Memorandum on Proposals and Recommendations for EIB Measures to fight Corruption

With reference to the Bank’s Policy and Guidelines against Corruption etc of 12th February 2007

1. Introduction

The Bank’s draft policy statement summarises clearly the Bank’s present policy and practice. Its aim is accordingly modest. The present paper suggests ways in which the Bank, advancing from its strong base in the field of development finance, could do a bit more. It could, as this paper advocates, declare its belief regarding the nature and gravity of corruption in the field of development and, having set itself an attainable operational target, sketch out its path for attaining it.

This memorandum is in three parts. The first part sets out proposals to amend operational practice, and the second provides reasons. The third part recommends changes, some of them radical, to the draft new EIB Policy and Guidelines.

While the proposals made in this paper are simple, some of them are technical and, taken together, amount to a notable change in practice. That does not mean that they are costly to apply or that borrowers and Bank staff would not appreciate their value.

References in this memorandum to corruption may be taken, where appropriate, to include fraud, money laundering and terrorist financing.

2. Means to fulfil Commitments

These proposals and recommendations provide elements for an anti-corruption policy. They offer ways by which the Bank could respond to the Commission’s call to EU institutions and bodies to “redouble their efforts” to combat corruption damaging the financial interests of the European Community.

They have the further technical aim of enabling the Bank to fulfil its commitments under the MDB Framework of 16 September 2006:

- towards “identification of mitigants and enforcement of covenants that address integrity risks.”

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1 Draft EIB Policy and Guidelines on fighting corruption, fraud, money laundering and the financing of terrorism, 12th February 2007 EIB consultation paper.


3 As established in ECJ Case C-15/00 at para. 120 of the judgement, “the expression financial interests of the Community in Article 280 EC must be interpreted as encompassing not only revenue and expenditure covered by the Community budget but also, in principle, revenue and expenditure covered by the budget of other bodies, offices and agencies established by the EC Treaty.”


5 http://www.ebrd.com/about/integrity/task.pdf: the MDB Uniform Framework for preventing and combating Fraud and Corruption, signed in Singapore 16 September 2006 by IBRD, IADB, ADB, AfDB, EIB, EBRD and IMF (the “MDB Framework”). Unlike the IBRD and EBRD, the EIB has not placed the framework on its own website.
• “to assist member countries and the private sector in…elimin[ing] opportunities for fraudulent and corrupt practices.”\(^7\); and
• to “ongoing monitoring of integrity risks through portfolio management”\(^8\).

It also offers ways to meet the objective given at point 2.1.c of the consultation paper “to ensure that… EIB staff and their business partners maintain the highest level of integrity and efficiency in all EIB activities and operations.”

These are high standards and they imply the allocation of adequate resources.

3. Proposals

The following proposals are all, in one sense or another, integrity risk mitigants that build on the Bank’s existing practice. That practice is shaped by the principle of helping the borrower fight corruption in its own shop.

The proposed mitigants include a novel form of enforcement. Taken all in all, they amount to a new approach to assist borrowers in eliminating opportunities for corruption and fraud. They come in bullet form, followed further down by a brief set of linked commentaries.

1. **EIB Guide to Procurement (for commentary, see 1 below)**\(^9\):

   The Bank should amend the EIB Guide to Procurement, especially on the Integrity Covenant, so as to:

   (A) **Standards and Disclosure**: Oblige owner to impose on contractor a continuing covenant to:

   (1) subscribe to relevant industry integrity standard;

   (2) disclose any sanction imposed against it, its officers or directors for corruption, or any legal proceedings commenced towards that aim;

   (B) **Integrity Bond**: Oblige owner to require contractor on major projects to post a bond against breach of integrity covenant within a defined range of amount; the amount of the Bond being dependent on contractor’s record and reforms;

   (C) **Sanction for Breach of Integrity**: Strengthen point 12 of the policy statement by obliging owner to provide in the major project contracts:

   (1) That the owner may terminate the contract, and that contractor may be liable in damages, in case of breach of integrity covenant.

   (2) That disputes over the integrity covenant be settled by arbitration.

   (3) That the standard of proof for breach of covenant be the standard of *no reasonable doubt*, so long as contractor applies industry-standard audited anti-corruption measures; if not, or if the contractor or its director, officer or agent has been convicted or sanctioned for corruption in the previous five years, the standard of *balance of probabilities*;\(^10\)

   (4) That an act of corruption committed by a director, officer or agent should be presumptively imputed to the contractor, unless the contractor would provide an audited certificate of compliance with its industry integrity standard.

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\(^6\) Paragraph 4, fifth bullet
\(^7\) Paragraph 6, second subparagraph.
\(^8\) Paragraph 4, sixth bullet.
\(^9\) Please note these cross-references are dynamic links that allow you, by clicking the numbers, to switch from proposal to commentary and back.
\(^10\) Such a provision must comply with the human rights principle of presumption of innocence.
Preserve Defined Tender Documents: Oblige owner:
(a) to require a tenderer that has recently been convicted or sanctioned for corruption to maintain higher, still to be defined, standard of documentation, including its preparatory work; and
(b) to submit its records relating to its tender to external audit, at the instance of the owner and at the tenderer's cost.

On-line Bidding: Encourage on-line procurement bidding, since it is said to be more resistant to certain kinds of fraud;

Consider Splitting Contract: Require non-EU owner of a major project reasonably to consider dividing up the procurement, by separating works and supplies that can be priced against a benchmark from those that cannot. For this purpose, the EIB would accept a reasoned argument that the division would push up the cost of the works and supplies or weaken the owner's control over the project.

Permit Debarment of corrupt Tenderer: Permit promoter to debar or disqualify candidates and tenderers that fall within the grounds for disqualification given in Article 45 of EU Public Procurement Directive 2004/18, namely conviction for fraud, corruption, money laundering and membership of a criminal organisation.

2. EU borrowers (for commentary, see 2 below):

Extend the policy, on principles to be agreed, to major EU projects the anti-bribery provisions of the EIB Guide to Procurement and the model finance contract. Those provisions require the promoter to:
- Procure from contractor an integrity covenant (Guide to Procurement of February 2004, point 3.5);
- Nominate a point of contact with EIB on integrity matters;
- Report to EIB any suspicion of corruption on project procurement;
- Investigate or move to stop corruption at EIB's motivated request;
- Facilitate, and fund, any EIB corruption investigation;
- Tell EIB of measures to recover damages from a corrupt contractor;
- Keep project papers together and available for inspection for six years.

The Bank could refer to some of these provisions at point 20 of the policy statement to complete the description of the borrower's duty to report. The Bank should explore ways to create a plausible sanction for breach of this obligation.

It should also complete point 27 of the policy statement regarding the Bank's power to conduct its own investigation.

3. Model Finance Contract (for commentary, see 3 below): Strengthen point 9 of the Bank's policy statement as regards the model finance contract, by requiring a non-EU borrower to:

(A) Provide civil immunity and protection to a project-related bribery whistleblower; this is the counterpart of point 23 of the Bank's policy statement;

(B) Undertake, upon the project financiers' request, to waive civil claims against a self-confessed bribe-taker, if his confession helps convict the bribe giver;

(C) Write, maintain and revise its anti-corruption code to standard best relevant practice;

For reasons not to make this obligatory see section 5(9) below.
(D) For a mining or hydrocarbon project, subscribe to the Extractive Industries Transparency Initiative\(^{12}\) and encourage government to subscribe, thus ensuring that all royalties and other revenues from mineral exploitation are published and the precise channel of flow is declared.

(E) In case of suspected corruption, consider terminating, and/or recovering damages from, a corrupt contractor and calling its integrity bond, and convey to the Bank the reason for its decision.

(F) To enforce the covenants listed in section 2 and proposed in this section 3 by novel means. Since the ultimate means of enforcement, namely to call default, is rarely credible unless the creditor’s financial interest is at stake, it is reasonable to explore alternative remedies, such as the imposition of a fee to cover the additional monitoring and administration that may result from a breach of covenant that addresses integrity.

4. **Limit Loan to cover Fair Project Costs (for commentary, see 4 below):** where feasible and useful, the EIB should:

   (a) limit its offer of funds to: (i) its standard proportion of the project price that it estimates would apply under fair competition; and (ii) a level such that total project debt financing would not exceed the aggregate fair price of the purchased works and supplies that are eligible for financing by the EIB;

   (b) if the borrower contests the Bank’s assessment of a fair price, to appoint, at the Borrower’s expense, an expert to report on the price; and

   (c) make available to third parties, upon request, EIB’s expert’s report on price.\(^{13}\)

5. **Public and Private Collaboration (for commentary, see 5 below):**

   EIB should:

   (a) Encourage a national capability to respond to risks of corruption, using, where available, trust funds at its disposal;\(^{14}\) and

   (b) Work on general issues with the PACI\(^{15}\) and on local issues with any local network of PACI signatories, e.g. as in Romania, or other informed bodies.

6. **Sharing Sensitive Data (for commentary, see 6 below):** EIB should contractually retain the right to share data in confidence with a national anti-bribery citizens’ body or with EU or international bodies.

7. **UNCAC (for commentary, see 7 below):** EIB should note in each board report on a non-EU project whether or not the host country has signed and ratified the United National Convention against Corruption (2003) (“UNCAC”).\(^{16}\) Internally, the EIB should note whether the relevant national legislation on public procurement:

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13 Difficult, according to various accounts, and less often necessary, if the final bullet point under proposal 1 is adopted.

14 See paper cited at footnote 5, at paragraph 6.

15 According to the World Economic Forum website on the Partnering Against Corruption Initiative, the heads of the World Bank, the EBRD, the ADB and the IADB have jointly agreed to work with PACI to:

   - require an anti-bribery certificate from bidders on large contracts;
   - explore requiring a copy of the bidders’ codes of conduct/anti-bribery policies as further evidence of commitment and ability to abide by the certificate;
   - work with PACI in regional and country workshops and anti-corruption awareness raising events.

NB Although four members of the MDB Taskforce are party to the above PACI agreement, none of these listed provisions appears clearly in the MDB Framework document. They are nevertheless valuable provisions.

16 See text cited in footnote 23.
addresses the consequences of corruption, as required by Article 34 of UNCAC; and

ensures that persons damaged by corruption may seek redress, as required by Article 35 of UNCAC, in particular by providing, for example, for: (a) an independent public agency to ratify major procurement contracts; or (b) a short automatic standstill period between announcement of the winner of a procurement process and signature of the contact.  

4. Commentary on Anti-bribery Proposals

1. **EIB Guide to Procurement (see 1)**: This section proposes several concrete provisions that would make corruption more readily detectable and make action against corruption more worthwhile, even where evidence of corruption falls short of conclusive proof. Such an easing of the burden of proof is critical, since, even where there seem to be clear indications of corruption, the evidence is rarely strong enough to secure a criminal conviction. The proposal balances the interests of an owner and a contractor, and encourages a contractor to suppress corruption in the tendering process and to demonstrate its sincerity.

Some of these provisions are proper for EIB to introduce by itself. Others will be better proposed through the MDB Anti-Corruption Taskforce.

2. **EU Borrowers (see 2)**: This section recalls the current provisions of the Procurement Guide and the model finance contract in the terms that apply to projects outside the EU. The bane of corruption is nowadays widely acknowledged: one high-level body has estimated that corruption costs up to 25% of all public procurement and the OECD cites it as a critical barrier to economic growth, as does the preamble to the UNCAC. The time is ripe for the Bank to tackle corruption across all its operations.

The Bank might reflect on a critique levelled against the IBRD, namely that its failure to be consistent, transparent and accountable in its structures and ways of doing business destroys its credibility in tackling corruption, and consider whether this critique might apply in any degree to the Bank, and, if so, whether it matters.

While the broadening of the Bank’s task might require extra resources, the Bank may, by modulating its procedure to the level of corruption risk in each country, reduce the administrative burden. The use of on-line bidding techniques may also help lower the cost.

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17 Any prolongation of the standstill would be decided by a judge or arbitrator on the strength of prima facie evidence that the appeal against the award is well founded, and against the claimant providing security for his liability for damages if his claim is unfounded and malicious.

18 This proposal has its parallel in EU money laundering law. By that law and under certain conditions, the holder of unexplained funds has the burden of proof to account for their source. Here, it is not proposed to shift the burden of proof but merely to lighten it.

19 For a study of the procedural effect of a presumption of corrupt intent, see Corruption and Misuse of Public Office, Nicholls, Daniel, Polaine and Hatchard, Oxford 2006, Section 5.90 et seq. Against the recommendation of the UK Law Commission, the government retained in the draft Corruption law a presumption that any advantage that a public official receives in the course of his duties is intended to influence him improperly: UK Corruption Bill 2006

20 Gunnar Myrdal, The Challenge of World Poverty (1970) is still accurate on the point.


22 See OECD corruption site

23 See preamble to UN Convention against Corruption (text 2003) and many conventions and international declarations.

24 See the report of August 2006 on The World Bank’s Strategy on Governance and Anticorruption by the CSO coopération internationale pour le développement et la solidarité: http://www.cidse.org, at page 4.
3. Model Finance Contract (see 3): These improvements to the finance contract reflect both the proposed changes to the Procurement Guide and the change in the political climate that allows the Bank to demand a wider range of information. They would help fulfil the Bank’s commitment to the other MDBs to identify risk mitigants and to enforce covenants that address integrity risks.

A key point is the provision to protect a whistleblower, including the confessed bribe-taker. This point finds support in Articles 33 and 37 of UNCAC.

4. Limit Loan to cover Fair Project Costs (see 4): This proposal is based on the Bank’s duty, under Article 20.1 of its Statute, to lend as rationally as possible and its duty to act in accordance with sound administrative principles. The proposal may also help the Bank achieve its aim in the terms of Article 267 of the EC Treaty and its own mission statement.

5. Public and Private Collaboration (see 5): International participants in the World Economic Forum have added their voices to the widespread concern about corruption and have joined PACI. In working with partners to suppress corruption, the Bank will be both a giver and receiver of ideas. The MDB Framework commits the Bank to collaboration with the other signatories and the UNCAC envisages a role for international organisations. In short, the texts encourage proactivity.

6. Sharing Sensitive Data (see 6): The Bank may need to share information when it collaborates with private and public bodies in the effort to root out corruption, e.g. under point 5. This proposal would grant the Bank the necessary right and would allow the Bank to respect point 3 of the MDB Framework.

7. UN Convention against Corruption 2003 (see 7): the European Community and the EU Member States signed this Convention. Many have ratified it. The Bank should endeavour to advance its aims and press its partners to apply it.

5. Recommendations on the draft Policy and Guidelines

The recommendations, inspired by the aims cited in Sections 1 and 2 above and by the standard of effectiveness, are these:

(1) Describe Process of Formation of Policy

The Bank should state what external and internal analysis of the phenomenon of corruption it endorses or adopts in forming its policy. Opinions within the Bank as to the gravity of the issue probably diverge.

26 See footnote 31.
27 See footnote 38.
29 See documents cited in footnote 5 and in [http://www.eib.org/Attachments/strategies/policy_and_guidelines_en.pdf](http://www.eib.org/Attachments/strategies/policy_and_guidelines_en.pdf) at footnote 4, although a typo for “website” in the name of the hyperlink aborts the link.
30 See footnote 5.
31 See text cited in footnote 23.
32 See footnote 1.
33 All this will help fulfil the objective set in Article 63 of UNCAC (see footnote 23) on the goal of publication and exchange of views on combating corruption.
The Bank can hardly honour the commitments that it signs up to, such as those of the MDB Framework, unless the senior management of the Bank accepts the gravity of the matter and leads in shaping an internal consensus on it. If the central administrative services of the Bank draw up the anti-corruption policy without sufficient input from the operational services, the policy may be at odds with reality. Even if it addresses the real issues, it may be ineffective. Unless the Bank’s operational units have been active contributors to the formation of the policy, it is unlikely that they will fervently espouse it. The policy is only as good as the willingness of the officials concerned to apply it. It may, therefore, be useful to include an operational officer of the Bank in the public consultation hearing.

There is a wealth of good and relevant research by NGOs. The Bank should show that it takes note of it in the formation of policy. The paper should not seem to stand in isolation from the actions of the rest of the world, other than the MDB taskforce.  

(2) Give Estimate of Cost of Policy

The Bank should consider, as a means to demonstrate its concern, broadly state the cost of the resources it currently devotes to the anti-corruption policy and the extra resources that it intends to use to implement its commitments under the MDB Framework. It would be proper to concentrate resources on projects where the risk is higher. The Bank’s commitment to ongoing monitoring may entail some cost. To mitigate the cost, the Bank could consider pooling resources or sharing costs with other lenders to the project.

(3) State Reasons, Sources and Context for Policy

The Bank should define and give reasons for the policy. Although the consultation paper is entitled “EIB Policy and Guidelines,” there is little in it that is strictly about policy. Admittedly, there are statements of the principle on which the policy is built, of the intention behind the policy and of the mode of presentation of the policy. All that is useful but it is not enough. The policy statement should also address:

• the mischief to be addressed;
• the Bank’s reason to hope to make progress against it;
• a measure of the size of the problem;
• the Bank’s baseline assessment;
• a proposal for a criterion of success;
• a target and a timescale;
• a provision for independent evaluation.

In particular, the consultation paper should assess the scale of corruption that the Bank’s operational officers currently confront. Potential surrogate indices of corruption in EIB-financed projects would be:

• Impressions of members of staff gleaned from their business contacts;
• Frequency with which the Bank declines projects, whether at an early or late stage, on the grounds of overt or suspected corruption;
• Incidence of allegations of corruption that the Bank’s Inspector-General receives under the current EIB Guidelines, number and scale of investigations his office has conducted, and their outcome;
• Frequency of public allegations of corruption on EIB-financed projects that are not manifestly unfounded;

34 Two good sources are http://www.againstcorruption.org/ and http://www.thecornerhouse.org.uk/index.shtml
35 See Part I.2 of the consultation paper.
• Spread of projects by sectors more or less susceptible to corruption;
• Report of the national chief anti-corruption officer, if any;
• Advice of local civil society;
• Transparency International’s informal corruption index rating.

The paper should state how many referrals the Bank has made to OLAF, and how many investigations OLAF has conducted on EIB loans and investments, and their outcome. It should state how often, if at all, the Bank has requested borrowers to conduct investigations. It should evaluate the use of the Integrity Covenant in the Bank’s procurement procedures. Finally, it should project the staffing and resources needed to address corruption.

(4) Anchor Policy in Bank’s Mission and Objects

The Bank should expressly anchor the policy in the Bank’s mission in its Treaty obligations and as integral part of the Community apparatus.

(5) Emphasise Human Character of Policy

The policy statement might usefully invoke the organisational spirit and values of the Bank, recognising that the Bank may do as much good by imbuing staff with those values as by imposing codes, guidelines and compliance charters. The policy should go beyond point 18 and state that it expects staff actively to seek ways to block corruption in the Bank’s projects. The staff duty is not limited to reporting suspicion of corruption.

(6) Recognise Limitations and Conflicts of Policy

The policy statement should recognise the challenge to balance the Bank’s immediate development goal of financing investment with the international long-term development goal of eradicating corruption. It should recognise that these goals may conflict and that the Bank may have to make choices. The policy should state how staff should resolve those choices.

(7) Frame Policy as a Guide to Design of Projects

The policy statement should acknowledge that the Bank has to take into consideration any hint of corruption on a project and that the staff of the Bank should be systematic in considering how the design and management of a project may enable or impede corruption.

Accordingly, the paper should be both a public policy statement and a manual to staff. It should therefore contain instructions to staff. While the code of conduct concerns action once corruption is suspected, the instructions would cover means to impede and prevent corruption.

The Bank should recognise the principle of modulation and note that the degree of diligence and proactivity that it should exercise varies with the quality of governance and integrity of each country in which it works.

(8) Put Developmental above Reputational Aim

The policy should reflect a primary concern for the damage that corruption does to long-term development goals. It should only as secondary matter be concerned with potential damage to the Bank’s reputation. An effective policy reduces the damage ensuing from the revelation of any corruption.

(9) Decline to adopt automatic Debarment of convicted Firms

There are probable benefits to policy in establishing a uniform and fair universal system of debarment. The Bank should resist pressure to establish a reciprocal blacklist of excluded

37 Under Article 8.04 of the model finance contract.
38 For instance, to be “at the service of the Union” and to promote “sound investment.”
39 See Article 280 of EC Treaty on “fraud and any other illegal activities affecting the financial interests of the Community” as well as the international agreements designed to tackle corruption.
suppliers and contractors and consultants and should reverse point 10 of the policy statement. There are many reasons in EU administrative law, natural justice, economic purpose and international policy for this recommendation. Here are some:

**Administrative law**

(i) Automatic blacklisting may violate the EU administrative principle by abnegating the Bank’s own discretion;

(ii) The sanction may be disproportionate, unless considered case by case on objective grounds; it may instead be enough to permit the promoter to debar convicted or blacklisted tenderers;

(iii) The sanction is arbitrary, in not distinguishing between cases;

(iv) The Bank has to balance policy goals and must not arbitrarily place one goal above another. It must consider case-by-case the merits of blacklisting; it has to weigh the interests of the particular project owner against the wider benefit of cooperation with other IFIs, and it needs to establish and publish principles for this choice.

**Natural justice**

(v) The imposition of the sanction without a hearing of the debarred company may breach the principles of natural justice;

(vi) An automatic sanction allows for no scope for atonement and corrective action by the blacklisted party.

**Economic Purpose**

(vii) The exclusion of a blacklisted party reduces competition and may increase the price that a promoter is constrained to pay in a competitive tender.

(viii) For reasons of law and economics, the Bank should weigh in each case the interest of the promoter against the wider development goal.

**International Policy**

(ix) There is no uniform practice among the Bank’s Member States that would justify imposing the rule on the Bank’s borrowers outside the EU. Article 45 of the EU Directive 2004/18 is defective in many ways and its implementation is far from uniform.

(x) International practice requires only that states consider the imposition of such sanctions.

(xi) There are inherent difficulties in defining a fair rule.

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40 For a thorough study of the procedure among MDBs, see http://www.u4.no/themes/debarment/debarmentreport.pdf

41 On a minor matter, point 10 incorrectly includes terrorist financing among the offences listed in Article 45 of Directive 2004/18. It should be modified.

42 For a careful study of the issues by Kirstine Drew in relation to the EU Procurement Directives, see a report for the Cardiff University School of Social Sciences of November 2004: Debarment.


44 For instance: (a) arbitrary choice duration of the debarment; (b) rarity and often fortuitous character of criminal conviction; (c) conviction more often of a natural person than a legal person, and problem of imputing the individual’s wrong to his employer or principal; (d) options for fixing sectoral scope of debarment; (e) imputing group responsibility for conviction of a subsidiary; and (f) instantaneous effect of debarment on existing contracts.
6. **Envoi**

If any of the foregoing proposals and recommendations finds acceptance, the proposed changes to the Guide to Procurement and to the model finance contract are worthy of consideration. They would contribute to fulfilling not only the Bank’s own declared goals but also the Bank’s commitment to other MDBs and they would respond to the exhortations of the European Commission, not to mention the expectations of civil society. They could be a useful complement to the high-level anti-corruption policy recently adopted by the World Bank.

Even if there may be additional benefit in introducing the one or other change jointly with the other members of the MDB Taskforce, the Bank could nevertheless introduce many of them on its own. The EIB’s experience of working with the changes could then be useful in advancing the collective work of the MDB taskforce.