MEMORANDUM

on the

European Investment Bank's Public Disclosure Policy (Draft II)

London
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ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · http://www.article19.org

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I. Introduction

This Memorandum analyses the European Investment Bank's (EIB) Public Disclosure Policy (Draft II) (draft Policy), released on 20 October 2005, for consistency with international and European standards regarding freedom of expression and the related right to information. The EIB first adopted an information disclosure policy in 1997 and this was amended in 2002. Another comprehensive review process is currently underway, and the documents analysed herein represent the EIB's most recent thinking in this area.

The draft Public Disclosure Policy released in October works in tandem with a number of other documents, two of which – the Rules on Public Access to Documents (Access Rules) and Sources of EIB Information (Sources) – are included as Annexes to the draft Policy. Other relevant documents include the Code of Good Administrative Behaviour for the staff of the European Investment Bank in its relations with the public (Administrative Code) and Guidelines on Fighting Corruption and Fraud (Corruption Guidelines).[1] These various documents will be referred to in this Memorandum by the bracketed names provided above, while references to all of the documents comprising the information disclosure system of the Bank will be referred to simply as the Disclosure Policy.

ARTICLE 19 set out in some detail its concerns with the existing policy in a 2004 Memorandum.[2] That document was resubmitted to the EIB in July 2005, as a formal submission to the present policy review. An ARTICLE 19 representative also participated, as a member of the Global Transparency Initiative (GTI), a global movement working for greater openness at the international financial institutions (IFIs),[3] in a roundtable held on 29 June 2005 to discuss the ongoing information disclosure policy review.[4]

The EIB was created in 1958 under the Treaty of Rome, which also created the European Community. The EIB claims a dual legal status both as a European Union institution and as a bank with autonomous legal personality. All EU Member States are shareholders of the EIB and provide its capital, and each is eligible for EIB loans. The EIB is also increasingly making loans to countries outside of the EU.

Our 2004 Memorandum set out in some detail ARTICLE 19's views on the legal obligations of the EIB in relation to openness. Since then, moves have been taken to bring the EIB, formally and unequivocally, within the ambit of the legal regime for openness within the European Union, in particular EU Regulation 1049/2001[5] and the Aarhus Convention.[6]

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[1] All of these documents are available at: www.eib.org.
[2] This Memorandum is available at: http://www.article19.org/pdfs/analysis/eib-information-policy.pdf.
[3] See: www.ifitransparency.org.
[4] The meeting was sponsored by CEE Bankwatch Network and Friends of the Earth Europe, in cooperation with the Members of the European Parliament and attended by several EIB representatives.
[5] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001.
[6] *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*. UN Doc. ECE/CEP/43, adopted by the European Community at the

ARTICLE 19 very much welcomes the information policy review instituted by the EIB and notes that there has been a good process of consultation around this policy review. The Disclosure Policy includes some very positive features, such as a strong statement of the presumption of disclosure, a clear and strong statement of the benefits of openness and a commitment to review the policy on a rolling three-year basis.

At the same time, we cannot but express our strong disappointment with the very limited advances the new Disclosure Policy makes in terms of actually ensuring access to the information it holds. The single most serious failing of the review is the fact that the Access Rules, which, crucially, contain the exceptions to the right of access as well as a number of other formal provisions, have not been amended. The EIB is proposing to wait until after the legal developments noted above have been adopted in final form. We note, first, that there is no need to wait until this point to amend this document. If the Bank's Access Rules were amended now in a manner that provided fulsomely for the disclosure of EIB documents, they would be sure to meet, and perhaps even go beyond, the new expected obligations. There would thus be no need to conduct a further review after that point, presumably the only reason the Bank has decided to wait until that point. Indeed, it is hard not to take the proposed delay as a sign of bad faith, and that the EIB will indeed amend the Access Rules, but to the minimal extent required to conform to its new legal obligations.

Second, regardless of the first point, it makes little sense to go through an involved and time-consuming review if central elements of the policy are not being addressed. This is exhausting and taxing on the resources of those civil society groups that have engaged in this review process and also quite inefficient for the EIB itself.

Other concerns include the failure of the Disclosure Policy to implement in practice its stated commitment to a real presumption in favour of disclosure, the confusion that remains between the systems providing for routine disclosure and those relating to request-driven access, the very significantly overbroad regime of exceptions, including a tendency to classify documents based on type rather than a risk of harm, the and poor procedural systems relating to request-driven access, and the absence of strong provisions relating to the promotion of the policy.

This Memorandum includes a number of general comments on the Disclosure Policy, as well as more detailed comments on its substance. The latter are organised around the GTI's Charter for IFI Transparency. Although this is still a draft document, it has undergone a long process of consultation and can be said to represent a wide degree of consensus among civil society organisations regarding principles for IFI openness. Furthermore, it has a solid basis in international standards including not only the European Union documents noted above,[7] but also more general international standards, including, Recommendation (2002)2 of the Committee of Ministers of the Council of

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Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001.

[7] The Aarhus Convention and Regulation 1049/2001. See notes 5 and 6.

Europe (Council of Europe Recommendation),[8] which elaborates the right to access to information in the context of the *European Convention on Human Rights*,[9] and the ARTICLE 19 publication, *The Public's Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),[10] a standard-setting document based on international human rights treaties, as well as international best practice.[11]

II. General Comments

ARTICLE 19 has a number of general concerns with the Disclosure Policy. First, we note that the fact that various aspects of the Disclosure Policy are spread out over four key documents, as well as some subsidiary documents, is extremely confusing for users, making it difficult to understand the precise implications of the different statements and how they work together. It also gives rise to a real possibility of policy confusion, with different statements, or at least different stresses, in different documents undermining the coherence of the document. A number of apparent contradictions are noted below, in the Specific Comments. This is a particular problem, for example, in relation to exceptions, where different statements in different documents give a very different sense of what is or is not included within the regime of exceptions. Other multilateral banks, such as the World Bank, have a single comprehensive policy document for information disclosure and it would be far preferable if the EIB adopted this approach.

Second, the various documents do not clearly and properly distinguish between two very different forms of access – routine disclosure and request driven access – and the overall regime tends to undermine the request-driven system. The lack of differentiation is reflected, for example, in the heading used to describe the section addressing routine disclosure, which is 'Disclosure of Information', whereas this properly describes both routine and request-driven processes. It is reflected in the absence of a clear statement on the right to request and receive documents, subject only to the regime of exceptions, in the principles section of the draft Policy.

It is reflected in the inclusion of specific statements relating to request-driven releases mixed among the routine disclosure provisions. For example, paragraph 43 of the draft Policy states that the Bank will, on request, release information from its own environmental and social impact assessments. However, we assume that the Bank will release all information on request, subject to the exceptions. To provide specifically for the request-driven release of certain documents is confusing and may imply that other documents will not be released upon request.

Finally, confusion between request-driven access and routine disclosure is reflected in the many statements in the routine disclosure section of the Disclosure Policy that state that

[8] On Access to Official Documents. Adopted 21 February 2002. Available at: http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm.
[9] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.
[10] (London: ARTICLE 19, 1999). Available at: http://www.article19.org/pdfs/standards/righttoknow.pdf.
[11] The ARTICLE 19 Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression. See UN Doc. E/CN.4/2000/63, 5 April 2000, para. 43.

documents will not be released. Non-release should be left to be considered in light of a specific request and the regime of exceptions; it should not be addressed through blanket denials of this sort in the provisions on routine disclosure. This point is further elaborated under Principle 3: Routine Disclosure.

Third, the policy appears to be based on an assumption that it is acceptable for the EIB simply to accept prevailing secrecy practices in the banking sector, or even claims of confidentiality by its business partners. This is reflected, for example, in paragraph 27 of the draft Policy, which talks about respecting banking secrecy and even more forcefully in Article 4(3) of the Access Rules, which states that information which 'has been identified to the Bank as being confidential' will not be disclosed. This is inappropriate. The Bank is a public sector actor, not a private bank. As such, it must accept certain obligations associated with that status, including openness. Furthermore, many banking practices are based on convenience or long-standing practices of secrecy rather than any legitimate secrecy interest, and should, therefore, not be followed. This approach negates the considerable leverage that the Bank can and should, as a major banking player, exert on the sector as a whole, or at least in relation to its own lending activities, in terms of promoting greater openness and changing increasingly unacceptable levels of secrecy, even in relation to private banks.

No doubt there are limits to the extent of the Bank's leverage, but it should at least subject its own lending operations to a clear policy that, while protecting legitimate commercial interests, does not defer to other rules and practices. Certainly it should not allow its business partners effectively to cast a shadow of secrecy over operations relating to them.

Fourth, key procedural aspects of request-driven access are left to be determined in accordance with the Administrative Code. This is a generic document, which covers the Bank's responses to all requests, queries and complaints. Apart from Article 10, this Code is in no way specifically oriented towards information requests. As a result, its provisions are in important respects inappropriate to the information context (some examples are provided and critiqued below). Instead of relying on the Administrative Code, the Disclosure Policy should include separate and specifically tailored provisions relating to information requests.

Fifth, quite a lot of the material in the draft Policy appears to be descriptive in nature and hence out of place in a policy document. This includes, for example, all of paragraphs 20-5 describing the EU Institutional Set-up, and most if not all of paragraphs 26-30, dealing with Working with Banking and Financial Sectors. This material should not be in the draft Policy; perhaps it could be included in an introductory or background section.

Recommendations:

- Consideration should be given to fundamentally reworking the Disclosure Policy into one clear, accessible and coherent document to avoid the current situation where it is confusing and at points apparently contradictory.
- The whole Disclosure Policy should be reviewed to ensure that it is clearer and

more coherent regarding the different rules that relate, respectively, to routine and request-driven disclosure.

- The Disclosure Policy should assume a more proactive role for the Bank, setting out ways it will use its leverage to promote greater openness in the banking sector and in relation to its business partners, rather than simply accepting long-standing banking secrecy practices.
- The Disclosure Policy should provide for a separate and specifically tailored set of rules relating to the processing of information requests.
- The descriptive paragraphs in the Disclosure Policy, noted above, should be removed and perhaps placed in an introductory section.

III. Specific Comments

As noted above, this section of the Memorandum is organised around the nine principles of the Charter for IFI Transparency. The actual principles are quoted at the beginning of each section and the Disclosure Policy is analysed in light of that principle. The analysis also refers to the commentary to the principles, also contained in the Charter, which elaborates in some detail on the implications of each principle.

III.1 Principle 1: The Right of Access

The right to access information held by IFIs is a fundamental human right which applies regardless of the source of the information (who produced the document), and whether the information relates to a public or private actor.

Paragraph 4 of the draft Policy sets out a strong and well-worded presumption of disclosure which, although it lacks the language of rights, largely conforms to this principle. Unfortunately, however, the detail of the Disclosure Policy does not respect this presumption. A key aspect of the presumption is that all information held by the institution in question, apart from information covered by a narrow and carefully tailored regime of exceptions, is subject to disclosure. However, at numerous places, the Disclosure Policy fails to respect this principle. The list of exceptions provided for in the box at paragraph 39 of the draft Policy, for example, is simply a list of types of documents without any reference to harm or, in the language of paragraph 4, 'a compelling reason for non-disclosure'.

The problems with the regime of exceptions will be covered more fully below. The problem, however, goes beyond simply adapting or rewording some of the exceptions. It appears that no attempt has been made to ensure that the presumption of disclosure contained in paragraph 4 is reflected in the overall tenor and approach of the document. In this respect, we cannot help but be suspicious that paragraph 4 is designed to serve the same function as almost identically worded 'presumptions' in the disclosure policies of other IFIs; that is, that it is intended more as an exercise in public relations than an actual underpinning of the policy.

The principle of maximum disclosure also means that all information held by IFIs should be subject to disclosure. Article 1(3) of the Access Rules, however, restricts the application of the Disclosure Policy to information "concerning a matter relating to policies, activities or decisions falling within its [the EIB's] sphere of responsibility." There is no reason to place conditions of this sort on the scope of information covered and they introduce an additional ground for refusing access to information which is confusing and may be abused. Article 3 of Regulation 1049/2001, in contrast, states: "This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union."[12]

Similarly, pursuant to Article 1(2) of the Access Rules, the Disclosure Policy only applies to European Union citizens, or legal or natural persons residing in the European Union or a State in which the EIB conducts its activities. This is inappropriate as a matter of principle and unfortunate as a matter of practice. Best practice access to information laws at the national level allow anyone to access information, consistent with international guarantees of freedom of expression and information, which apply to 'everyone'. There is no justification for limiting the policy in this way. The recently adopted Public Communications Policy of the Asian Development Bank: Disclosure and Exchange of Information, for example, applies to everyone. Why, for example, should an NGO working on a thematic issue involving the EIB but based outside of the EU or a target country be denied access to relevant information?

NGOs and others often work in global coalitions which reflect the global interest in transparency and the activities of the IFIs but Article 1(2) of the Access Rules prevents them from pursuing their interests.

Finally, paragraph 18 of the draft Policy provides that while the general policy principles apply to the whole EIB, including the European Investment Fund, the specific rules do not and that separate rules on access to EIF documents are published. First, it is not clear from this statement which parts of the whole Disclosure Policy apply to the EIF and which do not. Second, we are of the view that, notwithstanding their different operations, practically all of the rules and standards should apply to the EIF in the same way as they do for the rest of the EIB Group. If it were strictly necessary to exempt the EIF from the application of a certain rule, this could be stated specifically in the Disclosure Policy.

Recommendations:

- The whole Disclosure Policy should be reviewed and amended as necessary to bring it into line with the principle of maximum disclosure. This implies, among other things, that exceptions really are restricted to cases of a 'compelling reason for non-disclosure'.
- The presumption of disclosure should apply to all information held by the EIB, regardless of when it was produced or who produced it, and not only to information falling within its 'sphere of responsibility'.
- Everyone should benefit from the right of access, not just European Union citizens

[12] See also paragraphs 10 and 11 of the preamble.

and those living in EIB target countries.
- The whole Disclosure Policy should apply to the EIF; as strictly necessary, the EIF could be exempted from the application of certain provision in that Policy.

III.2 Principle 2: The Right to Request Information

Everyone has the right to request and to receive information from IFIs, subject only to the limited regime of exceptions, and the procedures for processing such requests should be simple, rapid and free or low-cost.

The Disclosure Policy does incorporate a right to request and receive documents. However, the language relating to this should be clearer and more explicit and it should be included explicitly as a transparency principle; at present, the right to request is only covered implicitly under Principles of Transparency.

Article 2 of the Access Rules provides for requests for information to be lodged in writing, including by email, to a central address. Consideration should be given to also allowing for requests to be made via any EIB office, or via project implementers (who may be placed under a contractual obligation to forward such requests to the EIB, a simple enough matter for them). Similarly, consideration should be given to allowing for requests to be made orally. It may be noted that Article 10 of the Administrative Code clearly envisages oral requests and it is unclear how these two provisions inter-relate. Regardless, these amendments would make the right of access far more practical for individuals who do not have Internet connections.

Article 2(3) of the Access Rules provides for the EIB to ask for clarification for requests which are imprecise. Consideration should be given to providing for Bank staff to assist requesters who are having problems formulating their requests. Furthermore, to assist requesters, a register should be made available, including over the Internet, listing the key documents and types of documents held by the EIB.

The Access Rules do not deal with the question of the language in which requests may be submitted. It should be clear that requests made by project affected people may at least be submitted in any official language of the project country and consideration should also be given to allowing for requests in indigenous languages which are not official languages.

The Administrative Code sets out the timelines for responding to requests. Article 13(1) gives Bank staff two months to respond to requests for information. Article 13(2) states that where a request raises complex issues, there may be a further delay in responding, but that the applicant will nonetheless receive a definitive reply "as soon as possible."

The time limit in Article 13(1) is excessive and we note that it is not tailored specifically to information requests but covers all requests and complaints. As noted above, specific rules relating to processing information requests should be adopted. Article 8 of Regulation 1049 states that either a response or access must be provided in 15 days. Principle VI(3) of the Council of Europe Recommendation states: "A request for access

to an official document should be dealt with promptly." Time limits in national laws very rarely allow more than 30 days to answer a request.[13]

The phrase "as soon as possible" in Article 13(2) is not sufficiently circumscribed to give full effect to the right to information, and could be abused to deny access indefinitely. Consistent with access to information legislation in many countries, Regulation 1049 provides for an extension of the response period for an additional 15 days provided that the applicant is notified in advance of the delay. Failure to respond within the time limit is to be treated as a deemed refusal, thereby entitling the applicant to make a complaint to the Ombudsman.[14] Article 8 of the Access Rules does appear to cover deemed refusals.

Article 2(4) of the Access Rules grants Bank staff the discretion not to follow-up a request for information if it is of an "excessive or patently disproportionate nature." This provision is not found in national laws and may be abused. It may be appropriate to refuse vexatious requests, or requests which would unduly divert the resources of the Bank. The notion of excessive, on the other hand, is highly subjective and does not relate the refusal to a legitimate Bank interest. Furthermore, many 'excessive' requests may be avoided if Bank staff are required to assist requesters in formulating their requests.

Article 12(4) of the Administrative Code grants Bank staff the discretion to refuse to respond to requests for information where these are of a "repetitive or inappropriate nature." With no set criteria regarding what constitutes a "repetitive" or "inappropriate" request, this provision could be abused. For example, if a number of persons in a community are concerned about the same issue, and each sends a separate request for information, could the Bank rely on this provision to refuse to acknowledge their concerns on the basis that they are repetitive? ARTICLE 19 suggests that a more appropriate formulation is that provided for in the Council of Europe Recommendation, which states that a request for access may be refused if the request is "manifestly unreasonable."[15]

Article 5 of the Access Rules provides that applicants may be given access either by consulting the document on the spot or by receiving a copy, and that documents will be provided in an 'existing version and format'. Requesters should have the right to specify which form of access they prefer, and access should be provided in that form, subject to protecting the integrity of delicate records. Restricting access to existing formats is too limiting. For example, where Bank staff can, using technology they can easily access, extract information from a database or process it into a more user-friendly form, this should be done.

Article 7 of the Access Rules states that applicants may be charged a fee to cover costs associated with making documents available. The Disclosure Policy should provide for the publication of a central set of rules relating to costs and specify that applicants will only be liable for reasonable expenses related to processing requests. The Council of

[13] Note 8.
[14] Articles 7 and 8.
[15] Note 8, Principle V(6). Reasons for the refusal must still be provided. See Principe V(7).

Europe Recommendation states: "A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs incurred by the public authority."[16] Regulation 1049 states that charges for documents "shall not exceed the real cost of producing and sending the copies."[17]

Recommendations:

- The right to request and receive information should be set out clearly in the principles section of the draft Policy.
- Consideration should be given to allowing requests to be lodged either orally or in writing, and via the channels noted above rather than just one central processing point.
- Bank staff should be required to assist requesters who are having difficulty formulating their requests.
- The Disclosure Policy should address the question of the language in which requests may be lodged, which should at least include the official national languages for requests from project-affected people.
- Much shorter time limits should be provided for responding to information requests, and the possibility of extending these time limits should be more clearly circumscribed.
- Article 2(4) of the Access Rules should be removed and, if necessary, replaced with a provision dealing with vexatious requests.
- Requesters should, subject to maintaining the integrity of a record, be able to specify the form in which they wish to access information, which should include reasonable processing of information by Bank staff using available technology.
- The Disclosure Policy should provide for the publication of a schedule of costs for accessing information which only allows for reasonable fees which do not exceed the actual costs associated with producing and sending the copies. Requests satisfied electronically should, as a result, be free. Consideration should be given to providing for lower fees for impecunious requesters and/or requests from project-affecting people.

III.3 Principle 3: Routine Disclosure

IFIs should routinely disclose a wide range of information about their structure, policies and procedures, decision-making processes, and country and project work in a timely fashion, and in a language and via a medium that ensures that interested stakeholders can effectively access it.

We reiterate our concerns with the title of the section of the draft Policy dealing with routine disclosure, namely 'Disclosure of Information'. The confusion this title may give rise to is exacerbated by the inclusion of the sub-section on 'Provision for Complaints' in the section on routine disclosure. The complaints section should be a primary section of its own, to make it clear that it applies not only to routine disclosure but also to request-

[16] *Ibid*., Principle 8(2).
[17] Article 10(1).

driven disclosure. Finally, as noted above, paragraph 43 of the draft Policy is quite obviously a request-driven provision and should not be included here.

The purpose of the regime of exceptions is to ensure protection for legitimate secrecy interests. The purpose of the section on routine disclosure, on the other hand, is to ensure that at least a minimum selection of documents will be publicly available. Where the provisions on routine disclosure include statements which bar access to information, as is unfortunately frequently the case in the draft Policy, this confuses the role of routine disclosure with the role of exceptions. It also runs the risk of giving rise to contradictions between these two parts of the policy, as well as preventing implementation of the principle of maximum disclosure. We therefore recommend that all statements which have the effect of restricting disclosure be removed from the routine publication section of the draft Policy.

A good example of this problem is found in paragraph 38 of the draft Policy, which states, among other things, that where disclosure of a project summary for a private sector project which requires an EIA 'may adversely affect the promoter's operations', the Management Committee may refuse to disclose it. In the first place, the phrase 'may adversely affect the promoter's operations' is very seriously overbroad. Disclosure of an EIA which indicated that the project was an environmental disaster would no doubt affect the promoters' operations but this would surely be a reason to disclose rather than withhold the information. The term 'may' is also simply too low a standard in this context. Rather, a serious likelihood of the requisite harm should be required. In all of these respects, this provision would be at odds with an appropriately drafted regime of exceptions. Furthermore, an appropriately drafted regime of exceptions would already protect any legitimate interests of the promoter, rendering repetition in the routine disclosure section unnecessary.

In most other cases, the exceptions woven into the provisions on routine disclosure fail to establish a clear risk of harm and, instead, simply list types of documents that will not be released. Paragraph 42 of the draft Policy, for example, provides that the Board Project Report for private sector projects will not be made available. There is no requirement of any harm or even a suggestion of any legitimate interest that needs protection. Similarly, paragraph 50 provides that publicity for private bond issuance is restricted for confidentiality reasons. If this is a type of confidentiality that is already set out in the regime of exceptions, there is no need to repeat it here. If it is something different, then it is probably not legitimate and, if it is, it should be included in the regime of exceptions.

The box provided at paragraph 39 of the draft Policy clearly belongs in the regime of exceptions rather than in the section on routine disclosure. Our discussion of the (very serious) problems with this paragraph is provided under the Limited Exceptions part of this analysis.

In some cases, we specifically disagree with the exceptions included in the routine disclosure section. For example, paragraph 53 provides that the agenda of the Board's monthly meeting, minutes and voting records are confidential. Other IFIs release agendas

and minutes and release of the voting records is a key way to promote accountability of the Board.

The last sub-paragraph of paragraph 46 of the draft Policy provides that the Bank does not 'object in principle' to other parties releasing information. This is positive but it should be made more explicit. It is common for those lodging requests at the national level to be refused access to documents on the basis that an international partner, such as the EIB, has asked for them to be kept confidential. This provision should be sufficiently clear to avoid that possibility. Paragraph 47 is clearer in this regard, stating simply that the EIB has 'no objection' to the release of information by financial intermediaries.

Consideration should be given to adopting a translation and dissemination framework relating to documents covered by routine disclosure so as to ensure that relevant information is accessible to project-affected populations. While dissemination via the website is clearly an important vehicle, many locally affected people will not be able to access this information. Paragraph 99 of the draft Policy does refer to translation into other languages in the context of wide interest in a particular document, but far more attention needs to be given to this important issue.

Recommendations:

- The section entitled 'Disclosure of Information' should be renamed, for example to Routine Disclosure, and the sub-section on 'Provision for Complaints' should be moved out of this section and be styled as a primary section of its own.
- This section should not include any restrictions on access but simply provide a list of documents which will be disclosed, and at what point, leaving the matter of whether they may be disclosed earlier, not disclosed or other documents disclosed, to be dealt with through the system for request-driven access, in tandem with the regime of exceptions.
- The Disclosure Policy should make it quite clear that the EIB does not object to the release of information by other parties.
- The Disclosure Policy should include provision for a set of rules relating to local dissemination of routinely disclosed information to ensure that it is accessible to project-affected people.

III.4 Principle 4: Limited Exceptions

The regime of exceptions should be based on the principle that access to information may be refused only where the IFI can demonstrate that disclosure would cause serious harm to one of a set of clearly and narrowly defined interests listed in the policy and that the harm to this interest outweighs the public interest in disclosure.

The regime of exceptions is the most disappointing aspect of the new draft Policy. It is almost identical to the old regime due to the non-reform of the Access Rules, goes far beyond what is permitted by either the Aarhus Convention or Regulation 1049/2001 and is inconsistent with the more progressive standards being adopted by other IFIs.

The principle above sets out three conditions before non-disclosure may be justified. First, the information must relate to a clearly defined interest set out in the policy. Second, disclosure must threaten to cause harm to that interest. Third, the threatened harm outweighs the public interest in disclosure, known as the public interest override.

These standards are all clearly recognised in international standards. Principle IV of the Council of Europe Recommendation provides:

> **IV. Possible limitations to access to official documents**
>
> 1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
>
> i. national security, defence and international relations;
> ii. public safety;
> iii. the prevention, investigation and prosecution of criminal activities;
> iv. privacy and other legitimate private interests;
> v. commercial and other economic interests, be they private or public;
> vi. the equality of parties concerning court proceedings;
> vii. nature;
> viii. inspection, control and supervision by public authorities;
> ix. the economic, monetary and exchange rate policies of the state;
> x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.
>
> 2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.[18]

This list of legitimate interests is clear and precise, and disclosure may only be refused where necessary in a democratic society and where this is proportional to the benefit to the protected interest. Furthermore, Principle IV(2) sets out a public interest override.

Article 4 of Regulation 1049 provides for a regime of exceptions. Article 4(2) states that access shall be refused if, among other things, it would undermine the protection of the commercial interests of a legal or natural person, court proceedings or legal advice, or the purpose of inspections, investigations or audits. However, this does not apply where there is an overriding public interest in disclosure. Again, all three elements of the test are included in this system of exceptions.

Article 4 of the Aarhus Convention allows for non-disclosure of information only where disclosure would adversely affect one of a given list of legitimate interests. It then goes on to state: "The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions in the environment."

Principle 4 of the ARTICLE 19 Principles also provides a list of legitimate interests, along with a requirement of harm to one of those interests before disclosure may be

[18] Note 8.

refused. It formulates the public interest override as follows: “Even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm.”

Article 4 of the Rules sets out the regime of exceptions to the right of access. Article 4(1) provides: “Access to all or part of a document shall be refused where its disclosure would undermine the protection of,” and then lists seven reasons for either the total or partial refusal to disclose a document, including:

- international relations or the financial, monetary or economic policy of the Community, its institutions and bodies or a Member State;
- privacy;
- court proceedings;
- legal advice;
- the purpose of inspections, investigations and audits;
- commercial interests; and
- professional secrecy, including professional banking ethics, rules and practices.

Article 4(2) provides for the confidentiality of internal documents or documents received from a third party relating to a decision which has not yet been taken, where disclosure would undermine the Bank’s decision-making processes. The former shall apply even after the decision for which the document was prepared has been taken.

Article 4(3) provides for the non-disclosure of information concerning third parties where the information has been identified to the bank as being confidential, where there is an undertaking of confidentiality between the third party and the Bank or “where the information is otherwise of such a nature that it is subject to the Bank’s confidentiality towards third parties.” These exceptions do not apply where the third party has consented to disclosure (Article 4(4)).

Pursuant to Article 4(5), the exceptions generally last for 30 years but, where they relate to privacy, commercial interests or ‘internal management powers’, they may be extended beyond this time period.

Various other exceptions, or reference to exceptions, are set out in other parts of the policy, including paragraphs 26-30 and 39 of the draft Policy, all dealing with business confidentiality, which attracts undue attention in the Disclosure Policy. It is of the greatest importance that the regime of exceptions in a disclosure policy be clear and coherent, and that overlap be avoided as it is likely to lead to confusion and conflicting standards. The multiple references to business confidentiality in the Disclosure Policy seem to justify the common complaints of external parties to the effect that a significantly overbroad approach is applied in this area. This complaint is also supported by the fact that the business confidentiality exceptions are very overbroad, as pointed out in the detailed critique set out below. Regardless, all of these provisions should be brought together in one place and rationalised into a clear and coherent statement on this issue.

In our view, as noted above, paragraphs 26-30 and 39, do not appear to have any place in the policy at all. They talk vaguely about the need to conform to undefined notions of banking and business secrecy and the confidentiality of market sensitive information, and suggest that the EIB will conform to standards applied by the banking community, without regard to the fact that much of this community is in the private sector, and hence not subject to the same general disclosure obligations as a public institution such as the EIB, although paragraph 29 also says, in what appears to be a contradictory point, that the EIB will seek to conform to the practices of other IFIs in this area. Paragraph 30 states that the policy achieves a balance between transparency and business confidentiality. We disagree strongly with this as a statement of fact but it has no place in the policy, basically being a self-congratulatory claim that the policy has gotten it right.

The list of examples of confidential business information provided in paragraph 39 of the draft Policy is both inappropriate and very seriously flawed. It is inappropriate because a disclosure policy should lay down the principles which underpin openness rather than provide specific examples of secret information. It is seriously flawed because it completely fails to conform to the three part test. None of the items on this list are interests to be protected; they are all categories of documents. Closely related to this, none include a requirement of harm (as they are categories of documents rather than interests, this would in any case be impossible). Furthermore, no attempt appears to have been made to draft them in narrow language. They include items such as 'procurement documents' and 'EIB's internal analysis' (of what, one must ask?). As a result, every one of them covers a large number of documents which do not relate to any secrecy interest and even extend to information which the Bank itself already routinely discloses.

To give just one clear example of this, paragraph 39 includes legal opinions. While these might in some cases be confidential (for example, where they would reveal the EIB's legal strategy in a contentious case), in other cases they would clearly not be and, indeed, it is common for organisations themselves to disseminate certain legal opinions in press releases and other public documents, for example to justify their behaviour. Clearly an exception which includes documents which the EIB may itself wish to disseminate is not appropriate.

Many of the specific exceptions found in Article 4(1) of the Access Rules are based on legitimate interests. The exception in favour of professional secrecy, however, is undefined and effectively grants the Bank wide latitude to avoid disclosing a document. It may be noted that national freedom of information laws do not include exceptions of this sort, even though banking operations are normally included within their ambit. We note that commercial confidentiality is already protected in Article 4(1)(vi). The professional secrecy exception is, therefore, not legitimate.

Some of the interests in Article 4(1) are phrased in unduly broad terms. Article 4(1)(i) refers to the public interest in international relations and various financial matters. This may be confusing and it would be better simply to refer to harm to these interests. Similarly, the exception in favour of court proceedings, at Article 4(1)(iii) is overbroad

and should be redrafted to focus on legal confidentiality; many aspects of court proceedings are or should be public.

Another concern with Article 4(1) is that it fails to articulate the harm test very clearly, and the reference to undermining the protection of the interests may be misinterpreted. Instead, it should refer clearly to harm or prejudice to the listed interests.

The exception in favour of internal documents, at Article 4(2) of the Access Rules, is very seriously overbroad and its reliance on the generic notion of decision-making processes is clearly open to abuse since the disclosure of practically any information may be considered by Bank staff to harm decision-making. The policy should identify the specific threats that disclosure might pose to decision making – such as preventing the free and frank provision of advice and/or undermining the success of a decision through premature disclosure – and focus the exception on these.

The EIB proposals may be contrasted, for example, with the recent disclosure policy adopted by the Asian Development Bank, The Public Communications Policy of the Asian Development Bank: Disclosure and Exchange of Information, paragraph 126 of which covers, in relevant part:

> 1. Internal information that, if disclosed, would or would be likely to compromise the integrity of ADB's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from Directors, their Alternates, Director's Advisors, members of Management, ADB staff, and ADB consultants.
>
> 2. Information exchanged, prepared for, or derived from the deliberative and decisionmaking process between ADB and its members and other entities with which ADB cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ADB and its members and other entities with which ADB cooperates by inhibiting the candid exchange of ideas and communications, particularly with respect to policy dialogue with developing member countries.

Article 4(3), again dealing (repetitively) with third party confidentiality, is similarly hopelessly overbroad. It effectively grants third parties a right of veto over the disclosure of information, which is quite inappropriate and may be used to seriously undermine the policy. It is not subject to a harm test; indeed, the third party does not even need to identify any legitimate interest they may be affected. The protections in favour of legitimate business confidentiality and privacy are sufficient to protect third parties and they should not be supplemented by this provision.

The Disclosure Policy does not include any reference to a public interest override.

Article 4(5) envisages an unduly long period of confidentiality. Consideration should be given to reducing this to 20 or even 15 years. Furthermore, one of the three exceptions which may justify ongoing confidentiality beyond 30 years is internal management powers. This is precisely the sort of exception which is likely to be abused and which an overall time limit is supposed to address. Whereas private interests like privacy and

business confidentiality may need ongoing protection beyond the time limit, it is hard to imagine a case where internal management requirements persisted beyond this period.

It is well-established under international law that, where only part of a document is legitimately secret, the rest should be disclosed, a concept known as severability. For example, the Council of Europe Recommendation states:

> If a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains. Any omissions should be clearly indicated. However, if the partial version of the document is misleading or meaningless, such access may be refused.[19]

This has been affirmed by the European Court of Justice, which stated, in *Council v. Hautala*, that "a refusal to grant partial access would be manifestly disproportionate for ensuring the confidentiality of the items of information covered by one of those exceptions …"[20]

The only reference in the Rules to this notion is in Article 4(2), which states that "all or part of a document…shall be refused if disclosure of the document would undermine the Bank's decision-making processes." It is unclear whether Bank staff will apply this approach in the context of other exceptions.

Recommendations:

- All of the exceptions should be brought together in one place and crafted into a clear and coherent statement of exceptions.
- Paragraphs 26-30 and 39 of the draft Policy should be removed. If anything from among these is retained in the policy, it should be the statement in paragraph 29 that the EIB conforms to the disclosure standards of other IFIs. Paragraph 39, in particular, is inappropriate and fundamentally at odds with the stated approach, which is to refuse to disclose information only where there is 'a compelling reason for non-disclosure'.
- The exception in favour of professional secrecy should be removed from the Access Rules.
- The exception in favour of international relations and various financial interests should be drafted more narrowly and, in particular, should apply only in the context of a risk of specific harm to these interests.
- The exception in favour of court proceedings should be redrafted to focus on legally confidential information rather than everything about court proceedings.
- The harm element in Article 4(1) of the Access Rules should be made more specific, referring to a likelihood of harm rather than undermining the protection of the interests.
- The exception in Article 4(2) of the Access Rules in favour of internal documents should be substantially revised and list the specific harms which are sought to be avoided.

[19] Note 8, Principle VII(2).
[20] *Council of the European Union v Heidi Hautala,* Case C-353/99 P, 6 December 2001, par. 29.

- Article 4(3) of the Access Rules should be removed.
- The Disclosure Policy should incorporate a public interest override for all exceptions.
- Consideration should be given to reducing the overall time limit to 20 or even 15 years and the category of 'internal management powers' should be removed from the list of interests which may justify ongoing confidentiality.
- Severability should be incorporated into the Disclosure Policy so that, where only part of a document is confidential, the rest should still be disclosed.

III.5 Principle 5: Access to Meetings

A presumption should be established giving a right of access to key IFI meetings and information about what transpired in these meetings should be disseminated.

ARTICLE 19 recognises that none of the IFIs include access to meetings in their disclosure policies and that, in practice, access to governing meetings is almost unknown. We consider, however, this situation to be unfortunate and believe that opening up meetings would contribute significantly to the democratic legitimacy of these bodies without in any way compromising their effectiveness. We therefore suggest that consideration be given, perhaps on a pilot basis to begin with, to opening up meetings. If, contrary to our expections, this does lead to serious problems, the pilot could be stopped.

Recommendation:
- Consideration should be given, at least on a pilot basis, to opening up the meetings of governing bodies.

III.6 Principle 6: Whistleblower Protection

Whistleblowers – individuals who in good faith disclose concerns about wrongdoing, corruption or other malpractices – should expressly be protected from any sanction, reprisal, or professional or personal detriment, as a result of having made that disclosure.

The provisions in the EIB Guidelines on Fighting Corruption and Fraud provide fairly strong protection to whistleblowers but this is limited in two key ways. First, only those who expose fraud are covered by these protections. Reporting on other types of wrongdoing, such as criminal activity or serious incompetence, is not covered. Second, only internal reporting, apparently within the OLAF framework, is covered by the protection. Where an employee is of the view that this would be ineffective – for example because he or she could not be ensured appropriate protection in case of internal reporting or the risk of danger is imminent – whistleblowers should still be protected for disclosures outside of this internal framework.

Recommendations:
- The protection currently provided for reporting on fraud should be extended to cover other wrongs, as well as serious incompetence or an imminent threat of harm.

- Protection for whistleblowers should extend to disclosures outside of the internal framework envisaged in the cases noted above.

III.7 Principle 7: Appeals

Anyone who believes that an IFI has failed to respect its access to information policy, including through a refusal to provide information in response to a request, should have the right to have the matter reviewed by an independent and authoritative body.

The EIB's Disclosure Policy contains relative strong provisions on appeals, in part due to the fact that it is situated within the framework of the European Union, which has an Ombudsman's office. Paragraph 56 of the draft Policy refers to the right to complain to the Secretary General of the Bank whenever one is of the view that the standards outlined in the policy have not been respected, the procedure for which is set out in the Administrative Code (Article 16). Paragraph 57 refers to the right of EU citizens and those residing in the EU to file a complaint with the Ombudsman, who reports to the EU Parliament. The Ombudsman may, on an 'own initiative' basis, also consider complaints from outside the EU. Paragraph 58 provides that, where an individual is unable to make a complaint to the Ombudsman, the Bank's Inspector General will investigate the case.

Paragraph 58, in particular, is a welcome addition to the Disclosure Policy and clearly an attempt to address the problem of complaints by non-EU residents or citizens. At the same time, this is not a full resolution of this problem and consideration should be given to setting up a specific, independent body which could receive and decide upon complaints relating to information access. Over the longer term, consideration should be given to the possibility of working with other IFIs to establish one central, independent and authoritative information appeals body for all IFIs.

Recommendations:

- Consideration should be given to setting up a specific body to deal with information disclosure complaints, which could receive such complaints from anyone.
- Over the longer term, consideration should be given to establishing one central, independent and authoritative body to process information disclosure complaints from all IFIs.

III.8 Principle 8: Promotion of Freedom of Information

IFIs should devote adequate resources and energy to ensuring effective implementation of the access to information policy, and to building a culture of openness.

The Disclosure Policy devotes almost no attention whatsoever to the issue of promoting implementation and building a culture of openness, apart from statements in the principles section about how central the policy is to the work of the EIB. Indeed, it is hard not to contrast the level of attention that business confidentiality receives with the almost complete lack of attention to this crucial issue. The Disclosure Policy could reference a number of key promotional activities such as:

- the provision of training to staff;
- building access to information into the employee incentive and appraisal structures;
- public outreach efforts relating to the Disclosure Policy;
- putting in place a central system for tracking requests which is itself a public document;
- publishing and widely disseminating an annual review of implementation of the access to information policy (a sort of internal audit);
- putting in place an effective and progressive system of record management; and
- providing for individual sanctions for wilful obstruction of access to information.

Recommendation:

- Far more attention should be given in the Disclosure Policy to promotional measures to ensure effective implementation in practice of the policy, once adopted in revised form.

III.9 Principle 9: Regular Review

Access to information policies should be subject to regular review to take into account changes in the nature of information held, and to incorporate increasingly progressive disclosure rules.

This is one area in which the Disclosure Policy is strong, with paragraph 14 of the draft Policy making a clear commitment to regular formal reviews every three years and a willingness to receive comments on a rolling basis throughout the year.