EIB Public Consultation on its policies on transparency, on public disclosure of documents and on a complaints mechanism.

Here follow the comments of Roderick Dunnett on the EIB’s on its policies on
- Complaints mechanism
- Transparency (“TP”)
- Public disclosure of documents (“PDP”).

This paper addresses the issues that are common to two or more of the policies and then comments on each policy and its expression in turn.

Common Policy Issues

Broad aim
1. While the broad approach, as set out obliquely at DPD §21, is positive, the message that the Bank is open and ready to disclose a document or fact, subject only to necessary and precise legislative, contractual and pragmatic constraints, is not clearly enough stated. Nowhere does the Bank recall that the Bank’s policy of openness is driven, as it is for all institutions of the EU, by the principle, expressed in Article 255 of the EC Treaty and extended by traditional legal analogy to the EIB, that:

“1. 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 European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3”.

2. Nor does the Bank recognise the essential motive, set out in the second recital to Regulation (EC) No 1049/2001 of the European Parliament and of the Council on public access to documents, that “Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights.”

3. Thus, the policy on openness is driven by the goal of public participation in decision-making. The Bank has not published any estimate of how effective its disclosure polices are in achieving this aim. The Bank’s trinity of policies may facilitate that process. The Bank should also show how it positively encourages that process. Perhaps the next round of public consultation might be on the topic of the accountability of the Bank under democratic processes. The Bank could explore ways in which information and ideas could be confidentially shared with an external democratic body.

4. The Bank notes that openness strengthens accountability (TP § 20). It claims, more doubtfully, that it helps achieve sustainable outcomes (TP § 23 and PDP §19). The latter goal is poorly articulated. It is hard to see what it means or how the policy furthers the goal. §81 of that policy makes it clearer. It would be useful to recall the sense in which the Bank uses the term “sustainable”. Here it seems to mean “optimised in environmental impact.”

5. The members of the organs of the Bank are entitled to deliberate freely in confidence in their assessment of the fitness of the borrower and the project for an EIB loan. However, where matters of policy are debated, there should be a presumption in favour of disclosure of internal debate.

Dubious Legal Principles
6. The Bank rightly bases its action of the above quoted Regulation. However, there is some legal confusion in respect of other texts.

7. The Bank cites Article 287 of the EC Treaty. This protects citizens against the breach by public officials and elected representatives and government officials of the duty of professional secrecy.

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1 Article 287: The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to
This duty attaches to individuals, not to institutions. The Article does not limit the power of an institution to disclose data in the public interest. An institution is bound by its public duty, by general principles of legal responsibility laid down in the EC Treaty and by its commitments to the suppliers of information but the institution is not a “professional”. Specific rules apply, such as those of the Decisions applicable to OLAF. Thus, I suggest that the Bank reconsider whether Article 287 restricts its corporate power to disclose information.

8. Secondly, the Bank refers to national laws relating to disclosure. It refers especially to market regulations and practices. While the Bank must disclose all that national law requires, within the limits set by EU law, it is likewise not bound by national legal restraints that violate the EU principle of openness, as set out in EC Article 255 or in the Regulation on public access to documents.

9. The Bank, in short, relies on a wrong legal basis to formulate a restrictive policy. Legitimate reasons for confidentiality are more pragmatic in character than compulsory. The Bank should examine its restrictions in the light of the general principle of openness, democratic accountability, trust between partners and free internal debate.

Merger of Policies
10. At the Brussels public consultation meeting of 22nd June 2009, Vice President de Fontaine Vive proposed to examine the idea of merging the three policies under discussion. That step would improve their clarity. There is overlap, duplication, cross-referencing and, at the margin, some contradiction between them, and there are gaps. In particular, remedies and complaints are an integral part of the EU policy on public access to documents. There is no reason why the Bank could not follow the practice of the institutions and fuse them.

Means, Costs and other Impacts of Transparency Policy
11. One common element is to ensure that the policies will be understood and followed by the staff. Even if this concerns administration more than policy, it would be of public interest to show the internal mechanisms by which the documents eligible for automatic public disclosure are prepared, and how sensitive material is treated.

12. No doubt, the policy of transparency bears a cost in terms of staff time. The public should be made aware of the cost. That might help discourage excessive and vexatious demands. Each shift of policy no doubt increases the costs. The publication of a cost estimate would help show how entrenched, and demanding, in Bank practice the policies have become.

13. The cost may lie not only in the man hours expended on preparing documents for publication and in keeping the EIB’s public domain up to date, but also in the lost opportunity for staff to arrange further loans in the public interest. Moreover, if there is any suspicion that frank expression of internal opinion is inhibited, and that that puts the Bank at risk of making bad decisions, that risk should be stated.

14. The same argument may apply in response to the demand to disclose ex-post evaluation reports on individual projects. Here, frank speaking must surely be essential.

15. It may also be true, for instance in the public demand for more precise data on global loans, that the cost of further disclosure on individual allocations would be prohibitively expensive. It might, for instance, require a redesigning of the website. Perhaps, nevertheless, the Bank could address calls for greater disclosure.

Internal Processes
16. A policy is only as good as the staff members who practice it. It is vital to update the staff handbooks. Each member of staff should follow the policy, and any justified complaints relating to non-disclosure would count towards the appraisal of performance of members of staff.

Further Disclosure
17. Two classes of document that are hitherto not disclosed could be the subject of some liberalisation of policy.

disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost component.

18. Firstly, finance contracts are the key expression of Bank policy. While the financial provisions are not a matter of public concern, the borrower’s covenants and conditions that relate to development, environment, and social and other matters of public interest ought to be disclosed. Borrowers may fear that the terms may raise the bar in terms of their obligations to third parties. If that objection is made, the Bank should welcome it. It would show that the covenants have effect, and it would reinforce them.

19. Similarly, the Bank refuses to disclose framework agreements concluded with beneficiary countries. It is anomalous, considering that many of these agreements are published and the equivalent Cotonou framework treaty is published and considering that other international financial organisations would not conclude confidential international agreements that have a general legal effect. However, if undemocratic host countries insist on secrecy, the Bank should at least press for disclosure of those parts of the agreement that concern fiscal and other matters of public interest, without revealing administrative advantages that borrowers from under such agreements might be entitled to obtain.

20. Thirdly, the Bank could disclose more liberally the typical confidentiality agreement that it concludes with borrowers and promoters.

21. Fourthly, the EIB could list more thoroughly the inter-institutional agreements that bear on transparency, whether the Bank is party to them, or bound by duty of solidarity or exhortation to respect them.

Individual Policies
22. Since the policies will be rewritten with a view to merging them, I limit my comments to those which may still apply in a rewritten text.

Transparency Policy
23. §20 TP misses the main principle, as set out above. It is not to strengthen public support for Bank policies; it is to increase accountability. The Bank may pursue a programme to improve public awareness of the value of its actions, as this paragraph says. That, however, is a matter for the EIB in its discretion, not a matter for obligatory disclosure.

24. In §68, which leaves to the Bank the choice between automatic disclosure and on-demand disclosure, the criteria of choice may not be clear. Public concern may be the chief one.

25. At § 91 the Bank mentions corporate social responsibility and annual evaluations designed to cover areas such as “respect for human rights”. It is all very well to evaluate this impact after the event. Regrettably the Bank did little to strengthen its respect for human rights upfront. It environmental and social policy fell short of best practice. Transparency will help diagnose the weakness but only a change of the underlying policy will cure it. Here, the Bank remains deficient.

26. In § 99 it may be useful to cite the words of the MoU between the Bank and the Ombudsman. In that document, the latter rightly states that it would be inappropriate for him to substitute his judgment for that of the Bank on environmental, social or developmental questions. He considers, as quoted in Complaints Policy § 12.4.3, that the Bank’s own record of how it handled such questions is the appropriate starting point for his review.

27. One could suggest a further reason for disclosure of individual project evaluations. Certain academic economists are seeking to raise awareness of the role of the Bank in EU economic policy. They are interested, for instance, in the multiplier effect of EIB loans in bringing about public investment, and in whether the EIB may also help shift power from one level of national government to another, and may, as it claims to do, contribute to better governance. The Bank should design its own practices and make available its internal papers with a view to allowing economists to test their hypotheses in this respect.

Public Disclosure Policy
28. In § 47 to §80, the policy paper cites many categories of document. In many cases it does not state whether the Bank publishes them or not and, if so, whether automatically or on demand. Since that is the point of the paper, it had better be made explicit for each document and class of document.

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3 For instance, Robinson, The European Investment Bank, the EU’s neglected instrument, JCMS 2009, vol. 47, number 3.
29. A recurrent ambiguity is the question of the Bank’s refusal to disclose a document because a private promoter or borrower objects. It is unclear whether that objection must be reasonable for the Bank to comply. §§ 33 and 36 imply that the Bank will listen to, but not be bound by, the expressed commercial interest. §80, by contrast, suggests that the Bank is bound by the promoter’s refusal to disclose, however unreasonable it is. The differences should be straightened out.

30. At § 73, it is not clearly said when the Bank will publish a project summary. § 73 implies that it must be before the loan is signed, at the latest, whereas §75 shows that they will be available at a different site, after signature.

31. In § 74 the Bank says that it encourages its borrowers to make available project documents. This kind of uninspiring statement suggests that the Bank fails to exercise its financial muscle to encourage disclosure.

32. At § 78 the reference to a Topical Project Brief is very short. It does not explain why or when the Bank would issue such a document, and what precautions would be taken.

Complaints Mechanism Policy

33. The policy could be more clearly stated in terms of who, why, what, when and how. It could more clearly attempt to show how the independence of the operator. In comparison with other IFIs, the EIB in this respect is below par. It is reckoned weak in whistleblower protection and in mechanism for internal and external complaints.

34. The policy, like the others applies to the EIF as much as to the EIB. This is said explicitly at §10.1 in reference to the EIB Group. Elsewhere, there is lack of precision. It is not evident that references to EIB embrace the EIB Group.

35. In § 9, there is confusion of aims. This paper is about complaints. It is more like the terms of reference for an office, of which the handling of complaints is just one part of its task.

36. In §11, the scope of subject matter for the mechanism is unclear. Whereas in § 11.2.1 it is said that complaints may cover developmental, environmental and social impacts of projects, in §11.4.2, entitled subject of the complaint, the developmental aspect is omitted. They should be included.

37. In § 3.1 the “EIB Complaints Office” is here introduced. It would be well to explain its staffing, its tasks and its place in the Community.

38. § 3.3, second sentence, is out of date.

39. In § 11.7.8 reference is made to the phrase “internal and external stakeholders”. Here are in the other two policies, these terms are never defined. It is implied that the internal stakeholders are the staff and the organs of the Bank. The latter cannot be considered as stakeholders. Their rights and duties are expressly defined. There is no residual scope to attribute to the Directors or the Governors sights or interests as stakeholders. Staff members, on the other hand, have moral rights beyond the contractual to ensure that the Bank remains faithful to its mission and character.

40. In §11.5.1 and 11.5.2 the word root “acknowledge” is used strangely. In the first instance, it seems to mean “reasonably known...” and, in the second case, it could be usefully followed by the words “by the EIB”.

41. In § 11.11.1 line 3 add “to this confirmatory complaint.”

42. In § 12.1.2, line 1, it would be normal to provide a link to this Memorandum of Understanding. In line three, the word “ineligible” should apply to the complaint, not the complainant.

43. In §12.3.1, the second sentence seems redundant. It would be relevant to refer to the second declaration made by the Ombudsman in his Memorandum of Understanding with the EIB, referred to in §12.1.2.

44. In Annex I, list the Framework Agreements concluded by the Bank with beneficiary states, agreements with the Commission about intermediated loans, international treaties signed by the EU or the Member States that make a framework for EIB activity. There are probably many other inter-institutional agreements that would merit a mention here.

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5 http://www.eib.org/attachments/strategies/complaints_mou_eo_eib_en.pdf