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Subject: Transparency International EU Office submission to the public consultation on EIB’s Transparency Policy

The Transparency International EU Office (TI-EU) welcomes the review being undertaken by the European Investment Bank (EIB) of its Transparency Policy, and the opportunity to comment on the draft revised text via the present public consultation.

The practice of regularly reviewing the Transparency Policy (TP) and reporting on its implementation demonstrates an appreciation by the EIB of the need to monitor how well it is able, as an institution, to meet its stated principles of openness, and to identify areas for improvement or greater scope for the Policy.

To enable such a policy to achieve its goals, it must of course be clear and accessible for those tasked with its implementation – namely Bank staff – and by the stakeholders, partners, and members of the public concerned by its work. The EIB’s efforts to simplify the existing Policy are therefore welcomed and duly recognised by TI-EU.

Nevertheless, the revised text appears worryingly to demonstrate a move away from embedding transparency as a principle in the EIB’s work towards creating a culture of narrow compliance with legal obligations. In an effort to simplify and streamline the infrastructure of governance policies at the Bank, revision of the Transparency Policy should not lead to a regression, or stepping back, from the important strides made by the Bank to establish practices of openness and accountability. The revisions as they currently stand do appear to usher in a much more restrictive information disclosure regime - representing a move away from the predictable and transparent handling of information requests and a policy of maximising public access.

Of course, transparency cannot be a stand-alone aim: it serves a purpose of bringing the work of the EIB closer to the public, and to specific stakeholders, and thereby anchors greater accountability into the Bank’s everyday operations and activities. At a time when the EIB is stepping up its lending activities to boost job creation and economic growth in Europe, the impacts of its activities may be more keenly felt by the EU’s citizens, and the importance placed on Bank accountability will only increase. Transparency also plays a crucial role in safeguarding EIB activities and funds from corruption, through better access to information on how financing decisions are made, for example, or on the implementation of Bank-supported projects. Public reporting on corporate governance structures, including anti-corruption mechanisms, and on overall operations and performance can encourage higher standards of behaviour from Bank staff and partners, and increase the EIB’s legitimacy as a responsible public institution. As such, it is essential that the revised Transparency Policy is fully aligned with all other relevant policies (e.g. on Anti-Fraud, Whistleblowing, etc). The principles and provisions contained in all of these documents must be understood and used in an integrated manner to be fully effective and ensure a robust barrier to corruption and fraud is put in place across the EIB’s activities.
TI-EU is, in this spirit, hereby providing its comments on selected sections of the revised draft text of the EIB Transparency Policy as they relate particularly to anti-corruption safeguards. Additional issues are dealt with in further detail in a joint submission to the consultation with other civil society organisations, to which TI-EU has directly contributed.

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Exceptions

The revised TP proposes a number of changes to the regime of exceptions pertaining to the disclosure of information and documents by the EIB. The changes appear to represent a move towards more restrictive practices at the Bank, away from a set of narrowly defined exceptions to those that invite broad interpretation.

Of fundamental significance appear to be the amendments featured in article 5.1.a. of the revised TP: ‘[A]ll information/documents held by the Bank as part of the exercise of its administrative tasks is subject to disclosure upon request, unless there is a compelling reason for non-disclosure...The Bank may, subject to the same exceptions, grant access to information/documents held be the Bank as part of the exercise of its non-administrative tasks...’ Though enshrined in article 15 of the TFEU, this clause is not included in the Bank’s current policy (released after the entry into force of the Lisbon Treaty). Notably, the revised policy does not include a definition nor distinction of what tasks are to be considered administrative and which non-administrative. In the absence of legislative or judicial powers, it is unclear what EIB activities would indeed fall under the category of non-administrative. As such, without this clear definition, and in combination with the new clause, the revised TP effectively provides the Bank will full discretion over what can be considered administrative and non-administrative tasks, on a case-by-case basis, and therefore full discretion on whether to handle a request for access to information under the disclosure obligations laid down. This is an excessive measure and invites uncertainty both for EIB staff charged with handling and responding to requests – potentially inviting an unnecessary administrative burden and inefficiencies to the current procedures – and for the public. This discretionary power therefore removes predictability, transparency and clarity from the Bank’s procedures. As such, TI-EU calls for these amendments to be removed from the revised policy, or for a clear, narrow definition of administrative and non-administrative tasks, including elaboration of the tasks falling under each category, to be inserted therein.

The revised policy also provides for the presumption of harm resulting from the disclosure of information in certain instances: thereby replacing the need for the Bank to demonstrate the actual and specific harm to a legitimate interest that would be caused by the disclosure of information, or to demonstrate that this harm outweighs the public interest case for disclosure. Additional exceptions have been included which increase the scope for the Bank to refuse access above and beyond the provisions included in corresponding EU rules (e.g. under Art. 4 of Regulation (EC) 1049/2001), and which move away from best practice as elaborated in the Global Transparency Initiative’s (GTI) Transparency Charter for International Financial Institutions. The revisions could, therefore, serve to undermine the principle of openness and stated presumption of disclosure guiding the policy, and thus prevent citizens from enjoying in full their rights of access to information held by the Bank.
This is specifically the case in article 5.5, bullet point 4: ‘...[D]isclosure 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.’ The blanket presumption of harm for all such documents is excessive and contrary to the guiding principles elaborated elsewhere in the policy and indeed, article 5.1, and runs against best practice on limited exceptions as set out in principle 5 of the GTI Charter. A harm test, through which the EIB can demonstrate ‘(i) that disclosure would cause serious harm to one of a set of clearly and narrowly defined, and broadly accepted, interests, which are specifically listed; and (ii) that the harm to this interest outweighs the public interest in disclosure’ needs to be stipulated in the revised TP and used to decide upon disclosure in such cases.

In clauses where a harm test has been alluded to – e.g. article 5.6 – the revised TP should also explicitly state that the Bank should demonstrate the specific and actual harm that would be caused by disclosure. This is particularly necessary where disclosure is being refused to ‘information/documents containing opinions for internal use as part of deliberations and preliminary consultations within the Bank or with Member States/other stakeholders’ after a decision has been taken. Refusing disclosure based on the fact, for example, that a similar category of decision might be taken in future allows for a broad scope of interpretation and could effectively limit Bank transparency severely.

Article 5.5 also includes a provision on the protection of the objectivity and impartiality of selection procedures for awarding contracts or grants or for assessing candidates for an office or position. While the integrity of such processes does legitimately need to be protected while they are ongoing, once concluded, transparency over how decisions have been reached can serve to increase the legitimacy of selections, and serve as an additional barrier against corrupt and fraudulent practices. Equal treatment and accountability can be better ensured through disclosure of decision-making documentation, as officials are aware that their work may be made public and more widely scrutinised. More broadly, disclosure can serve to support improvement in the quality of bids and applications, as candidates’ understanding of how selections are made, and upon which criteria, is enhanced. Greater transparency would then in fact support the protection of objectivity and impartiality.

A further area where revisions to the TP may be introducing more restrictive practices over the disclosure of information pertains to the capacity for Member States to oppose disclosure by the EIB of documents originating from their Member States themselves. Article 5.10 as it is currently phrased goes beyond corresponding provisions in Reg (EC) 1049/2001, and appears to provide Member States with a veto on disclosure. The EIB should therefore make it explicit in the revised TP that the final decision on disclosure rests with the Bank itself, and is based upon provisions laid down in the same policy.

Recommendations:

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• The amendments to article 5.1.a should be removed from the revised policy, or supplemented with a clear, narrow definition of administrative and non-administrative tasks, including elaboration of the tasks falling under each category.

• The proposed addition in article 5.5 of a presumption of harm in the exception to protect the purpose of inspections, investigations, audits and compliance due diligence should be removed. The revised TP should state that a three-part harm test would be used to decide upon disclosure of information/documents in such cases.

• In clauses where a harm test has been alluded to – e.g. article 5.6 – the revised TP should also explicitly state that the Bank should demonstrate the specific and actual harm that would be caused by disclosure.

• The proposed new exception in article 5.5 for selection procedures and comparative assessments of candidates should cease to apply once the competition has been completed.

• The proposed new article 5.10 should either be removed or the policy should make it clear that final decisions on the release of information will be made in accordance with the EIB’s Transparency Policy (i.e. that Member States do not have a veto over the disclosure of information).

**Confirmatory applications**

In cases where access has been refused or only partially provided, the revised TP rightly protects the prerogative of an applicant to submit a voluntary confirmatory application. To ensure decision-making over the latter does function as a form of oversight on original decisions on disclosure, and that applicants are provided with a genuine appeal channel, the revised TP should indicate explicitly that a higher authority than that responsible for the original decision and one not involved in the decision-making on the original application, will be responsible for deciding upon confirmatory applications.

**Recommendation:**

• The revised TP should explicitly outline the procedure for handling confirmatory applications, ensuring that these are decided upon by a standing authority e.g. Secretary General, and one higher than that/those responsible for decision-making on original applications. The former should, furthermore, not be involved in the decision-making on original applications.

**Ethics and corporate governance**

Essential to the EIB’s anti-fraud armoury are the mechanisms in place to ensure its senior decision-makers work to the highest integrity standards and that any conflicts of interest in their work for the Bank are prevented and addressed where they arise. Transparency is an essential component in the prevention of fraud and corruption, and efforts to ensure openness in the Bank’s practices should rightly extend beyond a focus only on the activities it finances but also to its own decision-making processes and governance bodies. In this regard, systematic public disclosure of the composition of the governing bodies, of their personal interest/financial assets of members, and of their internal procedures and proceedings is a necessary component. The current practices of the Bank
demonstrate elements of best practice and are in line with existing codes of conduct (e.g. the disclosure of the declarations of interest of the members of the Management Committee), but these practices need to be applied more consistently across all the Bank’s governance structures to embed transparency and accountability mechanisms into all decision-making bodies.

Recommendations:

- Reinstate the ‘Ethics’ and ‘Corporate Governance’ sections of the revised TP.
- **Reference should be made in the revised TP to the proposed transparency provisions below.**

  Annex 1 of the TP (‘Information routinely disseminated’) should duly be amended to include the CVs, internal rules of procedure, declarations of interest, meeting agendas and minutes of all governance bodies.

  - Members of all EIB governance bodies (Board of Governors; Board of Directors; Management Committee; Audit Committee) should be obliged to complete **public** declarations of financial interests. The declarations should be made available on the website of the EIB in open, searchable formats. Notifications of updates made to declarations should be made, and historical versions of declarations should also remain publicly available.

  - The (provisional) agendas and minutes from meetings of all governance bodies should be made publicly available on the EIB website, in a systematic and timely manner, subject only to the confidentiality provisions as described in the exceptions section of the TP.

  - The results of votes and explanations of votes by the Board of Directors should be made public.

  - The conflicts of interest reported at meetings of all EIB governance bodies should be recorded in the minutes. Notification of these conflicts of interest and subsequent recusals from agenda items/votes should be made available on the EIB website as is the current practice for the Board of Directors.

  - A register of gifts received by members of the EIB’s governance bodies, in their capacity as members thereof, should be maintained and published on the EIB website.

  - A register of the events attended by members of the EIB’s governance bodies, in their capacity as members thereof, should be maintained and published on the EIB website.

- Furthermore, the codes of conduct for members of the EIB governance bodies should be amended to include these provisions.

**Public procurement**

Reflective of the guiding principles of openness and transparency governing EIB activities, the Transparency Policy should **include a specific section on public procurement done on its own account.** This should specify, in particular:

- the EIB’s obligation, under the EU Financial Regulation (Regulation (EU, EURATOM) No 966/2012), to publish contract and award notices for all tenders done for its own account – and at least for those with a value greater than 25 000 EUR. This would in fact be a codification of existing EIB practice.

- That the EIB will require all promoters to whom the EU Directives on public procurement apply, to publish procurement notices in the Official Journal of the European Union, **and** that
links to corresponding notices on the TED website will be featured on the EIB’s own website (e.g. within project summary sheets).

Debarment (or ‘exclusion’) is an important mechanism to protect public procurement from corrupt and fraudulent activity, and the release of information on debarred individuals and companies further harnesses the deterrence effect that this tool can play to prevent future abuses.²

- The EIB should therefore include in its revised policy a commitment to publish its debarment decisions, and a list of debarred individuals and entities – as is the current practice of the World Bank, for example. This should at least be done in cases where the EIB has itself established that an individual or entity has engaged in ‘prohibited conduct’, and subsequently debarred the concerned party, in contrast to those parties prevented from participating in EIB-financed projects or operations due to registration in the European Commission’s Central Exclusion Database. Provided the EIB has confidence in the integrity and comprehensiveness of its investigations, publication of information on these debarred individuals and entities should be seen as an additional safeguard against abuse of EIB funds.³

- Annex 1 of the TP should be revised to include a register of all debarred entities and individuals.

Furthermore, TI-EU calls on the EIB to accede to the Multilateral Development Banks’ Cross-Debarment Agreement.

**Whistle-blowing**

Whistleblowers play a crucial role in identifying fraudulent, illegal or corrupt activity, often at potentially serious personal or professional risk. Echoing the legal obligations placed on EU civil servants, the EIB Whistleblowing Policy requires Bank staff to report “any suspected or presumed incidents of illegal behaviour in the activities of the Bank or of serious misconduct or serious infringement of the Bank’s rules, policies or guidelines….“⁴ To support individuals in fulfilling this duty, it is noteworthy that the EIB provides guidance on how to make a whistleblower report, including essential provisions on how whistleblowers will be safeguarded from retaliatory actions for having spoken out and their identity protected.⁵

The Bank’s whistleblowing arrangements should be underpinned by clear information and transparent procedures to ensure consistent and systematic treatment of whistleblowing reports,

² Cross-debarment agreements, whereby public institutions and international financial institutions enforce one another’s debarment decisions, can be a further bulwark against corruption and fraud, particularly in the development arena. Unfortunately, the EIB has still not signed up to the Multilateral Development Banks’ Cross-Debarment Agreement, despite its stated commitment to fighting corruption and fraud in its own activities and the projects it finances.


⁴ EIB Whistleblowing Policy, section II.

⁵ For best practice on internal whistleblowing arrangements, see the British Standards Institute Whistleblowing Arrangements Code of Practice, available at http://shop.bsigroup.com/forms/PASs/PAS-1998/
and the equal treatment of individuals coming forward with information. Anchoring whistleblowing rules in both the transparency and anti-fraud procedures at the Bank will help to ensure that they are effective and that staff and individuals providing contracting or consultancy services to the Bank have the confidence to step forward and make use of reporting channels.

In addition, while transparent, internal whistleblowing arrangements contribute directly to underpinning the integrity of the EIB and its staff, the scope of the Bank’s activities means that information from external whistleblowers – e.g. borrowers, project-related parties, and indeed the public - also plays a vital role in combating fraud and corruption. The right of citizens to report wrongdoing is a natural extension of the right of freedom of expression, and is linked to the principles of transparency and integrity. The absence of effective protection can, however, pose a dilemma for whistleblowers: they are often expected to report corruption and other crimes, but doing so can expose them to retaliation. While the current Anti-Fraud Policy imposes reporting obligations on borrowers and provides for reports from other external sources, these provisions are minimal. For both internal and external whistleblowing mechanisms to be truly effective, individuals need to be provided with adequate, clear and accessible information on how to report so-called ‘Prohibited Conduct’, and to be aware of how the information they report will be dealt with by the EIB. (This is aside from the separate complaints mechanism which deals strictly with maladministration.)

**Recommendations:**

- The EIB should reintroduce specific reference to its whistleblowing arrangements in the revised TP, in order to ensure wide promotion of the possibilities for both external and internal reporting.
- Explicit commitment should be made to disseminating information on:
  - the range of reporting channels available, including mechanisms to report information to regional offices;
  - how whistleblowers will be protected; and
  - on the information to be publically disclosed on the outcomes of fraud and corruption investigations resulting from whistleblower reports.
- The EIB should make a specific commitment to provide information on the possibilities to report ‘Prohibited Conduct’ to communities affected by EIB projects.
- The information called for above should be made publicly available on the EIB website and, where pertaining to external whistleblowing, in a dedicated and accessible form.

By ensuring whistleblowing features within its Transparency Policy, the EIB can demonstrate its recognition that a culture of openness is vital to enabling staff, contractors and project-related parties to come forward to report fraud and corruption, and concurrently promote the importance of such reporting to all parties affected by EIB activities. In such a way, the anti-fraud and anti-corruption protections provided by robust – and aligned – EIB policies can be fully harnessed.7

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6 Building on current practice e.g. the webpage on How to report fraud and corruption, available at http://www.eib.org/about/accountability/anti-fraud/reporting/index.htm

7 For more information, please see the Transparency International International Principles for Whistleblower Legislation, available at http://www.transparency-se.org/Whistleblower-Principles_final_web.pdf