary’s commitments to actively promote the anti-fraud and anti-corruption policy.

**f. Investigations**

We understand that the EIB is setting up a closer cooperation with OLAF in order to overcome its existing lack of investigative capacity (despite its recent efforts to strengthen the investigative unit within the Inspectorate General). However, we believe that several aspects of the EIB’s authority to investigate corruption allegations still need to be strengthened. We would seek clarification from the Bank as to precisely how the Inspectorate General will co-ordinate with OLAF and any other necessary bodies to **ensure that any legitimate corruption allegation is automatically investigated with appropriate rigour**. We also request clarification of **the process by which affected people or interested stakeholders can report corruption** to the EIB; it is by no means clear which bodies within the Bank take primary responsibility, nor the process by which they can be engaged.

As regards the **independence of the Inspectorate General and the Investigative Unit** in particular, the current draft of the policy does not specify how this will be **institutionally guaranteed**. In order to preserve the credibility of the Bank, such a degree of independence cannot be a matter solely dependant upon the integrity and personal commitment of the inspector general or to the individual investigators. It must be clearly guaranteed through adequate institutional provisions, to create a healthy precedent.

We are also deeply concerned about the process by which a corruption investigation gives rise to a corruption prosecution. OLAF lacks the capacity to prosecute. Thus, we ask the Bank: what steps will you take to ensure that prosecutions are brought when evidence of corruption is gathered, especially if host countries’ legal systems prove inadequate, or there is no will to prosecute? One possibility might be the covenan ting of agreements within loan contracts, compelling the legal systems of sponsoring states to follow up on evidence of corruption. We would ask the Bank to set in place **preliminary guidelines on its expectations concerning the uses to which investigations are put after sufficient evidence has been provided to the appropriate authorities**.

Another important issue is the assessment of what constitutes “sufficient evidence” of corruption to open an investigation. Although there is no prevailing clear EU standard on this, the current draft policy does not spell out clearly enough **which criteria** will be adopted by EIB investigators in the evaluation of allegations of fraud and corruption. These criteria ought to be described in the policy. Furthermore, it is unclear what criteria EIB investigators would use to open a case from sources of information not specifically filed with them.

Finally, we also recommend that once an investigation case is opened, the EIB should **suspend funding disbursement** to the specific operations. The Bank is invited to set out what obstacles it perceives in taking such a course of action, and in addition, to set out under what circumstances it would consider suspending disbursement of loans. Spelling out clearly the possibility of suspension of funding disbursement might be a deterrent that ensures companies take measures to root out corruption in their operations.
g. Sanctions and debarment

We would like to express our concern that the **EIB’s restrictive interpretation of EU legislation is preventing the Bank from putting in place a proper administrative debarment procedure** along the line of those already adopted by other IFIs. While we recognise the need to comply with EU law as regards excluding corporations from receiving EIB-financed contracts only when convicted by a national court - and appreciate the willingness of the EIB to respect the judgement of sovereign courts in developing countries - the experience of the Lesotho case tells us that local courts, even when functional, take a very long time to reach judgement and possible conviction. They also need significant financial resources to carry the prosecution through to the verdict, the absence of which may prejudice an otherwise clear-cut requirement for prosecution.

The EIB should take responsibility to explore all possibilities under EU law to develop **innovative instruments to bypass such problems** and limitations. In particular:

- in the context of the Council Regulation on Financial Regulation 1605/2002 and all its revisions, the EIB should explore all possible avenues to set up a mechanism of administrative sanctioning – including financial penalties - compatible with debarment procedures in place in other IFIs, notably the World Bank, and MDBs;

- once such a mechanism is established, the EIB should commit to a policy of mutual debarment and/or cross-debarment with other IFIs and/or MDBs. We believe that the risk of mutual/cross debarment has the potential to make corruption and fraud into infinitely more dangerous and expensive practice for companies. It could therefore be a critically important deterrent to committing illegal acts. If the EIB fails to join mutual/cross-debarment schemes, it would necessarily become a weak link in the development finance system;

- if allegations of corruption are confirmed, the EIB should also withhold support for the specific operation, while recovering all funds misused.

It should be added that we support the fact that compared with the World Bank and other financial institutions, the EIB is not covered by the same level of immunity and privileges. This should not however be used as an excuse by the EIB management to avoid the establishment of an adequate administrative sanction procedure whose outcome could be eventually challenged at the European Court of Justice by companies;

Concerning criminal provisions, the EIB should commit to the maximum use of all mechanisms under the OECD Convention Combating Bribery, including mutual support through OLAF for investigations and trials taking place outside of the EU and the possibility of trials taking place in corporations’ home countries instead of project host countries.

Finally, it is unclear how the EIB will co-operate with other European institutions in the definition of a blacklisting mechanism for those companies found guilty of corruption. We believe that in the spirit of European democratic culture, it would be important that such a blacklist be made public, in order to leverage substantial change in those companies excluded e.g. the establishment of strong and transparent integrity systems within them.

h. Recovery of misapplied funds

As mentioned in the preamble, the draft policy does not specify which measures the EIB will take to recover funds when it is proved that misuse or fraud or corruption took place in project
operations. We consider it crucial that the EIB do its utmost to recover these funds through effective procedures.

We look forward to management’s detailed answer to our comments and the possibility of discussing in detail some of our concerns in a new consultation meeting in the coming weeks.

Best regards,

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