Introduction

The recent European elections showed a further decline of the general turnout. Moreover, those who did cast their vote, often expressed their resentment by voting for eurocritical parties. In that sense, the EU still finds itself in a crisis situation, as it lacks legitimacy with an increasing part of the electorate. The reasons for the lack of popularity of the European Union are manifold, but one of the reasons is that people find the EU complicated and often regard it as a ‘black box’. Those who do take an interest and try to find out more about how the EU-institutions operate and how taxpayers’ money is spent, are often disappointed, since they may receive a lot of general information, but as soon as they have a specific query, information is being withheld. As Member of the European Parliament I frequently receive complaints from European citizens about the lack of transparency of the EU-institutions. I am convinced that only through increased transparency can the EU serve its citizens. Especially in modern times, with an ever faster exchange of information through the internet and social media, we cannot afford ourselves to be seen as impenetrable.

The same view is reflected in Article 15 of the Treaty on the Functioning of the European Union. This article emphasises the importance of transparency of the EU-institutions and creates the general framework for transparency policies of EU-institutions, including the European Investment Bank:

“1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.

3. 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 documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.”

It should be noted that the EIB’s policies on access to documents is governed by existing EU-legislation only when exercising its administrative tasks, but this notwithstanding the general principle of ‘working as openly as possible’ applies to all tasks of the EIB.

Against this background, I find the proposed changes to the EIB’s Transparency Policy most disappointing. These changes do not enhance transparency, but on the contrary they will make the activities of the EIB less transparent. In my opinion, the EIB could have used this opportunity for improving its current rules on access to documents in line with the general political considerations
mentioned above, as well as the thrust of article 15 TFEU. Thus, I felt the need for contributing to
the public consultation by including comments on a number of the proposed changes. The list is not
exhaustive, but it contains merely the most striking examples. I therefore hope that you will not
only consider these suggestions, but that you will reconsider the entire policy in order to bring it
into line with political and legal commitments as described above. As the EIB is responsible for a
big budget and its policies are not particularly well-known, I hope that the EIB will realise its
special responsibility in this respect.

Dennis de Jong, MEP
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Examples and Suggestions:

1. Disclosure of Information – Principles for Disclosure (paragraphs 5.1. and 5.2.)

It is typical for the general nature of the proposed changes that the scope of these paragraphs has been reduced to ‘information/documents held by the Bank as part of the exercise of its administrative tasks’. No provision has been made for the disclosure of other information/documents, except the very specific information/documents mentioned in paragraph 5.1.b.. This creates a legal vacuum.

Suggestion: since it is now completely unclear which rights citizens have in the case of information/documents of a different nature than mentioned in paragraph 5.1., a separate article has to be included laying down EIB’s policies in this regard. This is particularly relevant, since in accordance with art. 15 TFEU, the current EU-legislation on access to documents does not automatically apply to information/documents which are not part of the exercise of the EIBs administrative tasks. Although the general principles of art. 15 TFEU do apply to the EIB, it will only appear through litigation and the resulting jurisprudence how these principles work out in practice. This creates not only a burden for citizens, but also for the EIB itself and reduces legal certainty.

The reduced scope of chapter 5 means that the provisions of existing EU-legislation on access to documents, in particular, Regulation (EC) No. 1049/2001, apply. The EIB will be aware of the on-going negotiations between the European Parliament, the Council and the Commission on up-dating the Regulation. The EP has adopted as its position that the current Regulation does not go far enough in ensuring access to documents. The Council and the Commission have not yet agreed to this, but it is to be expected that in the near future, when the negotiations will be resumed, a compromise may be reached that will further strengthen the current Regulation.

Against this background, it is difficult to understand why the EIB in its proposed changes is actually falling below the standards of the current Regulation, which means that not only does it not implement the thrust of the TFEU and the Regulation, but it also completely ignores the more recent developments in the EP. Apart from possible litigations due to the tensions with existing legislation, it also means that the EIB will have to review its policy, once the Regulation has been brought up-to-date.

Paragraph 5.2.

Original corresponding text:

“Every member of the public has the right to request and receive timely information from the EIB. (5.1.2 EIB Transparency Policy 2010)

Has been replaced by:

“Every member of the public can request access and receive timely information/documents from the EIB” (article 5.2 EIB draft Transparency Policy)

The Regulation clearly stipulates: ‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation’ (art. 2.1).
Suggestion: maintain the right to request and receive information.

2. Disclosure of Information – Exceptions (paragraphs 5.3. to 5.16)

Paragraph 5.4.

The additional refusal ground concerning the undermining of the protection of ‘the environment, such as breeding sites of rare species’ is not only difficult to understand, but more importantly, it does not figure in art. 4, paragraph 1(a) of the Regulation. In the Regulation, this is an exhaustive list, and the EIB cannot singlehandedly add to this list whatever it thinks is topical.

Suggestion: stick to the previous text which reflected the Regulation.

Paragraph 5.5.

The original text of the EIB’s policy was already at odds with the Regulation (but since the scope was not limited to information relating to EIB’s administrative tasks, it was possible to sometimes deviate from the Regulation; with the reduced scope, as proposed in the changes, however, the Regulation does fully apply), but the proposed text makes it even worse. This will undoubtedly lead to legal disputes.

“the purpose of inspections, investigations and audits” (art. 5.2.3 EIB Transparency Policy 2010 & art. 4.2 of the Regulation)

Has been complemented with:

“... and compliance due diligence. Disclosure of all information and documents collected and generated during inspections, investigations, audits and compliance due diligence shall be presumed to undermine the protection of the purpose of the inspections, investigations, audits and compliance due diligence even after these have been closed, or the relevant act has become definitive and the follow-up action has been taken.” (art. 5.5 EIB Draft Transparency Policy)

Suggestion: in order to bring the policy in line with the Regulation, the proposed references to ‘compliance due diligence’ have to be deleted. The formulation is vague and if it amounts to an additional exception ground, it is contrary to the Regulation.

Paragraph 5.8.

Although paragraph 5.8. already existed in EIB’s original policy, it amounts to a broadening of the scope of the refusal grounds recognised (exhaustively) in the Regulation. Now that, due to the reduced scope, the Regulation fully applies, this paragraph can no longer be maintained.

Suggestion: deletion of the paragraph.

Paragraphs 5.9. and 5.10.

Original corresponding text:

“A Member State may request the institution not to disclose a document originating form that
Member State without its prior agreement” (No 1049/2001, Access to Documents art. 4.5)

Is in the draft policy complemented with:

“A Member State may request the Bank not to disclose a document originating from a Member State without its prior agreement, setting out the reasons for its objection by reference to the exceptions referred to in the present Policy. In explaining why a particular exception applies, a Member State may refer to any relevant provision or rules in its national law.” (EIB Draft Transparency Policy, art. 5.10)

The exemption for Member States is new in the draft Transparency Policy. It is extended compared to art. 4.5 of the Regulation which does not foresee reference to national law. This will increase legal uncertainty about the applicable legislation.

**Suggestion: delete the proposed paragraph 5.10.**

**Paragraphs 5.11. to 5.13.**

These paragraphs refer to confidentiality. Again, this is not as such foreseen in the Regulation, but in the original policy it might have been legitimate to refer to this concept, as for other than its administrative tasks the Regulation did not fully apply. With the reduced scope, these considerations will have to be covered by the privacy exception foreseen in the Regulation.

**Suggestion: delete the proposed paragraphs 5.11 to 5.13.**

3. Publication of Information (paragraphs 4.1. to 4.21)

**Paragraph 4.6.**

Original corresponding text:

“All public sector projects are included on the Project List on the Bank’s website, at least 3 weeks prior to Board approval, as are all private sector projects when there has been a call for international tender published in the Official Journal of the European Union and/or which have been subject to an Environmental Impact Assessment (EIA).” (art. 4.3.2 EIB Transparency Policy 2010)

Has been replaced by:

“The Bank shall publish project summaries at least 3 weeks before the project is considered for approval by the EIB’s Board of Directors. However, certain private sector projects are not published before Board approval and, in some cases, not before loan signature to protect justified interests.” (art. 4.6 EIB draft Transparency Policy)

In the draft Transparency Policy, not all public sector projects are included on the Bank's website. This is a weakening of the requirement for information, whereas the EIB private sector business partners should give more open access to information.

**Suggestion: return to the original text.**
4. Responsibilities (paragraphs 9.1. to 9.4.)

Paragraph 9.3.

Original corresponding text:

“The Transparency Policy is subject to a continuous process of internal evaluation and quality assessment and open to public comment. Reviews, including public consultation, will take place every 5 years.” (art. 3.4 EIB Transparency Policy 2010)

Has been replaced by:

“The Transparency Policy is subject to a continuous process of internal evaluation review and quality assessment and remains open to public comment at any time. Formal reviews, including public consultations, will take place in case of changes to the EU’s policy and legislative framework on transparency and disclosure of information, changes to policies and procedures within the EIB that require an alignment of this Policy, and any other changes the EIB judges necessary and appropriate.” (art. 9.3, EIB Draft Transparency Policy).

In the future, public consultation will only take place when a change in the legislative and policy framework occurs that requires a change in the EIB Transparency Policy.

Suggestion: retain the five year review, as the standards in the draft Transparency Policy are too vague and will probably result in a less frequent review.