Counter Balance
Challenging Public Investment Banks



Is the EIB up to the task in tackling fraud and corruption?

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CREDITS

Counter Balance – Challenging public investment banks is a European coalition of development and environmental non-governmental organisations with extensive experience working on development finance and the international financial institutions as well as campaigning to prevent negative impacts resulting from major infrastructure projects.

Counter Balance's mission is to make European public finance a key driver of the transition towards socially and environmentally sustainable and equitable societies.

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EXECUTIVE SUMMARY
Is the EIB up to the task in tackling fraud and corruption?

Challenges for the EU Bank's governance framework



The European Investment Bank (EIB) is the financial arm of the European Union, tasked under the EU Treaties with "making long-term financing available to sound investments" that support the priorities of the European Union. As such, it has financed thousands of projects across the world since its creation 60 years ago, and has become the largest multilateral lender in the world.

This report digs into the EIB's policies for combatting fraud and corruption practices, and aims at identifying key challenges for the EU Bank's governance framework in this regard.

Over the years, the EIB has put in place a web of internal mechanisms and governance structures to reduce risks of fraud and corruption as parts of its multiple financial operations. The Bank has also publicly committed to apply a "Zero tolerance to fraud and corruption policy" and claims to be able to track all its investments down to the last Euro.

But the critical conclusions of this report provide a rather different picture: **at the time being, the EIB is not up to the task in tackling fraud and corruption, partly due to weaknesses in its internal mechanisms, and partly to the unsatisfactory governance framework in which its activities are inscribed, together with a lack of adequate external scrutiny on its activities, including by OLAF**. This significantly jeopardizes the soundness of European investments in and outside of Europe.

Our objective is not to question the good faith or commitment of the EIB staff to fight fraud and corruption, but rather to assess if the mechanisms currently in place are strong enough to genuinely implement a "zero tolerance towards fraud and corruption policy". Our conclusion is unfortunately very clear: NO.

- **European law fails to make the EIB accountable.** Under current EU law, **the EIB anti-fraud**

due diligence is set on "policy" ground and does not fall under EU law, therefore the EIB operates in a "free zone" with much discretion. In effect, **the EIB's internal governance rules are simply internal rules, and there are no sanctions that can be applied by the courts if they are broken or unenforced**. There is not even EU legislation that provides for the EIB to have in place anti-money laundering rules. The EIB thus operates in a hermetically-sealed bubble of discretion – protecting it from legal challenge where that discretion is exercised to turn a blind eye to corruption.

- **The EIB's light touch on fraud and corruption jeopardises the EU's financial interest and creates risks to the use of public funds**. While on paper the EIB has internal procedures and tools to implement its stated "zero tolerance towards fraud and corruption policy", the report questions the way these policies and procedures are actually implemented, and identifies some weaknesses and missing elements that actually endanger the whole scheme.

- From the analysis of four cases of EIB investments tainted by corruption (loans to Volkswagen group, Passante di Mestre and MOSE infrastructure projects in Italy, Sostanj coal power plant in Slovenia), we conclude that **the EIB has a "variable geometry approach" to fight fraud and corruption** and lacks a systematic and stringent way to deal with politically sensitive cases. **These four investments alone saw EUR 2,8 billion spent on corrupt projects.**

- As far as **external scrutiny** is concerned, relations with European and national anti-corruption bodies already exist, and some efforts have been undertaken by the Bank to strengthen the link with national bodies. Nevertheless, **the current system is dysfunctional, and the limited legal framework in fact jeopardizes the credibility of the entire EU anti-fraud system**.

In light of these findings, the report issues the following key recommendations to reinforce the Bank's internal mechanisms, governance structures and the EU legal framework to fight fraud and corruption at the EIB:

1. **Changing the rules of the game to set a better framework for the EIB anti-corruption fight**

   a. The concept of the Protection of the EU's Financial Interest needs to be expanded and reinforced, as it currently limits the aim of the EIB's interventions to the simple recovery of its funds when a scandal occurs. Corruption damages the very image and raison d'être of the European Union far beyond the "financial interest" of the EU, hence new rules of the game for the EIB should be framed within an expanded concept of "EU Financial Interest". A new European Regulation on the EIB's due diligence obligations should be adopted. At minimum, the EIB should be included under the scope of the EU Anti-Money Laundering Directive.

   b. Making the best of the cooperation with European authorities (OLAF and the European Public Prosecutor's Office (EPPO)): ensure that EPPO pro-actively covers EIB cases by investigating, prosecuting and bringing to judgment the perpetrators of offences affecting the Union's financial interests via EIB operations

   c. Clarifying responsibilities towards national authorities: a revised Anti-Fraud policy should make it compulsory for the EIB to refer suspected prohibited conduct to national authorities and prosecutors, even when outside of the European Union.

d. Making the EIB more accountable towards other European Institutions:
Reinforcing the European Parliament's scrutiny over the EIB
European Commission to make a better use of the tools at its disposal to get the EIB on the right track
The European Court of Auditors should be awarded full rights to audit the EIB regarding all its operations

2. **Reinforcing internal mechanisms to fight fraud and corruption at the EIB**

a. Reviewing and strengthening key internal policies:
- A strengthened Anti-Fraud policy should provide the EIB with tools to effectively freeze projects in which credible suspicions have been raised and to break contracts with corrupt clients. Recalling loans cannot be considered as a sufficient way to deal with fraud and corruption.
- Ensure more transparency on the handling of investigations
- Raising the bar on protection of whistleblowers

b. Better implementing existing procedures and demonstrating political willingness: a stringent implementation of the EIB Exclusion Policy would be a litmus test: excluding the VW group is a positive signal, but the same should be applied to the Italian companies involved in the MOSE and Passante di Mestre schemes – and to the new consortiums of which they may be part.
- Reinforce due diligence and control over intermediated operations via commercial banks and investment funds.
- The EIB should publish the Beneficial Ownership (BO) of its clients on its website
- Beefing up contractual clauses with EIB clients in relation to fraud and corruption

3. **Revamping internal governance**

a. A stronger role for the EIB Board of Directors in relation to the fight against fraud and corruption is necessary

b. The independence of the Bank's investigative unit must be strengthened

c. the control functions of the Bank need to be appropriately and sufficiently staffed in terms of both financial and human resources.

During the negotiations over the next EU budget for the post-2020 period, in which the EIB is likely to be a strategic implementing partner for the European Commission, identifying solutions to existing problems is necessary. It is high time to expose and plug key loopholes and weaknesses which allow European public funding to be misused, and to open up space for developing proposals for fundamental reforms in the business model and practices of institutions like the EIB.

At a time when trust in public institutions, and in particular those of the EU, is declining, we deem it crucial to hold them to account, enhance their transparency, strengthen their resistance to corporate capture and accelerate their democratization. It is also the duty of public institutions to ensure that their funds are not misused and really benefit citizens and territories in order to re-gain this trust. Indeed, the perception of corruption in Europe is certainly one of the many factors fuelling mistrust in public institutions.

Therefore, we call on the European institutions and EIB shareholders to do their utmost to enhance the control over the use of public funds.

Introduction:

The European Investment Bank (EIB) is the financial arm of the European Union, tasked under the EU Treaties with "making long-term financing available to sound investments" that support the priorities of the European Union. As such, it has financed thousands of projects across the world since its creation 60 years ago and has become the largest multilateral lender in the world. Over the years, the "EU Bank" (as the EIB is known) has expanded its operations via various capital increases decided by its shareholders – EU member states – and is currently responsible for implementing numerous financial instruments under the EU budget on behalf of the European Commission. The best known of these instruments is the European Fund for Strategic Investments (EFSI) – the financial pillar of the Investment Plan for Europe, the flagship investment initiative of the Juncker Commission.

Given the expanding scale of its financing, it would be of course unrealistic to imagine that none of these investments have been affected by fraud and corruption. The traditional focus of the EIB on large-scale infrastructure projects – a sector particularly prone to corruption practices – and cross-border operations also represents a serious risk factor.

In its mission as a watchdog, the Counter Balance coalition has been monitoring several problematic projects supported by the Bank which have been – or still are – under investigation for fraud and corruption. In various reports we documented several of these controversial cases on which the Bank failed to take sufficient action. These projects range from huge infrastructure projects (such as Italian motorways or mega gas pipelines) to investments in multinational corporations (loans to Volkswagen as part of the so-called "Dieselgate" scandal) and equity in investment funds.

In parallel, we identified broader trends of state capture and illicit financial flows through public financing of large infrastructure projects at EU level. These phenomena are not confined to the EIB: they also affect various public banks, as well as the European cohesion and regional development funds. We also realised that many controversial practices, from conflict-of-interests-generating revolving doors between government and industry to un-transparent use of taxpayers money via shadowy investment funds, were actually often legal. This was the topic of our report *"Corrupt but legal: Institutionalised corruption and development finance"*.

A range of diverse organisations such as Transparency International in its "*Investing in integrity*?" report and the European Ombudsman have also identified serious transparency and accountability challenges at the EIB.

In addition, the European Parliament has taken a strong position via its annual resolutions on the EIB. In 2016, for the first time it called on the Bank to *"stop further loan disbursements to projects under ongoing national or European corruption investigations"*, pointing especially to road projects in Italy for which the EIB is called "*once again, to suspend all forms of funding*". Recently, in May 2018, the Parliament reiterated its call and pointed to a set of EIB-backed projects that testify to flaws in the Bank's due diligence and control functions, despite positively noting *"the importance given by the EIB to its policy of zero tolerance of fraud, corruption and collusion"*.

In response, the EIB has stood firm and reiterates its narrative: the Bank has a "Zero tolerance to fraud and corruption policy", it is second to none in that field among public banks, and is able to track all of its investments down to the last Euro. According to the Bank, its control functions and external scrutiny by other institutions are working properly.

This report confronts this narrative by documenting actual practices. Our objective is not to undermine the reputation of the Bank, but to seek ways to enhance the control over the use of public funds. This report does not come in a vacuum. It is an attempt to draw lessons from previous experiences and case studies, and to analyse the structural reasons why the EIB ends up financing projects tainted by fraud and corruption.

This study will explore possible solutions and issue key recommendations linked to both internal EIB processes, as well as to broader governance questions, including the links between the EIB and national and European anti-corruption authorities.

During the negotiations over the next EU budget for the post-2020 period, in which the EIB is likely to be a strategic implementing partner for the European Commission, identifying solutions to existing problems is necessary. It is high time to expose and plug the key loopholes and weaknesses allowing the misuse of European public funding, and in parallel to make room for proposals for fundamental reforms in the business model and practices of institutions like the EIB.

At a time when trust in public institutions, and in particular those of the EU, is declining, we deem it crucial to hold them to account, enhance their transparency, strengthen their resistance to corporate capture and accelerate their democratization. In turn, it is also the public institutions' duty to ensure that their funds are not misused and really benefit citizens and territories in order to re-gain their trust. Indeed, the perception of corruption in Europe is certainly one of the many factors fueling mistrust in public institutions.

The key questions guiding this report are: **Is the EIB up to the task in tackling fraud and corruption? And how can the structural issues identified be addressed? Following the European elections, what are the challenges for the EU Bank's governance framework?**

Firstly, we will present what are the tools at the disposal of the EIB to fight fraud and corruption, both via its internal mechanisms and governance structures and via its relations to other European and national bodies and institutions. Then, the second chapter will identify structural weaknesses of this system, using case studies to illustrate them. Finally, we will highlight key recommendations to reinforce internal mechanisms, governance structures and the EU legal framework to fight fraud and corruption at the EIB.

Our key finding is that, under current EU law, the EIB is in effect a "free zone" where staff have very wide powers of discretion in respect of the enforcement of anti-corruption policies. Despite being an EU body, there is no EU public law that governs how the EIB is governed. In effect, the EIB's internal governance rules are simply internal rules and there are no sanctions that can be applied by the courts if they are broken or unenforced. There is not even EU legislation that provides for the EIB to have in place anti-money laundering rules. Such anti-corruption policies that exist are enforced through private contracts with borrowers: as such, they are not open to challenge by third parties, such as ordinary citizens, unless they have a direct interest in the contract. Whilst the contracts typically give the EIB the right to suspend or withdraw a loan where there is suspicion of fraud or corruption, they impose no duty to do so. Likewise, the contracts may contain clauses requiring borrowers to prevent and deter prohibited conduct - but they place no obligation on the EIB to enforce these measures. The EIB thus operates in a hermetically-sealed bubble of discretion – protecting it from legal challenge when that discretion is exercised to turn a blind eye to corruption.

> The EIB Group has a vital role to play in the fight against fraud and corruption. As the largest multilateral borrower and lender by volume, fighting fraud and corruption is by necessity an important part of what we do. We therefore need to be mindful of the risk of fraud and corruption and ensure that this risk is mitigated to the fullest extent possible, for example through appropriate training and prevention strategies, including robust integrity clauses in the Bank's contracts… the EIB does not lend at any cost.
>
> Through its "zero tolerance" policy, the EIB Group is firmly committed to fighting Prohibited Conduct – which includes not only fraud and corruption, but also collusion, coercion, obstruction, money laundering and financing of terrorism – impacting any of its activities or operations. The EIB seeks to combat fraud and corruption throughout the project cycle, by preventing it wherever possible and detecting and addressing it where it has occurred. The zero tolerance policy means that corruption is never acceptable. Wherever and whenever there is an allegation of any form of Prohibited Conduct, the Fraud Investigations Division will investigate and appropriate action will be taken.

Figure 1: Extract from EIB President's foreword to Anti-Fraud Activity Report 2016

Chapter 1:
How does the EIB fight fraud and corruption?

On paper, the European Investment Bank has put in place a web of internal mechanisms and governance structures to reduce risks of fraud and corruption as parts of its multiple financial operations.

In parallel, given the EIB's central function as the financial arm of the European Union, other institutions such as the European Anti-Fraud Office (OLAF) are also mandated to ensure that these internal mechanisms are effective and that EU's financial interests remain protected. In addition, the EIB also collaborates with national authorities (such as prosecutors and anti-corruption bodies) investigating corruption. These structures and interactions are nominally intended to protect the EIB's interests and ensure the integrity of its operations.

The main elements of the EIB's anti-corruption safeguard policies are detailed below. This chapter will show that there are internal procedures and policies that should provide the EIB with tools to implement its stated "zero tolerance towards fraud and corruption policy". But as Chapter 2 will demonstrate, the problem lies in how these policies and procedures are actually implemented, and how some of their weaknesses and missing elements are actually endangering the whole scheme.

As far as external scrutiny is concerned, relations with European and national anti-corruption bodies already exist, and some efforts have been undertaken by the Bank to strengthen the link with national bodies. Nevertheless, as Chapter 2 will show, the current system is dysfunctional, and a limiting legal framework gives too much leeway to the Bank to use a light approach to the fight against fraud and corruption.

- **A complex set of internal governance structures and policies**

– Key bodies in charge of ensuring the EIB's integrity:

First of all, the **Inspectorate General**, through its Fraud Investigations Division (IG/IN) is the internal EIB service that is mandated to conduct independent investigations into allegations of fraud and corruption – in EIB jargon "prohibited conduct"[7] – in the operations or activities of the Bank. It is independent from the EIB operational services in charge of appraising and implementing the projects financed by the Bank. Its mission and key tasks are detailed in the Fraud Investigations charter.

The Inspectorate General leads on investigations brought by internal staff or external stakeholders, but can also launch so-called "Proactive Integrity Reviews" for projects that deserve further monitoring[2]. In this regard, the IG/IN can initiate such reviews itself, independently from other bodies in the Bank. The methodology for these reviews has been revised in 2017 to better detect and evaluate indications of potential irregular handling and performance in EIB-funded projects, and its implementation started in 2018. IG/IN is also in charge of cooperating with the European Anti-Fraud Office (OLAF, see below) and potentially tasking external experts to carry out investigations.

The workload of this service has increased from 95 new allegations in 2011 to 116 in 2014, and 184 in 2018. Most of these allegations originate from inside the EIB, and are related to fraud cases. The figures below are extracted from the EIB's 2017 Activity Report[3] and its Anti-Fraud 2018 report[4].

1 - For the EIB, „prohibited conduct" includes fraud, corruption, coercion, collusion, obstruction, money laundering and financing of terrorism.

2 - As of January 2019, 12 staff in IG/IN are assigned to assess and investigate cases referred to IG/IN. Other staff are assigned to policy and proactive integrity work.

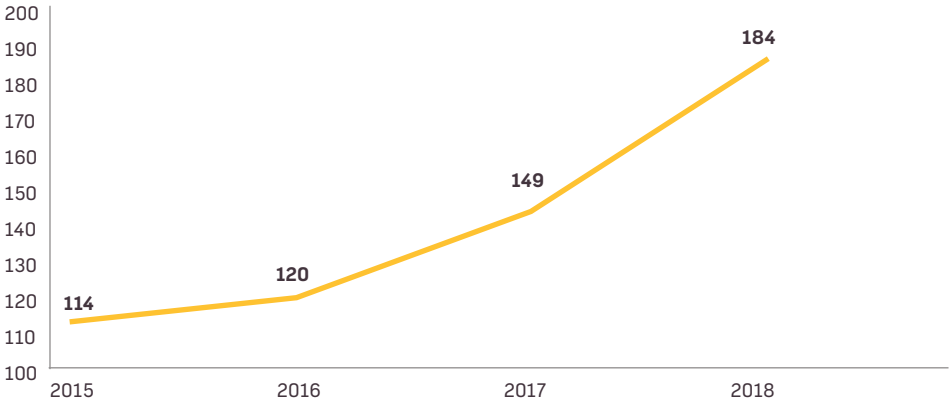


Figure 2: extracted from EIB Anti-Fraud Activity Report 2018

2018 CASE ACTIVITY SUMMARY

EIB and EIF	2016	2017	2018
New cases received during the year	120	149	184
Cases closed during the year	116	126	120
Of which at assessment stage	*	*	52
Cases under active investigation (as at 31 Dec)	113	136	200
Cases under monitoring (as at 31 Dec)	**40**	**59**	**44**

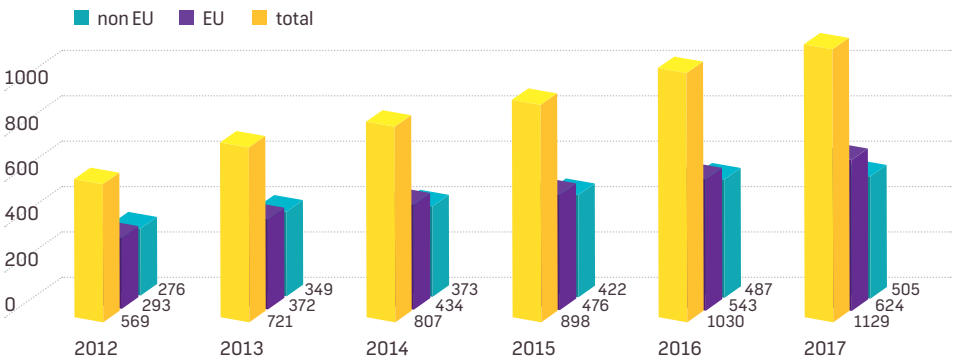
* Following the creation of two separate units within the Division in 2018 (the intake and Analysis Unit and the Investigations Unit) and changes to the assessment methods, there have been some changes to the statistical groupings.

Then, the **Office of the Chief Compliance Officer (OCCO)** is an independent function of the Bank, whose mission is to control the compliance risk of the EIB, which is defined as *"risk of legal or regulatory sanctions, financial loss, or loss to reputation of a member of the EIB Group may suffer as a result of its failure to comply with all applicable laws, regulations, staff codes of conduct and standards of good practice"*[5]. OCCO specifically aims at early detection, monitoring and discouragement of potential breaches in the application of the EIB rules on ethics and integrity, such as his Code of Conduct. Like the IG/IN, the Chief Compliance Officer reports directly to the EIB President and the EIB Audit Committee.

The type of activities OCCO conducts ranges from due diligence of EIB counterparties and operations – including on tax evasion and tax avoidance issues – to checking the compliance of staff and governing bodies with internal ethics guides and ensuring that procurement selection procedures comply with internal regulations. This office is also in charge of implementing the so-called AML-CFT framework (anti-money laundering and combatting financing of terrorism) of the Bank. The key mission and areas of activities of OCCO are summarized in the Integrity policy and Compliance charter. When internal capacity is stretched, external companies are hired to fulfil specific tasks[6].

Recent data about OCCO operations are available in its Activity Report 2017, and they show that the number of operations with OCCO involvement increased by 26% over 2016 and 2017. For instance, in 2017 alone, it had to issue 16 clearances for declarations of gifts to EIB staff, and 84 clearances for appointments to external organs, as provided by the EIB Staff Code of Conduct governing inter alia conflicts of interests. Other notable trends include a steep increase in OCCO interventions on EIB operations and reviewing EIB contract clauses with its clients – 1129 cases in 2017 as compared to 1030 in 2016 and 898 in 2015 (see graph below).

OCCO INTERVENTIONS IN OPERATIONS



3 - EIB 2017 Activity report http://www.eib.org/attachments/general/reports/ar_2017_en.pdf

4 - EIB 2017 Anti-Fraud Activity Report https://www.eib.org/attachments/general/reports/ig_fraud_investigations_activity_report_2018_en.pdf

5 - EIB 2017 Activity Report http://www.eib.org/attachments/general/reports/fr2017en.pdf

6 - Among these companies feature Logos IT Services SA (LUX), Control Risks (UK), PWC EU Services (BE), Deloitte Tax & Operations (LUX), Greyhawk Intelligence Group (UK), Dow Jones & Compliance (UK), Sandstone (LUX)

It is important to note that OCCO holds no veto power regarding EIB operations. It only provides advice to the EIB Management Committee and to the Bank's Directors before they approve financing for operations. Nevertheless, based on OCCO's findings, in 2016 14 transactions were either abandoned or re-worked before being presented to the EIB Management Committee[7].

Finally, two specific committees are worth mentioning:

The **Ethics and Compliance Committee** which *"rules and makes decisions on any potential conflict of interest of current and former members of the Board of Directors and the Management Committee, as well as members of the Audit Committee on a voluntary basis"*. The Committee provides opinions on ethical matters relating to how EIB Directors and Management Committee comply with their respective codes of conduct. It is composed of the four longest-serving EIB directors who have volunteered to participate, plus the Chairman of the Audit Committee, according to its operating rules.

The **Exclusion Committee** is a body which came into being after the publication of the EIB Exclusion Policy in February 2018. It is governed by Operating Procedures which detail its mission, remit and composition. The Exclusion Committee has the task of making recommendations to the EIB's Management Committee on respondents' culpability and exclusion decisions. It consists of five members, including three internal EIB staff members – the head of OCCO as well as the head of the EIB's procurement team[8] and a director from the Operations Directorate – and two external independent members appointed by the EIB President for a period of four years maximum, renewable once.

– Reference policies guiding the EIB in fighting fraud and corruption:

– The Anti-Fraud Policy adopted in September 2013 aims at preventing and deterring "prohibited conduct" in EIB activities. It details the principles and key steps under which all EIB services, as well as OCCO and the Inspector General, operate – from project appraisal and integrity due diligence on EIB clients, to the monitoring of project implementation. The sanctions and remedies at the EIB's disposal are also described in this document, as well as the obligations of EIB staff and clients to report suspected prohibited conduct to the Inspector General or OLAF directly. The way EIB investigations are conducted is then further detailed in a set of separate procedures.

– In February 2018, the EIB published its new Exclusion Policy setting the policy and procedures for the exclusion of entities and individuals found to have engaged in prohibited conduct from EIB-financed projects and other EIB activities.

Under the Exclusion Policy, the EIB is empowered to issue an "Early Temporary Suspension" of its client[9] in case of fraud or corruption, which can last 6 months, and be extended up to 12 more months. The Inspector General needs to propose that option to the Management Committee. The suspected client is also informed, and has the right to give replies twice if it opposes the EIB suspension. After replies are received, the Inspector General (IG) consults the Exclusion Committee for its opinion. Then the IG goes to the Management Committee, which ultimately takes the decision.

The early suspension may lead to a fully-fledged exclusion. Once more, the process would need to be initiated by the Inspector General for cases involving events that took place less than 10 years earlier. This procedure cannot cover a case for which a final judgment (under criminal prosecution and conviction) has been issued more than 5 years earlier. The IG proposes the exclusion to the Exclusion Committee, and informs the Client. The Exclusion Committee reviews the case, can organise a hearing, gets replies from the client, etc. The Committee seeks unanimity, but if not possible, a decision is taken by simple majority. Then, it makes recommendations to the Management Committee, which ultimately takes the decision.

The outcomes of exclusion procedures range from light options such as sending a letter of reprimand to the client, to an exclusion for maximum 5 years. Exclusion means the client cannot win new contracts under EIB projects, cannot be *"on-lent the proceeds of any loan made by the bank"* or enter any relationship with the Bank. But the exclusion cannot have a retroactive effect. It may also be extended to 5 more years if the client once more engages in a prohibited conduct. In specific cases, conditions can be put on the client, and if it fulfils them, then the exclusion period can be reduced, or exclusion lifted. Also, the client has to appoint a "Compliance monitor", supposed to be independent, to report directly to the Exclusion Committee how the client is fulfilling the conditions.

7 - OCCO 2017 Activity report http://www.eib.org/attachments/general/reports/eib_occo_activity_report_2016_en.pdf

8 - The EIB's head of Procurement in lending activities

9 - Under the EIB exclusion policy, what we called here „client" is named „respondent"

In terms of transparency of exclusion measures taken, the policy specifies: *"The EIB reserves the right to publish an Exclusion Decision on its website after notification to the excluded respondent in order to reinforce the deterrent effect of the decision"*. As of 23 July 2019, the EIB website reported four entities that had been excluded from EIB support (see below). This is a welcomed step, as in the past the EIB did not publish any such list of debarred entities.

EXCLUDED ENTITIES

The following entities are currently publicly excluded from EIB-financed project and activities:

Name	Excluded from	Excluded until	Type of exclusion
FIR Advisors S.L.	30.09.2016	29.09.2019	Voluntary settlement
Squatin Business Inc.	30.09.2016	29.09.2019	Voluntary settlement
Mr F. Prior Sanz	30.09.2016	29.09.2019	Voluntary settlement
Volkswagen AG	20.12.2018*	19.06.2020	Voluntary settlement

The policy also includes a provision which allows the EIB to enter into negotiated settlements with individuals or entities that have engaged in prohibited conduct. This means that a case can be closed if an agreement is found between the Bank and the client. Indeed, the Inspector General may, after consultation with the EIB President and the Vice-President with oversight of compliance and control, try to reach a settlement with the client. When the settlement negotiations start, the exclusion committee lifts the Exclusion proceedings for 60 days (with potentially an extension of 30 more days). If the negotiations fail, the exclusion procedure re-starts. When the negotiations succeed, the IG is required to inform OLAF, with the possibility for OLAF to provide comments. Then, the Inspector General goes to the Management Committee for final approval.
As of 23 July 2019, five cases of settlements are published on the EIB website, in relation to the following clients:

- Volkswagen AG – published on 20 December 2018
- Iberdrola Ingeniería y Construcción S.A.U. (Iberinco) – published on 5 January 2018
- Mr F. Prior Sanz, FIR Advisors S.L. and Squatina Business Inc. – published on 4 October 2016
- Gama Power Systems – published on 17 August 2015
- Siemens – published on 15 March 2013

- The Codes of Conduct which apply to EIB Staff, Management Committee, Board of Directors and Audit Committee establish the principles and ethical behaviour which EIB staff members, contractors, consultants and members of the governing bodies have to respect[10]. More concretely, they request staff to report conflicts of interest, illegal activities, misconducts or violation of the EIB regulations, policies or guidelines, whether by other staff or clients. Instances of wrong-doing and conflicts of interest have to be reported to OCCO.

The EIB defines conflicts of interest as occurring when: *"the private or personal interests of the members of the staff may influence or appear to influence the impartial or objective performance of their duties"*. This is considered particularly relevant whenever staff are *"related directly or indirectly to or have any interest in a likely beneficiary"* of an EIB loan or guarantee or any other of the Bank's operations. If such conflicts of interest concern a member or former member of the Board of Directors or the Management Committee, the file is escalated to the Ethics and Compliance Committee.

Potential sanctions for violating the code of conduct are disciplinary measures in case of EIB staff. For EIB counterparts or client, contracts can be cancelled, and legal proceedings can be initiated depending on applicable national laws.

- Finally, EIB staff are required to report any suspicion of prohibited conduct immediately after becoming aware of the matter, according to the Whistleblowing policy applying to all staff members and service providers[11]. This policy sets out reporting lines and aims at ensuring protection for any whistleblower. For EIB counterparts, it is the Anti-Fraud policy that sets the requirement to report allegations of prohibited conduct. In addition, OCCO is mandated to provide protective measures for whistleblowers and to penalise any retaliation on whistleblowers.

10 - The EIB Group Staff code of conduct is under review (as of January 2019).

11 - The EIB Whistleblowing is under review (as of July 2019).

- **A special relationship with OLAF**

Due to its pivotal role as financial arm of the EU, the EIB is embedded in a complex and multi-faceted framework of European policies and regulations. As part of this specific position, the EIB is accountable to the European Commission and its anti-fraud body, the European Anti-Fraud Office (OLAF).

OLAF is the only EU body mandated to detect, investigate and stop fraud with EU funds. It carries out independent investigations into fraud and corruption involving EU funds, investigates serious misconduct by EU staff and members of the EU Institutions and is in charge of developing a sound EU anti-fraud policy. Nevertheless, a limit to its mandate is that, while it issues judicial recommendations to national authorities, it cannot conduct criminal investigations and prosecutions itself.

The EIB has a close working relationship with OLAF, which has control over the integrity of the EIB operations. In practice, this means that fraud and corruption cases at the EIB are primarily dealt with by the Fraud Investigations Division (IG/IN), which should promptly notify OLAF of suspected prohibited conduct. Alternatively, allegations of prohibited conduct can also be reported directly to OLAF.

The EIB Anti-Fraud policy requires the EIB staff and governing bodies to cooperate with OLAF *"promptly, fully, efficiently [...] by answering relevant questions and complying with requests for information and records"*[12]. OLAF shall also have access to all relevant data and information at the EIB when conducting an investigation. On the EIB's side, IG/IN needs to notify OLAF of all investigations it opens and to submit quarterly reports about the progress made. Based on these elements, OLAF could then open and lead on its own investigation. An arrangement between the two institutions has been signed in order to provide a framework for this cooperation[13] . What happens in practice is that there is a shared pipeline of cases between IG/IN and OLAF, for example in corruption cases involving both EIB funding and EU funding (the primary focus of OLAF), and investigations may be carried hand in hand even if OLAF is leading, for example through field missions.

But against this de facto division of tasks, OLAF is also entitled to investigate alleged prohibited conduct at the EIB without an investigation by the internal mechanisms of the Bank – according to a 2003 court case at the European Court of Justice[14].

In a reply to a draft of this report, OLAF indicated that it *"has a good relationship with the EIB, with many joint activities and investigations seeking to counter and deter fraud. OLAF has discussed with the EIB how certain areas of its anti-fraud policy could be strengthened, as the Office does with other EU institutions on a regular basis. OLAF also discusses – where appropriate – the implementation of recommendations in concrete cases and is overall very satisfied with the cooperation with the EIB in this respect"*.

- **Growing relations with national authorities, but on a voluntary basis**

According to the EIB Anti-Fraud policy, the Bank "*may refer suspected prohibited conduct to national authorities for further investigation and/or criminal prosecution and provide further assistance as may be requested*". It is important to note that this is not compulsory for the EIB. As argued by the EIB, this is not compulsory in order for the Bank not to put itself into the obligation to report prohibited conduct, and the related persons concerned, in countries where human rights or due process rights are not respected. And in the case of OLAF's involvement in a case, it is up to OLAF to transmit its final report to the national authorities.

In the case of an investigation carried out by a national authority which may involve EIB financing, the IG/IN "*shall, in consultation with the services, liaise with and provide assistance to the national authorities*", whenever required, and also proactively. Here again, nothing is really binding on the Bank, arguably because the EIB does not have the authority to impose its contribution to investigations which are in the hands of national authorities.

This rather passive role for the EIB is reinforced by Article 68 of the Anti-Fraud policy which states: "*In the event of an investigation by judicial authorities, law enforcement, administrative, legal or tax authorities, the Fraud Investigations Division may decide to await the results of such an investigation and request a copy of their findings before taking further action.*"

The EIB's Anti-Fraud policy (article 53) mentions the possibility for the EIB to sign cooperation agreements with law enforcement and dedicated anti-corruption agencies to facilitate the exchange of information on cases of mutual interest concerning suspected prohibited activities. This had led the EIB to conclude various Memoranda of Understanding with various national anti-corruption authorities. Such agreements have been reached with more than twelve authorities in countries such as Italy, Bulgaria, France, Latvia, Malawi, Tunisia, Ukraine and Romania.

12 - EIB Anti-Fraud Policy http://www.eib.org/attachments/strategies/anti_fraud_policy_20130917_en.pdf

13 - The legal basis for cooperation with the EIB is Regulation 883/2013, the Financial and Administrative Framework Agreement (between the European Commission and the EIB) and subsequent Delegation Agreements. The Administrative Arrangement between OLAF and EIB's IG/IN does not create any additional legal obligations but gives a practical and flexible framework for operational cooperation, which can be revised at the request of either party.

14 - European Court of Justice (ECJ) concluded in cases C-11/00 and C-15/00 that OLAF can investigate alleged wrongdoing at the European Central Bank (ECB) and European Investment Bank (EIB). The Court also annulled decisions taken by the ECB and EIB by which they reserved the right to conduct such investigations internally.

For example, the agreement between the EIB and the Tunisian National Anti-Corruption Authority (INLUCC) was signed in 2017, and specifies how mutual exchange of information can become effective and how joint actions such as technical and operating assistance can be implemented in order to prevent and deter irregularities in relation with EIB financed activities in Tunisia. An agreement with the Italian Anti-Corruption Agency (ANAC) was also signed in 2016.

> *"The fight against corruption needs greater international cooperation more than ever. Building a strong partnership throughout Europe is a key step in facing this difficult task,"* said ANAC Chairman Raffaele Cantone.
>
> *"In all its activities the EIB, as the EU bank, applies the criteria of absolute transparency and zero tolerance for acts of corruption, which ultimately generate an additional burden for taxpayers and result in poorly designed or implemented projects: the agreement signed today with the Italian authority meets these criteria perfectly,"* remarked EIB Vice-President Dario Scannapieco.



ITALY

The European Investment Bank and the Italian Anti-Corruption Agency (ANAC) finalised an agreement for combatting fraud and corruption[1] . The MoU was signed in Rome on 13 September 2016 by EIB Vice-President Dario Scannapieco, the EIB Inspector General Jan Willem van der Kaaij and ANAC Chairman Raffaele Cantone.

The MoU allows IG/IN and ANAC to share information obtained during their respective investigations, to cooperate and assist each other in cases of common interest and to provide mutual technical assistance.

Figure 3: extracted from EIB 2016 Anti Fraud report

Nevertheless, while in some cases the EIB liaises with national authorities and law enforcement agencies dedicated to investigate corruption, most of the times there is no necessity for the EIB to relate to these above-mentioned dedicated anti-corruption agencies as they simply do not exist in the vast majority of EU Member States, where the bulk of EIB operations takes place.

15 - https://ec.europa.eu/anti-fraud/policy/european_public_prosecutor_en

16 - http://ec.europa.eu/justice/criminal/files/regulation_eppo_en.pdf

17 - https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en

18 - In May 2018, the European Commission proposed a revision of the OLAF Regulation 883/2013 to address inter alia the relationship between OLAF and EPPO (COM(2018) 338).

19 - https://www.euractiv.com/section/economy-jobs/news/auditors-anti-fraud-policy-recommendations-are-old-news-oettinger-says/

A role for the new European Public Prosecutor's Office?

As explained above, the EIB is mainly dependent on national authorities for judicial investigations, via the national authorities of its clients suspected of fraud or corruption. Currently, only national authorities can investigate and prosecute EU-wide fraud.

This creates a real gap for EU institutions, since existing Union-bodies such as OLAF do not have and cannot be given the mandate to conduct criminal investigations and prosecutions. This gap may be partly filled in the future at European level by the newly created **European Public Prosecutor's Office** (EPPO). Indeed, the EPPO would investigate, prosecute and bring to judgment the perpetrators of offences affecting the Union's financial interests[15].

The idea of such prosecutor is not new, as it was already flagged two decades ago, but it was only in 2013 that the European Commission came up with a proposal to establish the EPPO[16]. The negotiations for its establishment were concluded in autumn 2017 and according to the EPPO Regulation 2017/1939 of 12 October 2017, the EIB (as all other EU institutions, Bodies, Offices and Agencies) is already under an obligation to report to the EPPO about possible criminal offences affecting the EU budget.

EPPO should be an independent and decentralised prosecution office of the European Union with the authority to investigate, prosecute and bring to judgment crimes against the EU budget, such as fraud, corruption or serious cross-border VAT fraud[17]. According to the Commission, it should be based on the principles of effectiveness, independence and accountability. For example, it should be subject to democratic oversight and accountable before the European Parliament, Council and national Parliaments. The EPPO will have a decentralised structure composed of a European Public Prosecutor and European Delegated Prosecutors located in the Member States and embedded in the national judiciary.

A functioning EPPO could be an important development in order to hold the EIB to account on fraud and corruption issues at European level.

But the creation of this institution still raises questions such as how it will cooperate with OLAF[18], and how EIB operations will be covered by the remit of the institution. It also remains unclear when the EPPO will become fully operational – European Commissioner Oettinger indicated 2020 as a possible date[19] – and whether this new institution could make a difference regarding the EIB. In the meantime, more action against fraud and corruption will be needed at the EIB in any case. Eventually, even with a fully functional EPPO, it will still be necessary for the EIB to have in place all the relevant tools to avoid the misuse of its investments.

Case Study 1:
EIB loans to Volkswagen: Dieselgate hitting the Bank?

In September 2015, news broke that Volkswagen (VW) had installed defeat-devices in its diesel cars to rig emission tests, resulting in models emitting pollutants up to 14 less in emission tests than what they did on the street.

Shortly after, the NGO watchdog CEE Bankwatch Network uncovered that the EIB had supported VW, the world's largest car producer, with 19 loans worth EUR 4.3 billion between 2005 and 2015. 14 of these loans were intended for improving fuel efficiency and reducing emissions[20]. Out of them 5 were classified under the Bank's so-called 'climate action' lending[21].

Subsequently, Bankwatch requested the EIB to disclose information on these loans. Despite the reluctance of the EIB to publish much of the information it held, and after alerting the Board of Directors of the Bank, the NGO still managed to access finance contracts for 12 loans made to the company – even if largely redacted of "*commercially sensitive*" information – and the completion reports provided by VW to the Bank at the closure of each project[22].

In the completion report for the "Antrieb RDI" project that Bankwatch accessed, VW reported significant pollutions emission reductions from the project, including reductions in carbon dioxide emissions and oxides of nitrogen. A striking element was the completion report's length of 2 pages, including a cover letter, which seemed to be very little for reporting on a half a billion euro public loan. Unsurprisingly, it turned out later on that this was the loan misused by VW[23].

An opaque investigation system for a misused loan

In September 2015, the website Politico received this comment from an EIB official: "*We are very concerned about the allegations, including indications by VW executives of improper and possibly criminal behaviour.*".

A month later, the EIB President Werner Hoyer announced that thorough investigations were being carried on the use of EIB funds by VW, to make sure they were not linked to the Dieselgate scandal. In a press conference in January 2016, President Hoyer then admitted that the Bank could not rule out that one of the loans to Volkswagen in 2009 has been used to finance a cheating device to rig emission tests, and announced a temporary freeze of the EIB loans to the carmaker[24].

Then, in July 2017, an investigation by OLAF, the EU anti-fraud office, concluded that VW had misused a EUR 400 million loan from the EIB for the "Antrieb RDI" project, confirming the concerns raised by Bankwatch earlier.

Politico reported that OLAF opened investigation OF/2015/1139 in November 2015[25] and found out

20 - An online database of these loans have been uploaded by CEE Bankwatch Network

21 - https://bankwatch.org/project/volkswagens-emissions-scandal-and-the-european-investment-bank#project-news

22 - These documents are available on this Google Drive

23 - See the EIB's statement confirming that this is the alleged fraudulent loan http://www.eib.org/en/infocentre/press/news/all/eib-statement-following-the-finalisation-of-the-olaf-investigation-into-the-possible-misuse-of-eu-funds-and-european-investment-bank-loans-by-the-volkswagen-group.htm



that VW secured the loan by "fraud" and "deception", using the money to develop a diesel engine despite knowing that it would only meet its emissions targets with a defeat device. To our knowledge, VW did not respond to requests for comment by Politico.

In July 2017, OLAF sent a judicial recommendation to public prosecutors in Braunschweig (Germany), who are leading criminal inquiries into VW, asking them to take its findings into consideration. And an OLAF spokesperson indicated that OLAF also issued an administrative recommendation to the EIB to take "active steps" in implementing its anti-fraud policy[26].

But this is not the end of the story. Following these announcements by OLAF, many – from journalists to policy-makers and NGOs – were expecting that the key conclusions and recommendations by OLAF would be made public. This was only done on 18 February 2019, when the EIB published a summary of the OLAF report and a press release on the matter[27].

Trust us, we do the job

In a statement published on its website in August 2017, the EIB claimed that it was analysing OLAF's conclusions in order to "*consider all available and appropriate action*" and to conclude its ongoing internal investigation. The EIB President said: "*We are very disappointed at what is asserted by the OLAF investigation, namely that the EIB was misled, by VW about the use of the defeat device*". In October 2018, he further told EuObserver: "*To be honest, I don't hide the fact that I was furious when I learned more and more about it*"[28]. The Bank also indicated that the suspicious loans have already been fully repaid back in February 2014, and that it was not considering any new loans to VW for the time being.

It is then only on 20 December 2018 that the EIB announced having reached an agreement with Volkswagen AG in relation to the EIB loan "Antrieb RDI"[29]. It further details that, following the OLAF investigation, its internal investigation continued and is now concluded. Indeed, "Volkswagen AG will in turn voluntarily not participate in any EIB project during an exclusion period of 18 months" and "will continue to inform the EIB regarding its Compliance Programme and cooperate with the EIB in the exchange of best practices in relation to compliance standards and the fight against fraud". In addition, Volkswagen will set aside EUR 10 million for environmental and sustainable projects in Europe.

Before this agreement was reached, the EIB indicated that it was monitoring the situation in various Member States where court proceedings were ongoing in relation to the Dieselgate. It is worth noting that there have already been several rulings, and that some investigations were already completed by the time of the publication of this report[30]. For example, in June 2018 Volkswagen has been fined €1bn over diesel emissions cheating by German authorities (the prosecutor in Braunschweig) and did

24 - https://www.euractiv.com/section/transport/news/dieselgate-eib-freezes-new-loans-to-volkswagen/

25 - In OLAF's words, the investigation looked into the possible misuse of EU funds and EIB loans by the Volkswagen Group, which could be linked to the production of engines or devices implicated in the manipulation of the real gas emissions level of vehicles.

26 - https://www.politico.eu/article/vw-secured-eu-money-by-fraud-for-dieselgate-engine-watchdog/

27 - The press release is available here: EIB Press release http://www.eib.org/en/infocentre/press/releases/all/2019/2019-049-eib-publishes-a-summary-of-the-european-anti-fraud-office-report-into-alleged-misuse-of-eib-loan-by-volkswagen-ag.htm
The summary of OLAF report is available here: http://www.eib.org/attachments/press/summary-olaf-report-antrieb-rdi-volkswagen-ag.pdf

28 - https://euobserver.com/environment/143208

29 - http://www.eib.org/en/infocentre/press/news/all/agreement-reached-between-the-european-investment-bank-and-volkswagen-ag-in-relation-to-eib-loan-antrieb-rdi.htm

30 - https://www.theguardian.com/business/2018/jun/13/vw-fined-1bn-german-court-diesel-scandal

not appeal. "Following thorough examination, Volkswagen AG accepted the fine and it will not lodge an appeal against it. Volkswagen AG, by doing so, admits its responsibility for the diesel crisis and considers this as a further major step towards the latter being overcome" the company said in a statement[31]. In the US, as part of a deal with the US Justice Department, VW pleaded guilty to criminal misconduct and agreed to pay $4.3bn to resolve criminal and civil penalties for installing illegal software in diesel engines to cheat US anti-pollution tests[32].

Hence, this story turned out to be an international scandal analysed by national authorities, prosecutors and courts that are considering various types of actions and penalties against the companies who cheated, while the EIB took 1,5 year to sanction VW following OLAF's report, following an untransparent process during which it refused to reveal any information despite the overriding public interest in disclosure.

Transparency under pressure

Several requests for disclosing the OLAF report have been filed, either by Peter Teffer (a journalist at EuObserver) and Bankwatch; but they have been unsuccessful to date. The case has now escalated to the European Ombudsman, challenging the EIB's decision not to disclose the report.

In parallel, the European Parliament, in two resolutions adopted in February and May 2018, called on the EIB to be transparent about its handling of the case and to disclose the report. The Annual report on the control of the financial activities of the EIB for 2016 states the following:

96. [The European Parliament] regrets that the 'Dieselgate' cases raised a number of questions over the fact that Volkswagen had received EIB loans through fraud and deception; asks the EIB to follow OLAF's recommendations on taking active steps in implementation of its anti-fraud policy; underlines the secretive nature of the EIB's handling of the case and urges the bank to disclose OLAF's report on its Volkswagen loan, and to publish as a minimum a meaningful summary of this report;

Again, the EIB refused to share the report with the European Parliament[33]. This stubborn decision was explained to parliamentarians of the Budgetary Control Committee in a meeting behind closed doors on 26 March 2018, during which it the MEPs were granted the possibility to just read the OLAF's report without taking pictures.[34]

In response to a request by EuObserver for disclosure, the EIB referred to exceptions in its Transparency Policy that protect the outcomes of ongoing investigations, which is a usual technique used by the Bank to not disclose any information about corruption cases (see Chapter 2). But in this case, the OLAF investigation is actually closed and its broad conclusion has been publicized in media, so the justification to keep the report secret lied on thin grounds. More shockingly, the EIB declared that it saw "no overriding public interest" in disclosing the OLAF report and internal documents held by the Bank on these loans to VW. This despite the fact that the European Parliament had passed a resolution that clearly expressed such public interest.

This led to outraged reactions such as the one of Finnish MEP Heidi Hautala: ***"It is really a shame that our European Investment Bank is behaving in this way"***. and Bankwatch's Anna Roggenbuck: ***"The EU's bank hides behind its sluggish internal investigation to not explain how it was possible the company was getting public money for environmental improvements whereas it deceived its consumers and threaten the right to clean air for millions EU's citizens"***.

Finally, the EIB disclosed a summary of the OLAF report only in February 2019, while still refusing to disclose the full report. The justification brought by the EIB in its press release is the following: "*The European Investment Bank has today published a detailed summary of the investigation report by the European Anti-Fraud Office (OLAF) into alleged misuse of EIB loan by Volkswagen AG. This was done in accordance with the EIB Group Transparency Policy and considering the strong public interest in this highly exceptional case." "The end of legal proceedings arising from the OLAF investigation and the implementation by the Bank of OLAF`s recommendation gives the possibility to the Bank to publish the summary of the OLAF report.*"

While this disclosure is welcome, the argument used by the Bank of a "strong public interest in this highly exceptional case" stands in stark contrast with previous arguments used by the EIB to deny such overriding public interest in the case.

31 - *Ibid*

32 - https://www.theguardian.com/business/2017/jan/10/volkswagen-confirms-43-billion-us-payment-over-diesel-emissions

33 - https://euobserver.com/political/141178

34 - OLAF provided access to the Final Report and recommendations in a secure reading room to CONT Members, officials of CONT Secretariat and to the persons from political groups designated by the coordinators (from 21 January to 21 February 2019).

What the summary of OLAF report confirms is that OLAF concluded that VW did not report to the EIB that a 'defeat device' had been used and implemented on one of its engine, contrary to its contractual obligations.

As a consequence, OLAF recommended that: *"The European Investment Bank apply all relevant measures vis-à-vis Volkswagen AG as provided for in Section V, Measures to prevent and deter prohibit conduct, of its Anti-Fraud Policy, including entering into a negotiated settlement with Volkswagen AG, in order to safeguard the EU financial interests and reputation. In this respect, it is recommended that the EIB, in its actions towards Volkswagen AG takes into consideration the possible financial advantage VW benefitted from, by obtaining the loan at an advantageous interest rate compared to the market conditions applicable at the time of the conclusion of the finance contract."*

The story did not end here: in March 2019, following a complaint by the EUObserver journalist Peter Teffer, the European Ombudsman ruled maladministration against the EIB and issued the following recommendation[35] to the Bank[36]:

"The Ombudsman considers that release of the summary by the EIB is insufficient, particularly as the report contains several facts which are in the public interest to be disclosed.

She therefore recommends that the EIB should grant public access to the report and recommendation, as well as the internal notes drawn up by the Bank, with redactions only for personal data and any other information which could lead to individuals being identified".

Finally, in July 2019 the EIB replied to the Ombudsman via an 11-page response[37]. In its response, the EIB sticks to its previous position and its argumentation for not releasing the report. But it also adds an astonishing extra reason: the EIB blames the Ombudsman for not agreeing to join a "high-level inter-institutional meeting" with the Bank and the author of the report (OLAF). The Bank said it was "in principle" willing to publish a redacted version of the report, but wanted to sit down with the Ombudsman and OLAF to discuss how to redact it[38]: *"The EIB is of the opinion that the outcome of the present inquiry would have been different if the EO [European Ombudsman] had accepted the EIB's invitation to a high-level inter-institutional meeting"*. And the usual confidentiality argument was used once again: *"the EIB persists in considering that the disclosure of commercial information, shared with EIB clients as part of a banking relationship based on trust and confidence, would result in a loss of confidence of future EIB clients."*

The Ombudsman replied that "it is not our practice on access to documents cases to meet the institution and discuss redactions one by one" and that "furthermore, such a meeting would only needlessly prolong the inquiry yet further for the complainant[39]."

Transparency under pressure

- In this case, the cooperation between the EIB and OLAF functioned well in the end. Indeed, based on OLAF's investigation, the EIB could conclude its own investigation and sanction the client suspected of prohibited conduct.

- There is still a transparency issue, as the EIB refused for 1.5 years to disclose the conclusions of the OLAF report, before eventually publishing a 3 page summary. The claim that there was no overriding public interest in disclosing more information about the report is unacceptable, as confirmed by the European Ombudsman's decision on the case.

Not being able to access the full report, it is delicate to assess whether OLAF judged the EIB's monitoring of its loan of hundreds million euros as appropriate or deficient. It is important not to forget that the EIB awarded public money to carmakers, and that the loan was supposed to help fight climate change.

- A pending question is about the lessons learnt by the Bank from this case. For the moment, apart from claiming that it became more sensitive to Fraud after Dieselgate, the EIB once more refuses to tell more about which lessons were learnt[40] in order for this type of prohibited conduct not to happen again in the framework of EIB loans.

- Now that other carmakers are clearly linked to the scandal, it has also been alleged that other EIB investments may have been misused, such as support to Daimler[41] or Audi[42]. The widening Dieselgate scandal raises questions about the overall due diligence performed by the EIB on its loans to the automotive sector over the past decade.

35 - https://www.ombudsman.europa.eu/en/recommendation/en/111836

36 - EU bodies dodge questions on secret VW loan report, https://euobserver.com/institutional/144565

37 - https://www.ombudsman.europa.eu/pdf/en/115899

38 - https://euobserver.com/institutional/145333

39 - *Ibid*

40 - https://euobserver.com/environment/143208

41 - https://www.reuters.com/article/us-daimler-emissions-eib/eib-investigates-loans-to-daimler-in-light-of-diesel-questions-welt-idUSKCN1G80YV

42 - https://global.handelsblatt.com/companies/audi-ceo-stadler-prosecutors-dieselgate-936578



Case Study 2:
Will EIB financing to fraudulent Italian mega-projects ever stop?

For several years, Counter Balance and its Italian partner Re:Common have documented the EIB's involvement in infrastructure projects in Italy under investigation for fraud and corruption. Back in 2015, Re:Common published the report "Italian Malaffare – European money: Or how the European Union funds Italian infrastructures linked with Corruption". A year later, in April 2016, another report called "Highway to Hell" was published by the two organisations, providing an in-depth analysis of two major infrastructure projects in the Veneto region in Italy: the Passante di Mestre highway bypass, and the infamous MOSE project in Venice. The case of the motorway bypass around Venice – "Passante di Mestre" - and the gigantic movable-dam project around this city – MOSE – are intertwined when it comes to the decision-makers involved, the companies contracted, the significant public funding from the EIB and the scale of systemic corruption affecting both operations. Both projects are an important part of the "Veneto system" of systemic corruption and violation of the law.

Passante di Mestre: an extraordinary Bypass

Both the Passante di Mestre and the Mose projects have become enmeshed in one of the biggest corruption scandals in Italian history, leading to the arrests of politicians, businessmen and public officials. We will refer to this scandal of systemic corruption as the "Veneto system".

This highway bypass around the city of Mestre was, back in 2003, estimated to cost EUR 750 million. The project involves the construction of a 32-km dual 3-lane, toll motorway by-passing the City of Mestre, close to Venice, designed to relieve an existing and highly congested road by-pass. But the project rapidly faced serious cost overruns. By 2010 costs had already amounted to EUR 1.3 billion, an increase of 80 percent. Various toll increases were decided between 2009 and 2015, with Passante rated "the most expensive highway in Italy in 2013.[43]"

43 - http://nuovavenezia.gelocal.it/venezia/cronaca/2013/09/29/news/pedaggi-d-oro-il-passante-e-l-autostrada-piu-cara-d-italia-1.7830662



On 9 February 2009, a significant section of the bypass was inaugurated. The ribbon-cutting ceremony was held with great pomp and circumstance, in the presence of the Italian Prime Minister Silvio Berlusconi, the Minister of Transports Altero Matteoli and the governor of the Veneto region Giancarlo Galan.

In March 2011 the project was subject to a critical report by the Italian Court of Auditors[44] which highlighted the risk of infiltration of organised crime via subcontracting companies carrying out the construction[45], as well as the lack of public supervision and control leading to an unjustified cost increase[46].

In May 2014 the project hit the news with the arrest of 30 people including numerous entrepreneurs, managers, administrators and politicians – among them the former governor of the Veneto region Giancarlo Galan (a shareholder of CAV – the company managing the project)[47], the former Minister Altiero Matteoli[48], the general from the Italian fiscal police Emilio Spaziante[49] and the mayor of Venice Giorgio Orsoni[50].

...massively supported by European funds

In 2013, the EIB issued the first tranche of a EUR 350 million loan to the company CAV (Concessioni Autostradali Venete) managing the Passante di Mestre project, via the Italian public institution Cassa depositi e prestiti. CAV is a company controlled by the Veneto region and by ANAS (the public national road agency) whose 100% shareholder is the Italian government. The loan was approved by the EIB's board of directors in June 2011 (so after the report from the Italian Court of Auditors was published). The EIB loan was fundamental to enabling CAV to pay off its debts and to allow temporarily fresh resources to help with a difficult financial situation which may have necessitated an intervention from ANAS (meaning, ultimately, the Italian government) and the Veneto region to contribute to the liquidity of CAV.

44 - Court of Auditors, deliberation number 4 of 30 January 2009

45 - Ibid, page 57, note 65, http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_centrale_controllo_amm_stato/2011/delibera_4_2011_g_e_relazione.pdf «La criminalità organizzata tende ad assumere un ruolo preponderante non tanto nella fase dell'aggiudicazione, ma nella fase dell'esecuzione, privilegiando il suo inserimento, anche nel circuito economico delle grandi opere, attraverso il sub-appalto o le attività di fornitura di merci e servizi locali, e rappresentando, tra l'altro, una fonte di costo "extra". Del resto la libertà di cui gode il soggetto esecutore [il general contractor deve assicurare l'esecuzione dell'opera 'con ogni mezzo' e non deve scegliere le imprese mediante procedure concorsuali] può trasformarsi in occasione di infiltrazione malavitosa».

46 - In its Right of Reply response dated January 2019, the EIB stated that „***contrary to what is stated in the draft report, the Italian Court of Auditors never stated that the project was infiltrated by criminal organisations***". Indeed, what we indicate in this report is that the risks of criminal infiltration were identified by the Court back in 2011.

47 - Giancarlo Galan negotiated a plea bargain, he was convicted to two years and ten months of jail and the seizing of his villa located on Colli Euganei for a value of 2.6 million euro. In February 2017, the Court of Auditors of the Region claimed EUR 5.2 million in damages caused to the image of the Region and EUR 608 000 for disruption due to his corrupt behaviour (see https://www.ilfattoquotidiano.it/2017/02/28/mose-galan-condannato-a-pagare-58-milioni-danni-di-immagine-e-disservizio/3421150/). In april 2019, the financial police uncovered part of the allegedly stolen money, in what turned out as a massive money laundering scandal (see http://espresso.repubblica.it/inchieste/2019/04/10/news/mose-tangenti-galan-1.333599?ref=fbpe&fbclid=IwAR1xU33uPKv9bmeQrwkOqadol7dYU-fE-CnQE3WakWT3KImyOlGpVcf5ARI).

48 - Altero Matteoli went through trial and was convicted to four years of jail and the seizing of EUR 9.575 million (https://www.ilfattoquotidiano.it/2017/09/14/mose-lex-ministro-matteoli-condannato-4-anni-per-corruzione-assolto-e-parte-prescritto-lex-sindaco-orsoni/3857031/). He died in a car accident on December 17 2017 (https://firenze.repubblica.it/cronaca/2017/12/18/news/capalbio_l_ex_ministro_altero_matteoli_ferito_in_un_incidente_stradale-184494652/).

49 - Emilio Spaziante negotiated a plea bargain, he was convicted for collusion in corruption to four years of jail. The Court of Auditors of Lombardia claimed EUR 1 million in damages to the image of the public administration body of which he was part - the fiscal police (http://www.veneziatoday.it/cronaca/mose-condanna-ex-generale-finanza-spaziante.html).

50 - Former major of Venice Giorgio Orsoni went through trial and was acquitted from the accusation of illicit financing. The crime of corruption was statute-barred (https://www.ilfattoquotidiano.it/2017/09/14/mose-lex-ministro-matteoli-condannato-4-anni-per-corruzione-assolto-e-parte-prescritto-lex-sindaco-orsoni/3857031/).

Three years later, in 2016, the European Commission and the EIB decided to re-finance the project under the so-called "Project Bond Initiative". This despite the arrests of numerous officials on corruption charges related to the project. Under the Project Bond Initiative, the EIB enhances the credit rating of bonds issued by a project promoter. In this case, the rating agency Moody assigned a provisional A3 rating to the EUR 830 million senior bonds issued by CAV. As stated by Moody's Vice President, the involvement of the EIB *"significantly reduces the bondholders' exposure to traffic risk and potential operational underperformance"*. For the EIB, it was the second tranche of its loan (EUR 166 million) which was used to support the project bonds issues in April 2016.

In its Right of Reply response dated January 2019, the EIB claims that *"to the Bank's knowledge, the allegations made in the draft report are not directly linked to the Passante di Mestre project financed by the EIB, but to other infrastructure projects where some subcontractors contracted in the framework of the Passante di Mestre project were involved; these other infrastructure projects took place three/four years after the completion of the Bank's project. The Bank does not have any evidence at this stage of any misuse of EIB funds in relation to the project."* What does not add up in the chronology suggested by the EIB is that they haven't taken into account the fact that the Bank refinanced the debt accumulated by the project under this operation via the Project Bond Initiative in 2016, so once the Veneto scandal already hit the news.

– MOSE: welcome to the mega-project era

Still in the Veneto region, an emblematic infrastructure project aims at protecting Venice from water rising levels: the MOSE[51]. It is composed of 78 mobile barriers, deployed in three port mouths linking the Venice lagoon with the Adriatic Sea. In serious floods hitting Italy and the Veneto region in November 2018, the flood defence mechanisms of MOSE – still unfinished – did not enable to prevent three-quarters of the city being submerged in water.

Its formal birth certificate was "written up" in 1991 as a Memorandum of Understanding between the Magistrate for Venice Waters and the Consorzio Venezia Nuova – the company consortium in charge of carrying out the construction works. These works started in 2003 and are far from reaching completion at the time of this report's publication. From an initial estimation of EUR 2 billion back in 1988[52], the project costs have spiralled to EUR 5.49 billion[53].

Despite early warnings about the costs increase, the EIB committed EUR 1.5 billion for MOSE – one of the greatest commitments for a single infrastructure project ever approved by a public institution. Three loans have been disbursed up to now for less than EUR 1.2 billion: on 29 April 2011, EUR 480 million; on 12 February 2013, EUR 500 million; and on 13 February 2014 another EUR 200 million. Already in 2009 the Italian Court of Auditors had published a critical report questioning the spiralling increase of costs and other maladministration aspects[54].

On 28 February 2013, the Fiscal Police of Venice arrested Piergiorgio Baita[55] and other administrators of Mantovani S.P.A. – a key sub-contractor in both MOSE and Passante di Mestre – for the presumed fiscal fraud already mentioned, perpetrated by creating false invoices[56]. Then, in July 2013, another 14 arrests took place. Among them was the man that Paolo Biondani from L'Espresso called "the most powerful man of the Veneto": hydraulic engineer Giovanni Mazzacurati, founding father of the Consorzio Venezia Nuova[57], who won a tender of EU 15 million for dredging the channels. Phone interceptions indicate that, in order to favour a team of small local companies, Mazzacurati asked the "big" ones not to bid. In exchange, the small companies are alleged to have returned a percentage to the staff of the Consortium under the table. And, in the meantime, the EIB continued to disburse its loans, in spite of the scandal bursting.

In 2014, after further investigation, many of those arrested people were said to be involved in a circle of kickbacks within the project's financing. For example, the former national Vice Commander of the Fiscal Police, Emilio Spaziante, was accused of having paid compensation under the table to other suspects for "*inside information on investigations in course and fiscal verifications operated by the Fiamme Gialle*[58] *on the activities of the Consorzio Venezia Nuova, taking advantage of his acquaintances and power inside the corps and depositing 500,000 euros from the Consortium.*"

51 - https://www.mosevenezia.eu/?page_id=8

52 - https://www.mosevenezia.eu/?page_id=14

53 - Op.Cit. page 8

54 - (February 2009) Corte dei Conti, Sezione centrale di controllo sulla gestione delle amministrazioni dello Stato. "Stato di avanzamento del progetto di salvaguardia della Laguna e della Città di Venezia".

55 - Baita agreed on a plea bargain of maximum two years of jail. However the judge refused the proposal in September 2018 given that his former company Mantovani has not paid all necessary taxes. The defense of Baita is challenging this because he is not the CEO of Mantovani anymore (https://www.ilgazzettino.it/nordest/primopiano/processo_mose_no_patteggiamento_per_baita_e_buson-3981743.html).

56 - http://www.ilfattoquotidiano.it/2013/02/28/tangenti-arrestato-a-venezia-d-della-societa-di-costruzioni-mantovani/515540/

57 - http://espresso.repubblica.it/attualita/2013/11/14/news/c-e-una-cupola-sul-mose-1.141137

58 - Italian police

59 - http://corrieredelveneto.corriere.it/veneto/notizie/cronaca/2014/16-ottobre-2014/udienza-mose-primi-patteggiamenti-230356714911.shtml

There followed a list of plea-bargains or admissions of guilt which certified a series of irregularities of criminal significance around MOSE. The list is long and even more exhaustive, inasmuch as it concerns nearly all of the suspects[59]. The judicial proceedings were closed in record time, and a complete collection of evidence on the suspects was gathered. The Italian State was civil part in the trial, asking for remediations, therefore testifying for the loss for the public coffers and the misuse of public funds for up to EUR 3 billion.

On 27 February 2019 the Italian Court of Auditors announced the seizing of EUR 1 million to the advisor of Minister Tremonti – Mario Milanese[60]. Mario Milanese – also a former officer of the fiscal police - was prosecuted during the MOSE trial, but ultimately was not convicted because of prescription. The Court of Auditors claimed damage to the public image of the administration based on the proof of corruption that emerged from the MOSE trial. Indeed, Mr Milanese received a bribe of EUR 500 000[61] in cash in order to unlock EUR 400 million of public financing for MOSE[62].

The MOSE court case concluded in September 2017, with local and national newspapers and press agencies in Italy closely reporting about this judgment[63]. Former Italian Infrastructure and Development Minister Altiero Matteoli was judged guilty of corruption for having accepted bribes in the scale of millions from the President of Consorzio Venezia Nuova, Giovanni Mazzacurati[64]. Matteoli was sentenced to 4 years imprisonment and confiscation of almost EUR 10 million. All together 8 people were judged guilty of corruption, and 19 have plea-bargained[65].

The EU's financial arm ignoring corruption red flags

Back in 2013, the EIB invested in CAV – in charge of Passante di Mestre - regardless the ongoing investigation by Italian magistrates for alleged corruption by several of the companies that were part of the consortium and the arrest of four people in February 2013 and more during the following months. Even before that, the EIB did not take into account the warning from the Italian Court of Auditors in 2011.

In light of the above, we decided to alert the EIB, the European Commission and the European Anti-Fraud Office (OLAF) about the project and several subcontracting companies being under investigation by the Italian authorities for alleged fiscal fraud and possible infiltration of the Mafia.

Together with Italian partners Re:Common and Opzione Zero, Counter Balance filed in January 2014 a complaint with OLAF, calling on the EU's anti-fraud office to open an investigation into the EIB loan for the project given the arrests and investigations in Italy on individuals and companies linked to the project. But in March 2014, OLAF "dismissed the case on the grounds that the information is not sufficient to open an investigation" – even though the project was under investigation by the Italian authorities.

In December 2018, OLAF further explained why it decided not to open an investigation. In its own words, *"OLAF analysed a series of allegations about Passante di Mestre related to unjustified increase in construction costs, inaccuracy and lack of transparency in reporting payments and costs of the project, lack of public control and possible risk of infiltration of organised crime, and the EIB's alleged failure to prevent corruption and money laundering. OLAF did not detect sufficient suspicion of fraud or irregularities related to the EU funds. The alleged inaccuracy and lack of transparency in reporting payments related to accounting matters but did not raise any suspicion of fraud or other irregularities affecting the EU financial interests. As to the relations between the Controlling Authority, the Managing Authority, the Implementing Bodies, and the Intermediary Bodies for the PON Trasporti 2000-2006, this issue had already been flagged by OLAF previously as an element of risk because it did not guarantee sufficient independence amongst the actors and their tasks and responsibilities. However, this systemic problem did not automatically constitute as such an indication of fraud specifically in the Passante Autostradale case. Finally, concerning the alleged risk of infiltration by organised crime, the report of the Italian Court of Auditors praised the specific anti-mafia checks carried out in the project.* ***To summarise, the assessment carried out in this case did not allow for establishing a sufficient suspicion that any of the alleged irregularities had taken place. OLAF therefore did not have a legal basis for launching an investigation****".*

60 - https://nuovavenezia.gelocal.it/venezia/cronaca/2019/02/27/news/scandalo-mose-sequestrato-un-milione-a-mario-milanese-1.30048459?fbclid=IwAR3MCazpS6Jj66nn3Csi69h06ostkmnjcAcaK-f1o22k8eK7ezjdxpqOl1U

61 - 28/2/2019 La consulenza nascosta nell'armadio costa all'ex uomo di Tremonti un milione di euro - La Verità

62 - The money was in a drawer of an accountant of Consorzio Venezia Nuova the day when the fiscal police searched his office in 2014. The accountant threw the money behind the closet, and came back to his office at night to take the money that the fiscal police could not find, and gave it to Mario Milanese.

63 - http://video.corrieredelveneto.corriere.it/processo-mose-sentenza/fe5a3e72-9973-11e7-85d6-0e8387c4a501 ; http://www.ilfattoquotidiano.it/2017/09/14/mose-lex-ministro-matteoli-condannato-4-anni-per-corruzione-assolto-e-parte-prescritto-lex-sindaco-orsoni/3857031/

64 - Mazzacurati is in the United States and has been diagnosed dementia. The court decided the seizure of his wealth for EUR 22.75 million.

65 - There is no public information about appeals to the sentence. Only former Minister Matteoli commented the sentence claiming that his lawyers will appeal, however he died a few months after (http://www.veneziatoday.it/cronaca/sentenze-dl-processo-mose-condanna-orsoni-matteoli.html). In Italy the plea bargain acknowledges culpability, however the penal crime is not on the books and for instance does not lead to debarring.

After OLAF's decision not to open investigations into the Passante di Mestre case, we entered into a long exchange of letters with the EIB. In July 2014, we sent a letter to the EIB President Werner Hoyer to express concerns about the bank's financing of MOSE and Passante di Mestre, claiming that the EIB's involvement in these projects despite official legal investigation and warnings by civil society organisations, seems to stand in sharp contrast to the "zero-tolerance to corruption" principles it claims to follow. In its reply, the EIB stated that "the Bank does not have any evidence at this stage of any misuse of EIB funds in relation to this project."

In October 2014, a second NGO letter called on the on EIB not to re-finance under the Project Bond Initiative the debt accumulated by Passante di Mestre. The EIB kept replying that it was in touch with the Italian authorities and monitoring the situation closely.

In 2017, we followed up on this previous correspondence via a letter to the EIB Directors and its President to notify the Bank of the latest developments regarding the trial for corruption that just ended in Italy in relation to the MOSE project. We also asked the Bank what investigations it had undertaken concerning the potential mismanagement of EIB funds in this project, and what steps the EIB was considering once the evidence of corruption was in the public domain. In its reply on 10 November 2017, the Bank flagged that it opened its own investigation on MOSE in March 2013 and "*in coordination with OLAF, has closely followed the development of the investigations by the Italian judicial authorities.*" *Following the court judgement in September 2017, the EIB mentioned that it "is currently engaging with all the relevant parties to review in detail their findings and how they might affect the EIB's investments.*" The Bank's admission that it supported the project even though it was under an internal investigation raises serious questions as to its procedures. The public surely has a right to expect that no decision would be taken until the investigation was concluded.

We followed up with another letter in February 2018, in which we called on the Bank to use its recently approved Exclusion Policy and blacklist its clients and sub-contractors involved in the Veneto System, and urged the EIB to publish an update on the progress of its investigation.

In response to a Right of Reply letter from us in December 2018, OLAF stated that it "*opened a coordination case in April 2014 (OF/2014/0653) based on its own initiative and media reports. In the course of coordination activities, it emerged that the national authorities progressed sufficiently in their criminal investigation and did no longer need OLAF assistance. Consequently the case was concluded by OLAF in November 2015. The OLAF final report was transmitted to the Prosecution Office of Venice in December 2015 for their information. […] In such coordination cases, if OLAF is satisfied that national authorities are at a given moment in time well advanced in their own investigations, OLAF closes the case because of subsidiarity reasons. Indeed there would be no added-value for EU citizens that OLAF would leave such coordination cases open indefinitely. Consequently, OLAF can focus its resources on other cases.*"

The European Parliament raised the pressure on the Bank and took strong positions on this matter. On April 30th 2015, it passed a resolution stating in article 34 that it: "*Regrets that the EIB financed the highway bypass 'Passante di Mestre', after the Italian authorities publicly announced the arrest of the CEO of its main subcontractor for fiscal fraud; in light of the still ongoing investigations by the Italian authorities into the corruption scandal related to the construction and management of the 'Passante di Mestre', calls on the EIB not to finance the 'Passante di Mestre' project through the PBI or any other financial instrument, and to ensure that it implements its zero tolerance to fraud policy when considering the use of project bonds*".

On 28 April 2016, a further resolution by the Parliament reiterated its position: "*Stresses that the financing of major projects often facilitates infiltration by companies linked to organised crime; criticises the fact that the EIB has provided funding for the 'Passante di Mestre' motorway bypass, which is the subject of tax fraud investigations; notes with concern that the EIB has not responded to the requests in this regard set out in the report on the Annual Report 2013 on the Protection of the EU's Financial Interests – Fight against fraud; calls on the EIB, once again, to suspend all forms of funding for the project.*"

Unfortunately, it seems that no one in Brussels nor Luxembourg, where the EIB is headquartered, took into account this call, since the support to the project continued.

Main takeaways

Both Passante di Mestre and MOSE are an important part of the "Veneto system" of systemic corruption and violation of the law. In that context, it is alarming that the EIB failed to account for the numerous red flags that emerged along the years.

- In these cases, **the EIB is taking a very light approach to implement its Anti-Fraud policy and self-proclaimed "Zero tolerance towards fraud and corruption"**, to say the least. Despite the emergence of red flags and civil society's appeal, the EIB has provided both projects with several loans and continued to disburse tranches of these loans even once the corruption scandal burst and high profile investigations were opened in Italy. This blatantly contradicts the EIB's commitment to a "*zero tolerance to fraud and corruption policy*" and several legal commitments through EU legislation. Even when the related corruption scandals and arrests hit the press, the Bank continued to deny any wrongdoing in its due diligence, partly since the scope of its due diligence revolves around this question: will the EIB funds be put at risk?

One may wonder if there are any red lines for the Bank in such cases. The institutional inertia in the Bank once it enters a project is unfortunately a reality: it is quite rare that the EIB walks out of a project after approving its support. Hence the case of MOSE shows that it can support a project already tainted by maladministration, regardless this being exposed by the national authorities, like in the case of the report by the Italian Court of Auditors which was published in February 2011. Nevertheless, this way of functioning cannot be used as an excuse in the case of serious allegations and investigations on mafia infiltration: the EIB needs to make use of the tools at its disposal not to end up fuelling a corrupt system.

- **Will the bank ever take responsibility?** Now that the court judgement of September 2017 is out, and that the only ongoing criminal proceeding is about how much companies will pay to settle the case[66], the EIB should make an efficient use of its exclusion process and blacklist the main client companies, its members and key sub-contractors involved in the corruption scheme. But instead of taking prompt action, the bank is still conducting an internal investigation on only one of the two projects linked to the corruption scandal.

Given the scale of the corruption scheme at stake, and the size of EIB's financing to MOSE, it is in the public interest that information about how the EIB is handling this case be regularly disclosed to the public. Nevertheless, to date the bank has not issued any official statement about its investigation, and its March 2018 reply to our letter does not seem very promising: "*If deemed appropriate by the Bank, in due course and in accordance with the provisions of its Anti-Fraud Policy and Transparency Policy, the EIB will consider communicating to the public about the outcome of the investigation*". Like in the Volkswagen case, **the transparency of the EIB's investigation is very limited**.

- **The bank largely hides behind the role of national authorities**. Our point here is not to say that the Italian government did not back the project and was not aware itself of red flags emerging. Nevertheless, especially in relation to large-scale infrastructure projects – a sector prone to corruption practices – the EIB should not take for granted that political greenlights at national level are tantamount to a safe and clean project[67].

The Italian authorities unfortunately did not specifically dig into the potential corruption of Passante until the project was almost completed, even though the project was mentioned in testimonies during the MOSE investigation. However this should not have prevented the EIB from looking into it. The Passante project clearly emerged as one of the key mega-infrastructure contracted within the systemic exchanges of "favours" payed off through the "Veneto system" scheme[68]. And the EIB turned a blind eye to this reality, together with the European Commission and OLAF.

In a letter from November 2017, the Bank told us the following: *3We would like to draw your attention to the fact that the EIB's participation to the financing of this project occurs in line with a scheme whereby all expenses incurred and to be financed by the EIB are certified by the Italian Ministries for Infrastructure*". What the Bank does not mention is that it was the former Minister for Infrastructure Altero Matteoli – who was in office between May 2008 and November 2011 - who was responsible for certifying expenses financed by the EIB – or that he has been judged guilty of corruption in September

66 - https://www.ilgazzettino.it/nordest/venezia/processo_mose_baita_minutillo_patteggiamento-3750376.html https://corrieredelveneto.corriere.it/venezia-mestre/politica/18_giugno_22/mose-patteggiamenti-mezzo-milione-d3c13616-762c-11e8-b993-106b337c9a96.shtml?refresh_ce-cp

67 - In a Right of Reply response dated January 2019, the EIB indicates that „The allegations raised by NGOs regarding Passante di Mestre have been systematically contradicted by all the relevant authorities. The EIB's own investigations, OLAF and the Italian Authorities have all concluded that no link could be established between the fiscal fraud allegations and the project financed by the EIB".

68 - https://corrieredelveneto.corriere.it/veneto/notizie/cronaca/2014/11-giugno-2014/-tutte-opere-false-fatture-223374031633.shtml

2017 and died in a car crash before entering prison. Considering that the first EIB loan to Consorzio Venezia Nuova was agreed on 12 April 2011, it is legitimate to question the potential complicity of top level individuals in the expenses certification. The EIB should take responsibility for its financing and due diligence process, and draw appropriate consequences when Prohibited Conduct occurs.

Equally concerning is the EIB's reply to our draft report, claiming: "*please note that contrary to what is stated in the draft report, the Italian Court of Auditors never stated that the project was infiltrated by criminal organisations". Indeed, this is not what we state in this report, but rather the fact that the Court flagged "risks of infiltrations" and found that the mitigation measures put in place were "extremely appropriate*". But, from the EIB's perspective, discarding these risks on the basis of this Court's statement is a misinterpretation of the message sent by the Court. Indeed, in Italy, acknowledging the risk of infiltration is fundamental for public officials, in order to call for the intervention of the anti-mafia authority (DIA). In any case, the EIB should have not exempted from considering these risks and performed a much more solid due diligence leading not to enter into business relations with a set of clients and sub-contractors that ultimately ended up being part of the Veneto System corruption scandal.

- **The EIB is failing to acknowledge the systemic nature the Veneto System**, despite all evidence in the public domain of the existence of instruments which were used for state capture by a range of actors, including major corporations, individual politicians, officials from different institutions – including the police and supervisory bodies – and middlemen.

The company managing the Passante project, CAV SpA, is a public company owned on equal terms by the national road agency, ANAS, and the Veneto region. As detailed by public prosecutors in Venice, beyond MOSE, the same Consorzio Venezia Nuova played a key role in facilitating contracts for all infrastructure in the region, including Passante. Public vehicles, such as this consortium, have been managed purely for private interests and have become – de facto – the highest decision-making bodies able to direct the public-private relationship at all levels by defining the rules applicable to all actors involved, whether public or private. In short, an indissoluble and permanent combination of the public and private spheres was created with the aim of benefiting a few.

The Bank is boxing off projects into silos in order to separate its various loans to Passante, MOSE and another project, the construction of the third lane of A4 Motorway, a project linked to Passante. In November 2017, it told us that "*to our knowledge, the elements raised in your letter about the MOSE project are not related to the Passante di Mestre or A4 Motorway widening projects financed by the EIB". It went further in a March 2018 letter, "we would like to reiterate that, to the best of the Bank's knowledge, there are no criminal investigations affecting the Passante di Mestre or the A4 Motorway projects financed by the EIB. The allegations mentioned in your letter are not directly linked to the Passante di Mestre and A4 Motorway projects financed by the EIB, but to other infrastructure projects where some subcontractors contracted in the framework of the Passante di Mestre and A4 Motorway projects were involved; these other infrastructure projects took place three/ four years after the completion of the Bank's project. At this stage, the Bank has no evidence of any misuse of EIB funds in relation to the Passante di Mestre and A4 Motorway projects.*"

This is concerning, given that there are proven links between various actors involved in the MOSE project, and those involved in the Passante di Mestre and widening of A4 motorway[69] projects. The EIB should extend its current investigation on MOSE to both the Passante di Mestre and A4 Motorway financed by the EIB in the last years with the involvement of the same companies.

- **Questions around OLAF's involvement**: in March 2014, OLAF decided in a relatively short time[70] not to open any investigation about the allegations tainting Passante di Mestre by stating that evidence submitted by civil society organisations was "not enough" and, in any case, not attributable to the EIB and its counterparts in the deal.

69 - http://wwwb.ansa.it/nuova_europa/en/news/sections/news/2017/02/27/motorways-a4-3rd-lane-600mn-bei-cdp-loan-given-green-light_f8d5e804-06fb-4e57-85b6-9083f6144f50.html ; http://www.eib.org/projects/loan/loan/20090448

70 - Roughly two months – which is the usual timeframe for this type of decisions by OLAF.

OLAF added that: "*Analysis of the Italian Court of Auditors' report of March 2011 did not raise concerns regarding potential fraud in the project. No link could be established between the fiscal fraud allegations currently under investigation by the national judicial authorities and the project financed by the EIB. There was no element in the complaint concerning possible implication of an EIB counterpart in a fraudulent activity, nor suggesting complicity or negligence attributable to the EIB.*[71]"

The decision not to investigate the Passante di Mestre case is disturbing since several key staff of the main sub-contractors in the project were part of the Italian investigations. What is striking in OLAF's argumentation is the acknowledgement of the problematic interconnections between stakeholders involved in the Passante di Mestre case, but still "*this systemic problem did not automatically constitute as such an indication of fraud specifically in the Passante Autostradale case*". So, as the EIB, OLAF failed to draw consequences from the systemic nature of the Veneto system and the numerous illegal activities related to it – which in the end surely affect EU's financial interest. This decision also shows OLAF did not do its utmost to exercise its limited control over what was happening in Veneto around the use of EIB funds.

While it may be an administrative body rather than a public prosecutor, it is however clear that OLAF should have been in a position to investigate misuse of EU funds - an aspect that Italian authorities did not specifically focus on but that should have been specifically addressed by OLAF.

In the case of MOSE, the Italian prosecutor office only focused on the role of **Italian** companies and public officials, but did not have competence to investigate the potential role of EU officials. Indeed, the prosecutor could only focus on crimes committed on the territory of Venice, or by residents, or by companies registered in Venice. Therefore, there would have been an added-value with OLAF continuing its investigation on MOSE, as it would have been complementary to the proceedings taking place in Italy.

In a pro-active approach to cooperation with Italian magistrates on specific cases, OLAF should have acquired in a timely manner all relevant information regarding the use of European public funding, mainstreaming the EU public interest in the project. In that context, the fact that the EIB largely relies on OLAF investigations is concerning, when the latter does not pick up sensitive files.

- **What role for the Italian anti-corruption authority ANAC?** As explained in Chapter 1, the EIB has signed various agreements with national authorities, including one with ANAC in Italy in 2016. In 2016, Re:Common and Counter Balance alerted ANAC about EIB's involvement in MOSE and Passante di Mestre. Nevertheless, at this stage it seems hard to identify what added-value the exchange of information agreement signed between the two institutions has had, and how it helped the EIB take appropriate decisions in relations to its controversial loans.

- **Limited influence of the European Parliament**. The European Parliament expressed its criticism of the Passante and MOSE project and related corruption allegations, as well as concerns about the EIB's dubious due diligence in its financing choices. So far, the Parliament's position has simply been ignored by other European institutions. This raises overall concerns about the ability of the Parliament, despite being well informed on the matter, to intervene against the corrupt Veneto system and prevent European funding being potentially misused.

- Under political pressure, the EIB buys into the argument of governments to focus on boosting their economies through the promotion of large-scale infrastructure investment and claiming the "urgency" to get such investments off the ground. Such a rush all too often leads to the wrong choices being taken, based on inadequate economic assessments as well as the under-evaluation of environmental and social impacts of projects. What this case teaches us is that debt generation can be an instrument to force public institutions to stay at the table under the blackmail that project companies might go bankrupt and projects get derailed by leaving a high political price to pay for ruling parties. And, even when private investors are involved, still some form of public guarantee exists to make projects and their debt generation possible. Thus, any new failure will involve some vital public involvement, and loss, in any case.

71 - Information on decision to dismiss a case, OLAF case OF 2014/0103/01, OLAF answer to Antonio Tricarico, Re:Common, prot.#7460, 19.03.2014



Case Study 3:

When pollution and corruption go hand in hand in Slovenia



The Šoštanj lignite plant in Slovenia (TEŠ6) was one of the last coal power plants directly supported by the EIB. Loans from the EIB amounted EUR 550 million and were signed in 2007 and 2010, and have been fully disbursed.

The project rapidly turned out to be a financial disaster - making losses of EUR 70-80 million annually and is currently contributing to locking the country into a carbon-intensive economy. In 2013 on the website EurActiv, a senior EIB source described TEŠ6 as "one of those projects that tends to haunt you".

Initial concerns around TEŠ6 centred around its climate impact. Its promoters argued that the new unit would increase efficiency and reduce CO2 emissions, but forgot to mention that it would lock Slovenia into high-carbon electricity generation until 2050 and beyond. In this context, we will not

focus on the project's harmful climate impacts, but rather take a closer look at the corruption side of the story.

Various NGOs such as the Slovenian group Focus raised numerous concerns about the project with the Slovenian government and international financial institutions like the EIB. But these institutions did not take concerns into account until the project was considered a fait accompli.

Since 2006, when the project was announced as part of a governmental wish-list, costs have more than doubled from around EUR 600 million to EUR 1.43 billion. In a February 2012 report, the Slovenian Commission for the Prevention of Corruption issued serious warnings that: "*the project is designed and implemented in a non-transparent manner, lacks supervision and is burdened with political and lobbying influences, and as a result there has been [and still is] a high risk of corruption and conflict of interest.*"

The reasons for the costs increase are numerous but include alleged fraud of EUR 284 million that benefitted the lead equipment supplier Alstom – a French company which was the main contractor for the project. Alstom was suspected to have secured financial gains by changing contracts and increasing the cost of the project. After a lengthy investigation, in October 2014 ten people were charged with fraud in relation to the project .[72]The case is still ongoing and is currently at the stage of judicial inquiry, with 14 persons charged (12 individuals and 2 legal persons)[73].

All this information, as well as the dubious track record of Alstom, was communicated by Bankwatch and Focus to the EIB as soon as 2012 in the briefing "the dirty French-Slovenian connection".

And information published in 2018 as part of an investigation confirmed that indeed fraud contributed to TEŠ6 being about half a billion more expensive than it should have been.

In a statement on its website dated March 2013, the EIB indicated that the project was the subject of investigations initiated by several bodies or agencies at national and EU level, including the EIB Complaint's Mechanism. The Bank indicated that it was "*closely following these on-going investigations and has taken the necessary legal measures regarding its loan to ensure that the project is fully in line with the EIB policies as well as with the national and EU legislation, and that the appropriate remedies are applied should any of the allegations regarding the project be confirmed. Pending the outcome of the investigations regarding these allegations, the Bank will closely monitor the implementation of the project.*"

A complaint lodged at the EIB's internal mechanism related primarily to environmental and economic aspects of TEŠ6, as the Complaint Mechanism is not authorised to take complaints on corruption matters. The economic part of the complaint was concluded and found out that – unsurprisingly - TEŠ6 should have been indeed more economically diligent. The following recommendations were made:

- The EIB operational services should pro-actively engage in the monitoring of the Project's compliance with the Finance contract and the fulfilment of the additional undertaking made by TES in its letter to the EIB of 25 February 2013 to comply with the conditions set forth in article 1.2 of the Act regulating the State Guarantee.

- The EIB shall ensure an improved and systematic communication on profitability figures of the project to the EIB Board of Directors, as key element for the decision-making process of the Bank. Although the EIB may decide to support a project whose profitability figures are below the hurdle

72 - https://bankwatch.org/project/sostanj-lignite-thermal-power-plant-unit-6-slovenia

73 - https://www.dnevnik.si/1042836920

rate used by the Bank, a clear and transparent discussion on the profitability of the project is crucial as this might impact decisions related to the terms and conditions of the Bank's assistance.

The environmental dimension of the complaint is still being handled by the EIB Complaints Mechanism, with extensive delays.

The Slovenian NGO Focus also tried to alert OLAF about concerns with the EIB's support to this project via a letter highlighting corruption risks and a meeting. In April 2012, OLAF opened an investigation OF/2012/0398 to look into the allegations of corruption reported to OLAF by the European Commission and by the EIB itself. According to OLAF, the TEŠ6 Project was also being investigated by the Slovenian Judicial Authorities, but Slovenian law prevented the Judicial Authorities to share information with OLAF. OLAF therefore assisted the Judicial Authorities with specific requests because it was considered that possible investigative activities by OLAF could prejudice the Slovenian judicial investigation. The OLAF investigation was concluded in 2014 and a judicial recommendation was issued to the Slovenian state prosecutor[74].

Ultimately, Slovenian media started reporting that this case was highly dodgy and talking about the corruption scandal emerging. But a vast majority of the national political spectrum, throughout several governments, supported this project. After TEŠ6 started its operations, the investigations of the prosecutors showed that there was corruption, and a Parliamentary report was adopted on the TEŠ6 case, explaining that the project was managed poorly, with no transparency and economically unfeasible.

Main takeaways

TEŠ6 is a good example of what can happen when a project is pushed forward to satisfy narrow interests without adequate transparency, public participation or an examination of alternatives. Had the project been opened to scrutiny at an earlier stage, the wrong assumptions behind it could have been discussed and serious mistakes avoided.

Then, looking at the EIB's role in financing a corrupt project, once more a worrying conclusion is that the Bank refuses to stop disbursing loans when corruption investigations start. Already in April 2012, NGOs called on the EIB to follow-suit on the decision of the European Bank for Reconstruction and Developement (EBRD) to freeze loan disbursements to the project over corruption allegations[75]. But following a brief and temporary freeze, this did not prevent the Bank from disbursing its loans in 2013 after issuing its statement, and to have them repaid.

Since the EIB's Statement in 2013, the Bank only recently indicated in its Right of Reply response to the draft of this report that there is an on-going criminal investigation and the EIB is monitoring its developments. But the Bank provided no information about what it has done so far, or what are the conclusions from its internal investigations, or how it took into account the conclusions from OLAF.

Finally, as in the case of large-scale infrastructure projects in Italy, OLAF could have played a stronger role in further streamlining the EU angle into the investigations taking place at national level. Indeed, it remains unclear if the Slovenian judicial authorities are currently looking into the specific issue of EU funding to the project, more than four years after receiving OLAF's judicial recommendation.

74 - Information received from OLAF on 21 December 2018.

75 - https://bankwatch.org/press_release/slovenia-the-ebrd-freezes-loan-disbursements-in-alstoms-coal-project-over-corruption-allegations-ngos-call-on-the-eib-to-follow-suit

A Variable Geometry Towards Fraud and Corruption

Name of project	Status of EIB investigation and EIB loan	OLAF intervention	National investigations, trials and convictions	Transparency of investigations and outcomes	Decisions taken by the EIB
Volkswagen AG	- EIB investigation is closed - EIB continued its investigation even though the loan had been repaid, and closed it in December 2018 - EIB loan repaid in 2014	- OLAF opened investigation OF/2015/1139 in November 2015 - Concluded investigation in July 2017, finding that VW secured the loan by fraud and deception. *"The investigation established that VW never informed the EIB throughout the duration of the loan from 24 February 2009 to 24 February 2014 about the continuous use and implementation of this `defeat device' on the EA 189 engine in the context of the Research and Development activities financed by the EIB loan."* - OLAF sent an administrative recommendation to the EIB to take "active steps" in implementing its anti-fraud policy. OLAF recommended that: *"The EIB apply all relevant measures vis-à-vis Volkswagen AG as provided for in Section V, Measures to prevent and deter prohibit conduct, of its Anti-Fraud Policy, including entering into a negotiated settlement with Volkswagen AG, in order to safeguard the EU financial interests and reputation. In this respect, it is recommended that the EIB, in its actions towards Volkswagen AG takes into consideration- the possible financial advantage VW benefitted from, by obtaining the loan at an advantageous interest rate compared to the market conditions applicable at the time of the conclusion of the finance contract."*	- In total, as of September 2018, there were EUR 27 billion fines paid by VW in various countries (mainly the US and Germany), with various executives charged and several trials - Court conviction in Germany (EUR 1 billion fine) in June 2018 - In January 2017, plea agreement in the US - German Court case opened in September 2018, with several investors claiming damage - EIB and OLAF came to conclusion before all trials were over	- EIB issued a statement in August 2017 while its own investigation was still ongoing - Requests for disclosure of OLAF report made by a journalist and Bankwatch in January 2018. Disclosure refused by the EIB, with the justification that it saw "no overriding public interest" in disclosing the OLAF report. Case opened at the European Ombudsman in May 2018 on the Bank's refusal to disclose the report. Ombudsman ruled maladministration. The EIB confirmed it wouldn't not publish a redacted version of OLAF's report and its own investigative documents. 2 resolutions of the European Parliament in February and May 2018, called on the EIB to disclose the report. The EIB refused to share the report but ultimately MEPs had the possibility to read OLAF's report without taking pictures - In December 2018, the EIB announced the outcomes of its investigation and decisions taken - On 19 February 2019, the EIB published a 3-page summary of the OLAF report: *"The EIB has today published a detailed summary of the investigation report by OLAF into alleged misuse of EIB loan by Volkswagen AG. This was done in accordance with the EIB Group Transparency Policy and considering the strong public interest in this highly exceptional case."* *"The end of legal proceedings arising from the OLAF investigation and the implementation by the Bank of OLAF`s recommendation gives the possibility to the Bank to publish the summary of the OLAF report".*	- EIB suspended consideration of new loans with VW AG since October 2015, while its investigation was ongoing - EIB and Volkswagen AG finalised an agreement in December 2018, 1.5 year after the OLAF report came out, with the following key elements: • Exclusion of any EIB project during a period of 18 months • *"Volkswagen AG is committed to its sustainability initiatives including environmental protection activities and, in this context, will contribute EUR 10 million to environmental and/or sustainability projects in Europe"* • *"Volkswagen AG will continue to inform the EIB regarding its Compliance Programme and cooperate with the EIB in the exchange of best practices in relation to compliance standards and the fight against fraud"* - Decisions taken by the EIB even if trials are still ongoing in various courts within and outside of Europe.

Name of project	Status of EIB investigation and EIB loan	OLAF intervention	National investigations, trials and convictions	Transparency of investigations and outcomes	Decisions taken by the EIB
Passante di Mestre (Italy)	No investigation opened In January 2019, the EIB claims that *"to the Bank's knowledge, the allegations made in the draft report are not directly linked to the Passante di Mestre project financed by the EIB, but to other infrastructure projects where some subcontractors contracted in the framework of the Passante di Mestre project were involved; these other infrastructure projects took place three/four years after the completion of the Bank's project. The Bank does not have any evidence at this stage of any misuse of EIB funds in relation to the project".* The EIB kept stating that it was in touch with the Italian authorities and monitoring closely the situation.	In January 2014, complaint sent by NGOs to OLAF, calling for opening an investigation into the EIB loan. In March 2014, OLAF "dismissed the case on the grounds that the information is not sufficient to open an investigation." No investigation opened, "OLAF analysed a series of allegations about Passante di Mestre related to unjustified increase in construction costs, inaccuracy and lack of transparency in reporting payments and costs of the project, lack of public control and possible risk of infiltration of organised crime, and the EIB's alleged failure to prevent corruption and money laundering. OLAF did not detect sufficient suspicion of fraud or irregularities related to the EU funds. The alleged inaccuracy and lack of transparency in reporting payments related to accounting matters but did not raise any suspicion of fraud or other irregularities affecting the EU financial interests. As to the relations between the Controlling Authority, the Managing Authority, the Implementing Bodies, and the Intermediary Bodies for the PON Trasporti 2000-2006, this issue had already been flagged by OLAF previously as an element of risk because it did not guarantee sufficient independence amongst the actors and their tasks and responsibilities. *However, this systemic problem did not automatically constitute as such an indication of fraud specifically in the Passante Autostradale case. Finally, concerning the alleged risk of infiltration by organised crime, the report of the Italian Court of Auditors praised the specific anti-mafia checks carried out in the project.* **To summarise, the assessment carried out in this case did not allow for establishing a sufficient suspicion that any of the alleged irregularities had taken place. OLAF therefore did not have a legal basis for launching an investigation."**	In March 2011, critical report of the Italian Court of Auditors In May 2014, arrests of 30 people including numerous entrepreneurs, managers, administrators and politicians The Italian authorities did not specifically dig into the potential corruption of Passante until the project was almost completed, even though the project was mentioned in testimonies during the MOSE investigation. The Passante project clearly emerged as one of the key mega-infrastructure contracted within the systemic exchanges of „"avours" payed off through the "Veneto system" scheme.	No transparency about EIB contacts with national authorities and its monitoring of the case	No suspension of loans or relationships with clients, since no investigation opened EIB referring to OLAF's dismissal of the case in order not to act In 2013, first tranche of a EUR 350 million loan to the company CAV (Concessioni Autostradali Venete). The loan was approved by the EIB's board of directors in June 2011 (so after the report from the Italian Court of Auditors was published). In 2016, the European Commission and the EIB re-financed the project under the "Project Bond Initiative". For the EIB, it was the second tranche of its loan (EUR 166 million) which supported the project bonds in April 2016.

Name of project	Status of EIB investigation and EIB loan	OLAF intervention	National investigations, trials and convictions	Transparency of investigations and outcomes	Decisions taken by the EIB
MOSE (Italy)	- Ongoing investigation (opened in March 2013) - EIB *"is closely following the developments of the ongoing criminal proceedings by the Italian judicial authorities in coordination with OLAF. The EIB will consider any follow-up once all ongoing proceedings are concluded."* In a letter from 10 November 2017, the EIB indicated that *„in coordination with OLAF, has closely followed the development of the investigations by the Italian judicial authorities".* Following the court judgement in September 2017, the EIB mentioned that it *"is currently engaging with all the relevant parties to review in detail their findings and how they might affect the EIB's investments."*	In December 2018, OLAF stated that it *"opened a coordination case in April 2014 (OF/2014/0653) based on its own initiative and media reports.* *In the course of coordination activities, it emerged that the national authorities progressed sufficiently in their criminal investigation and did no longer need OLAF assistance.* *Consequently the case was concluded by OLAF in November 2015. The OLAF final report was transmitted to the Prosecution Office of Venice in December 2015 for their information."* OLAF's decision not to open investigations left it up, despite the fact that the trial in Italy did not cover EU funding of the project.	In 2009, critical report of the Italian Court of Auditors questioning the spiralling increase of costs and other maladministration aspects Arrests of key individuals involved in MOSE and Passante di Mestre started in February 2013 MOSE court case concluded in September 2017. Former Italian Infrastructure and Development Minister Altiero Matteoli sentenced to 4 years imprisonment and confiscation of almost EUR 10 million for accepting bribes from the President of Consorzio Venezia Nuova. 8 people were judged guilty of corruption, and 19 have plea-bargained.	OLAF report closing its "coordination case", not published EIB investigation ongoing, no official statement about its investigation in the public domain In March 2018, the EIB replied: *"If deemed appropriate by the Bank, in due course and in accordance with the provisions of its Anti-Fraud Policy and Transparency Policy, the EIB will consider communicating to the public about the outcome of the investigation".*	- Despite the investigations and trial ended in Italy, the EIB has not suspended its relationship with the client and not proceeded to any exclusion - EIB kept on disbursing its loans, even after opening its own investigation - 3 loans disbursed: on 29 April 2011, EUR 480 million; on 12 February 2013, EUR 500 million; on 13 February 2014, EUR 200 million
Sostanj (Slovenia)	Ongoing investigation at the EIB In a statement on its website dated March 2013, the EIB indicated that the project was the subject of investigations initiated by several bodies or agencies at national and EU level, including the EIB Complaint's Mechanism. The Bank indicated that it was *"closely following these on-going investigations and has taken the necessary legal measures regarding its loan to ensure that the project is fully in line with the EIB policies as well as with the national and EU legislation, and that the appropriate remedies are applied should any of the allegations regarding the project be confirmed. Pending the outcome of the investigations regarding these allegations, the Bank will closely monitor the implementation of the project."*	In April 2012, OLAF opened investigation OF/2012/0398 to look into allegations of corruption reported to OLAF by the European Commission and by the EIB itself. According to OLAF, Slovenian law prevented the Slovenian Judicial Authorities to share information with OLAF. OLAF assisted the Judicial Authorities with specific requests because it was considered that possible investigative activities by OLAF could prejudice the Slovenian judicial investigation. The OLAF investigation was concluded in 2014 and a judicial recommendation was issued to the Slovenian state prosecutor.	In a February 2012 report, the Slovenian Commission for the Prevention of Corruption issued warnings that: *"the project is designed and implemented in a non-transparent manner, lacks supervision and is burdened with political and lobbying influences, and as a result there has been [and still is] a high risk of corruption and conflict of interest."* Investigation at national level: in October 2014 ten people were charged with fraud. The case is still ongoing and is currently at the stage of judicial inquiry, with 14 persons charged (12 individuals and 2 legal persons) Alleged fraud of EUR 284 million that benefitted lead equipment supplier Alstom	No meaningful information disclosed by the EIB about its ongoing investigation. No transparency about OLAF conclusions and its recommendations to the Slovenian authorities.	EIB loans worth EUR 550 million signed in 2007 and 2010, fully disbursed. After a temporary freeze of the loan in 2012, the EIB disbursed the 2nd tranche in 2013, after OLAF investigation and its own investigation started. EIB monitoring developments at national level, did not suspend its contractual relationship with the client.

CONCLUSIONS

- In certain cases, the EIB did not wait for the end of criminal proceedings to act and suspend/sanction its client.
- In certain cases, the EIB published summaries of its investigations and provided updates, while in other cases it completely lacks transparency.
- In all cases, the EIB ultimately disbursed its loans, whether investigations at national or European (OLAF) level – or at the EIB itself – had been opened or not.

→ **There is a large discretion for the EIB on how it investigates corruption cases. The cases collected above show this variable geometry to tackling fraud and corruption.**



Chapter 2:
A dysfunctional system creating risks to the use of public funds

1) HOW EUROPEAN LAW FAILS TO MAKE THE EIB ACCOUNTABLE

As part of the research undertaken for this report, we commissioned a legal opinion from the Center for Higher Education and Administrative Consulting at the Department of Law of the University of Ferrara (Italy). Its conclusions were clear – and disturbing:

The EIB "anti-fraud due diligence" is set on "policy" ground and does not fall under EU law, therefore the EIB operates in a "free zone" with much discretion. Hence, the EIB's claim that it applies a "zero tolerance towards fraud and corruption policy" seems to be only hot air.

Our report demonstrates that the EIB is actually in most cases acting – and justifying its positions – according to the current state of EU law. Hence, the point here is not to claim that the EIB acts unlawfully. But rather to show the deficiencies of the current system and invite the European institutions to change this state of affairs.

Indeed, how can the financial arm of the European Union be kept apart from the strict legal constraints imposed by EU law to national banks in order to protect the EU financial interest after the 2008 financial crisis?

Below are our key conclusions:

- Under articles 308 and 309 TFEU, the EIB has legal personality, subject to EU law. Its statutes are laid down in a Protocol (n.5) annexed to the European Treaty itself.

As an international development bank, the EIB has legal personality distinct from that of the EU, so that it is administered and managed by organs of its own and that it has its own resources and own budget. As the case-law of the European Court of Justice (ECJ) makes clear, the EIB must, in order to perform the tasks it is assigned under the TFEU, be able to act in complete independence on the financial markets, like any other bank[76].

Nevertheless, as the Court has also stated, the fact that the EIB has that degree of operational and institutional autonomy does not mean that it is totally separated from the Union and exempt from every rule of European Union law. It is clear in particular from Art. 309 TFEU that the EIB is intended to contribute towards the attainment of the EU objectives and thus by virtue of the Treaty forms part of the framework of the Union.

It follows that the **position of the EIB is therefore ambivalent inasmuch as it is characterized, on the one hand, by independence in the management of its affairs, in particular in the sphere of financial operations, and, on the other hand, by a close link with the EU as regards its objectives**.

- There is only **limited eligibility of judicial review on EIB decisions before the ECJ**. Under Article 271 TFEU, it appears that the ECJ only has jurisdiction in relation to the Member States obligations under the EIB statutes and measures taken by the EIB Board of Governors or Board of Directors. And only the EIB Board of Directors, any Member State or the European Commission can have legal standing in this

76 - ECJ, 3 March 1988, C-85/86, Commission v. EIB Board of Governors, par.28;
ECJ, 10 July 2003, C-15/00, Commission v. EIB, par.101.

context. What is considered here are only "measures" – meaning decisions – which do not include a potential refusal or delay by the EIB to carry out the monitoring and due diligence over its loans for the protection of the EU's financial interests. Indeed, the activities of the EIB to combat fraud and corruption are carried out by EIB's internal offices (like OCCO or the Fraud Investigations Division) and do not constitute "decisions" or ,"measures" that could be challenged in front of the Court.

- As pointed out by the EIB in its reply on the draft version of this report, "*the EIB does not have the powers, nor the role, of a law enforcement agency or prosecution authority (…), the EIB fulfils its role by investigating suspected Prohibited Conduct within the context of the Bank's activities and, whenever needed, referring to competent authorities.*" So **the EIB has the right, not the duty, to suspend or withdraw a loan where there is suspicion of fraud or corruption. This is entrenched on an assumption that the EIB corporate governance is not specifically governed by any EU source of law**. As a result, third parties do not have legal actions against to EIB to enforce its anti-fraud and integrity policy.

- Therefore, the EIB main activities with regard to the protection of the EU financial interests are through the provisions it includes in the contracts with its clients - the exercise of contractual powers[77], its due diligence performed on all counterparts and operations and the freedom not to contract with individuals or entities found to have engaged in Prohibited Conduct[78]. These are all **internal governance rules, not imposed by legal regulations**. And none of the actions above constitute decisions that could be referred to the ECJ for judicial review.

It is quite striking that the well-known Anti-Money Laundering Directive at EU level (which provides that Member States shall create a clear legal framework for banks' integrity obligations, laying down rules on the applicable administrative sanctions, ensuring that obliged entities can be held liable for breaches of rules laid down by law and empowering competent authorities up to the task) does not apply to the EIB. The European law does not provide anything similar with regard to the EIB corporate governance and due diligence obligations.

- The EIB's "business model" is strongly inspired by the legality of corporate governance, in the interest of the EU. In doing so, the EIB limits its own behaviour with rules of conduct, the violation of which is not without legal significance but these are still norms of private law and not of public law. Ultimately, the EIB can never be brought before the courts only for failing to carry out the duties laid down in its internal policies. As a result, the only options to act before a court are civil lawsuits for violations of rights based on a personal interest, where the breach of private statutory duty or internal EIB policies can come into play.

- The EIB differs from a European institution or administrative body. In addition to the above-mentioned lack of regulation of EIB corporate governance, this means there is no chance of public litigation against the EIB for lack of due diligence.

- **The only duty of the EIB, under European law, is to inform OLAF but not to act directly**[79]. OLAF then has a legal obligation to exercise investigative powers. And **this duty does not exist in the case of illegal acts which do not harm the financial interests of the EU**.

Our conclusion is that the existing European laws do not support a rigorous anti-corruption stance at the EIB. On the contrary, the existing legal framework gives the EIB such discretion as to make their anti-corruption policy largely toothless given what appears to be political will to turn a blind eye wherever possible.

- It is indisputable that there are many weaknesses among the current set up of combating fraud in EU spending. As a consequence, the issue of "EIB accountability" is not in itself only a "legal" problem, but above all a question of laws to be introduced and of reforms to be carried out.
Even if the EIB was fiercely committed to enforce its zero tolerance policy, it could not properly do so because the law stands in the way. One consequence demonstrated by the following case studies is that the EIB exploits the lacuna in the law to enable dubious and unethical practices.

Part of the recommendations at the end of this paper therefore focus on changes needed to make the EIB better enshrined under the EU anti-corruption legal framework and re-balance the system in favour of citizens rather than corrupt corporations.

2) STRUCTURAL WEAKNESSES OF INTERNAL MECHANISMS AT EIB:

- **The EIB does not always act when aware of prohibited conducts – and, as detailed above, has no legally-binding duty to do so**. This is a very concerning conclusion, since EIB internal policies become largely meaningless if known cases of fraud and corruption are not dealt with properly.

77 - According to the EIB Anti-Fraud policy, *„the bank's financing agreements shall contain appropriate contractual provisions to prevent and deter Prohibited Conduct" and „EIB's financing agreements shall include appropriate remedies for dealing with breaches of the relevant undertakings under such financing agreements. Such remedies may include the ability to suspend disbursements or seek early reimbursement of the loan (or part thereof)".*

78 - As stated in EIB's Anti-Fraud policy and Exclusion policy.

79 - See Regulation 833/2013: „The institutions, bodies, offices and agencies shall transmit to the Office without delay any information relating to possible cases of fraud, corruption or any other illegal activity affecting the financial interests of the Union".

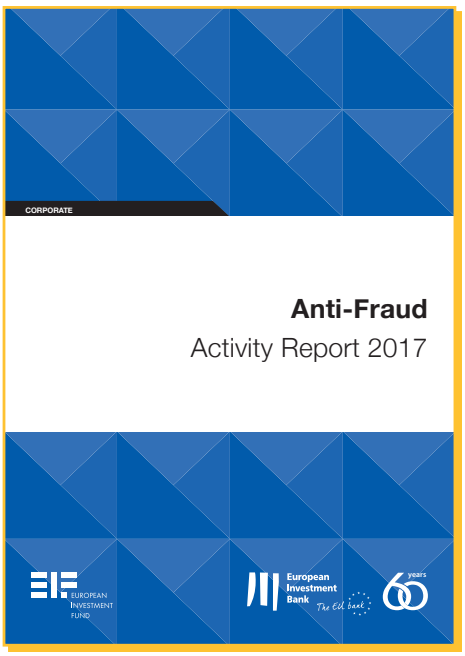


Figure 4: Extract from the EIB Anti-Fraud Activity Report 2017

The EIB Group's commitment to integrity and accountability is clearly articulated in the EIB and EIF Anti-Fraud Policies, which reaffirm zero tolerance towards prohibited conduct (including fraud, corruption, collusion, coercion, obstruction, money laundering and financing of terrorism). Zero tolerance does not mean zero aversion to risk in the challenging environments in which the EIB Group operates, but rather that the EIB Group will not tolerate any prohibited conduct and will investigate all allegations and take the appropriate action when evidence of prohibited conduct is found. In doing so, IG/IN ensures that the EIB Group's integrity framework is effective.

The inaction of the Bank in some cases we monitored, even when alerted in timely fashion about information already available in the public domain, raises a legitimate question about why the EIB keeps on pursuing investments in projects undergoing corruption investigations. Such decisions to keep on investing in dubious projects appear as politically-motivated, given the thin justifications brought by the bank, revolving mainly about the need to wait for final outcomes of corruption investigations before taking a decision to step out of a project. But then, when the judgements come, and criminal offences are proven, the EIB already disbursed its loans.

In its Right of Reply response from 18 January 2019, the EIB indicates that "*while the Bank can suspend in case of serious concerns, the concerns need to be serious, and such an approach cannot be generalised. Also the legal framework for certain business lines (e.g. contributing to investment funds) does not allow EIB (like any other investor) to refuse to contribute when there is a call for capital. That is the nature of the project and once the EIB signs the agreement, the Bank is committed, unless certain things occur, as specified in the investment agreement – EIB cannot suspend disbursements based on suspicions or rumours of misconduct, there needs (at the very least) to be a finding if not a criminal court judgement*".

"*The presumption of innocence is a fundamental principle of the legal process and one of the most important rights of the defence (see article 48 of the European Charter of Fundamental Rights). Imposing penalties or sanctions on the sole basis of suspicions would not only erode due legal process but would also pave the way to arbitrary decision making at the level of EIB projects.*"

This is exactly the kind of approach that leads us to the critical conclusions spelled out in this report. On the one hand, discarding national or European investigations on corruption or fraud allegations as "not serious" or being "based on suspicions or rumours of misconduct" falls short of acknowledging the serious nature of corruption investigations. If a massive scandal like the Veneto System is not a serious one, what is then left in the category of "serious" matters?

On the other hand, the justification by the EIB of its legal obligations under certain contracts, especially for its support to investment funds, is something deeply worrying: it is in the public interest that the EIB does not tie its hands by signing contracts or agreements leading to disbursing money even when corruption allegations and investigations by public authorities are launched – without appropriate exit clauses to keep the bank out of potentially fuelling a corrupt scheme or project.

– **Political willingness to act in highly political cases is limited on EIB's side**, as shown in our case studies in Italy and Slovenia. The EIB is hesitant to take any responsibility, certainly fearing that it would damage its reputation if findings that its funds have been misused reach the public domain.

Such attitude leads to situations like the case of Italian infrastructure projects – which have largely been backed and promoted by successive Italian governments – where the EIB failed to acknowledge the existence of red flags. Is it because of the political pressure exerted by the Italian authorities?

– **The bank often hides behind the involvement of national governments that back controversial projects**. But even though national governments are involved, this should not be used as an argument for the EIB not to act. It appears that EIB services are not able to resist political pressure from Member States to support certain projects that violate EIB standards. Of course, there is an intricate situation for the bank, since these same governments are its shareholders and are themselves supposed to defend the EU's financial interests according to the EU law. And especially in the case of larger EU Member States, most of these governments are de facto also represented in the Management Committee of the bank by EIB Vice-Presidents who are in charge of operations in their home countries.

As pointed out by Transparency International EU in its "Investing in integrity" report, "*there is an ongoing risk that senior managers at the Bank have too much discretion to favour companies from their 'home' countries.*" Indeed, the EIB Vice-Presidents are nominated to the EIB Management Committee by the Member States, and they are put in situation where they risk "*favouring well-connected national champions from their home countries" as highlighted by the report. "Even accounting for the fact that the Committee decides in a collegial way by consensus or majority vote, this still gives rise to the risk that members may consciously or unconsciously favour companies from their home countries*".

This was further confirmed by the 2017 report from the EIB Audit Committee[81] which flags that "*the Audit Committee reiterates its prior years recommendation that all members of the management body should be able to act objectively, critically, independently and avoid potential conflicts of interests. In order to achieve that, unorthodox combinations of responsibilities, for example responsibility for the oversight of both first and second line of defence activities, should cease.*"

Risky business – the EU's flagship energy project built by companies with a legacy of corruption

Early 2018, the EIB decided to channel more than EUR 2.4 billion into one of the most expensive (and controversial) infrastructure projects of all times: the Southern Gas Corridor. Amid civil society's dismay, the bank decided on a EUR 1.5 billion loan to the Trans Adriatic Pipeline (TAP) – western leg of the corridor passing through Greece and Albania and landing on southern Italian shores - and a EUR 932 million loan to the Trans Anatolian Pipeline (TANAP) - the eastern "sister" crossing Turkey.

But in December 2016, the NGO CEE Bankwatch Network published the report "Risky Business" showing that no less than 15 of the firms contracted to build TAP and TANAP had been implicated in various forms of corruption in the past.

Using publicly available information on companies contracted to build the two main sections of the Southern Gas Corridor in Italy, Greece and Turkey, the report revealed how many of them have a worrying history of corruption. In several cases, construction companies and their executives have been convicted on different charges, or they are currently facing criminal investigation and prosecution.
Among the companies identified in the report are three Greek firms – Ellaktor (through its subsidiary Aktor), J&P Avax, and GEK Terna – that are considered by authorities in Greece to be part of a cartel which operated in the construction sector for nearly 30 years. Companies in this cartel are alleged to have taken turns winning large public tenders and then dividing them among themselves.

Siemens, who is to supply the TAP project with six gas turbine turbo compressor units, is also said to have taken part in the same cartel. The German firm has a history of corruption in Greece, primarily in connection with a major scandal that came to be known as "The black cash of Siemens," in which it allegedly bribed state officials.

In Italy, three of the companies contracted by TAP for the construction of the pipeline, or their past subcontractors, allegedly have had connections to mafia groups in the past[80]. One of them, Bonatti Group, was hired to build a 760 kilometers section of the pipeline in Greece, while in Italy a company it had hired in the past has had its public contract suspended for mafia links and CEOs of two other Bonatti subcontractors were jailed for their association with the mafia.

Finally, Turkey's state-owned energy firm Botas is the company responsible for the construction of the TANAP project. Botas has been implicated in at least two major corruption scandals, where bribery has played a central role in winning public tenders. Among those convicted in these two scandals were top executives in Botas and in some of its subcontractors for the TANAP project, as well as senior officials in the Ministry of Energy and Natural Resources which partly controls Botas. The Turkish Supreme Court later overturned the rulings, clearing most of the defendants, but much of the evidence remains in the public domain.

This report seriously questions the track record of companies which are about to receive some of the largest loans in EIB's history. Entrusting companies that have a history of bribery, tax evasion and mafia connections to manage public funding sends a worrying signal about the real control exerted on the EIB funds.

It can be argued that there is a strong influence on how the national "corporate-state combo" is able to successfully lobby and intervene at the level of European bodies such as the EIB – where, in any case, national governments are represented in different forms – to push for large-scale projects at national level. Political influence between governments and European institutions may also take place, even though it would probably be more accurate to say that the fear of political consequences in other fields of cooperation could prevent effective control action by European officials.

- **The defensive approach of the bank mainly aims at limiting reputational damage**. A key limit in this approach is when fraud and corruption cases are of a systemic nature. In the MOSE – Passante – A4 motorway projects in Italy, the Bank's approach was to deny the systemic nature of the corruption scheme and do salami-slicing to reduce its exposure to criticisms in the public domain. By doing so, it fails to really tackle the fact that its loans may have fuelled corruption schemes. A much more pro-active approach is necessary to live up to its commitment to fight corruption.

- **Once it enters a project, the Bank does not exit, whatever scandals may emerge. Indeed, when a problem occurs, the EIB asks for the money back. While recovering its funds is a logical step, we consider it as insufficient. This actually questions the whole concept of the "protection of EU's Financial Interest" which is guiding both EIB and OLAF investigations and approach to fraud and corruption**. The EU legislation establishes that "*financial interests of the Union' mean all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them*".

By sticking to the letter, and not the spirit of EU legislation, the EIB risks fuelling corrupt schemes but then claims that EU's financial interests have been safeguarded. In the case of loans to MOSE or Passante di Mestre, the fact that its loans may have supported corrupt practices then becomes a negligible side story. The EIB then safely preserves its Triple A credit rating[82].

It is disturbing that the EIB did not make a systematic use of the clauses it inserts in contracts with its clients in the cases covered by this report (in Italy and Slovenia for instance). Back in 2015,

80 - https://bankwatch.org/wp-content/uploads/2016/09/risky-business.pdf

81 - http://www.eib.org/en/infocentre/publications/all/audit-committee-annual-reports-2017.htm



following a request for information, Counter Balance obtained the EIB template contractual clauses on integrity, which are included in the contracts signed by the Bank. These clauses refer to key principles and obligations for clients, like audit and visit rights, information obligations, compliance with laws, as well as to EIB sanctions. A pending question is though about how these clauses are activated when prohibited conducts occurs. As an example, why is the EIB not using suspension/sanctions clauses supposedly inserted in its contracts towards clients under investigations in Italy?

– The new Exclusion Policy of the EIB is a promising step forward, given that to date, the EIB has been extremely cautious in blacklisting companies. To date, it only published the names of 5 companies who have settled with the Bank. Therefore, we expect the new policy to lead to more companies being debarred, like in the case of Volkswagen Group. Nevertheless, **the EIB Exclusion Policy bears several limitations**.

First of all, the policy does not foresee any involvement by the EIB Board of Directors, who are not even informed about the exclusion proceedings. Then, it still remains up to the Inspector General to kick the procedures off – which necessitates a real pro-activity on his side to ensure the effectiveness of this mechanism.

The transparency of exclusion procedures is far from being ensured, as it seems that the whole process would take place behind closed doors, with no room for other stakeholders, such as external or internal informants to inform the Exclusion Committee. And the policy does not make it binding for the bank to publicise its early temporary suspension decision[83].

– **There is a systemic lack of transparency in how corruption cases are handled by the EIB**[84]. All case studies in this report show this trend. To justify the fact that it does not publish the outcomes of its investigations – or OLAF investigations, the EIB relies on restrictive provisions it managed to introduce in its Transparency Policy in 2015. And it was only after years of pressuring the EIB that it finally disclosed a 3 page summary of OLAF report on its loan to Volkswagen AG.

The EIB's Transparency Policy (TP) is the document guiding the bank in this field, and it reflects relevant EU legislation on transparency and access to documents, such as Regulations 1049/2001 and 1367/2006, but also key principles such as the right of public access to information promoted by the EU Charter of Fundamental Rights. Under its TP, all EIB documents fall under a presumption of disclosure, though considerable exceptions exist.

Some of these exceptions have been inserted by the EIB, despite opposition of civil society, during the revision of the TP in 2015 which underwent public consultation. Hence, quite conveniently, the EIB used

82 - See recent rating from Standards & Poor for example: http://www.eib.org/attachments/sp_eib-press-release_31jul2018.pdf. Reputational risk is not mentioned as part of the scoring system used.

83 - The EIB argues that not publishing this temporary suspensions is in line with best practices from Multilateral Development Banks.

84 - In its Right of Response to the draft of this report, the EIB indicates that „this report consistently assimilates an alleged lack of disclosure of investigations-related information, to a lack of action". We contest this claim, since in all the case studies of this report, we differentiate what relates to lack of action by the EIB and to the lack of transparency on investigations.

the practice of OLAF about exception to the presumption of disclosure on investigation reports (see Annex 2 on confidentiality of OLAF investigations). The argument used by the bank is that such reports cannot be disclosed as they risk to undermine cooperation with judicial and prosecutorial authorities, and investigations and decision-making processes at the EIB (see Annex 1). And the EIB even managed to extend this provision in articles 5.5 and 5.6 of the TP to closed cases (see Annex 1). The only compromise made by the bank was to agree to disclose "meaningful summaries" of cases once concluded.

These provisions largely ignore the overriding public interest in understanding how EU public funds are spent, even if they are in line with the applicable legal provisions under EU law (see Annex 2). **Despite legitimate concerns about protecting investigations and the decision-making process at the EIB, the EIB has a moral duty to act in a transparent way and demonstrate to European citizens that it handles such controversial case in line with its "zero-tolerance to fraud and corruption policy"**. For confidentiality purposes and not to expose individuals or truly sensitive commercial information, the EIB will always have the possibility to redact elements of its reports and investigations. But claiming that the whole outcome of an investigation – particularly when it has already been closed - cannot be disclosed largely ignores the right of the public to access information on how public institutions are dealing with taxpayers-derived money.

A decision from the European Ombudsman from May 2018 on alleged shortcomings in the EIB's Transparency Policy reinforces our analysis[85]. As part of a complaint lodged by NGOs Client Earth, CEE Bankwatch Network and Counter Balance, the Ombudsman took a specific look at the presumption of confidentiality concerning inspections, investigations and audits included in the EIB's Transparency Policy (TP). The Ombudsman's conclusions are the following:

"The EU Courts have not ruled on the application of a general presumption of non-disclosure to EIB investigations."

"While the EIB could justify a presumption of non-disclosure for on-going EIB investigations, it cannot rely on a general presumption of non-disclosure for all inspections, investigations and audits indefinitely."

*"The Ombudsman further notes that the EIB TP extends the general presumption of non-disclosure to **after the investigation has been closed**. Even in the case of a fraud investigation, the general presumption of non-disclosure would in principle apply only as long as the investigation is ongoing. The Ombudsman believes that the EIB could guarantee the protection of the purpose of any subsequent internal investigations or national criminal investigations by assessing requests for access on a case-by-case basis."*

Still, our analysis is that, under the current legislative framework, there is too limited space for the public at large and civil society to obtain full access to relevant investigative documents of the EIB and OLAF. Mainly because of a strict interpretation of legal texts by the CJEU, the general presumption of confidentiality doctrine prevents the access to investigation documents, as the possibility to demonstrate the existence of public interest to disclosure exists in abstract, but it is in general very difficult, if not practically almost inoperable[86].

- The **Whistleblowing policy** of the EIB only applies to EIB staff and clients, but not to external informants who have to refer to provisions under the EIB's Anti-Fraud Policy. For an institution approving each year projects worth around EUR 80 billion, one could expect more robust mechanisms to be established, with better protections against retaliations. As pointed out by Transparency International, "Without whistle blowing, corruption goes understudied and under-prosecuted. A visible commitment to the cause of whistle-blowers is needed to empower prospective informants to come forward and create a culture that encourages the reporting of wrongdoing." In July 2015 the EIB Audit Committee requested that the main parties responsible within the bank initiate a review of its whistleblowing policy, pointing out that the current policy dates back to 2009 and "may not reflect best banking practice requirements"[87].

- **There are also weaknesses which are inherent to the business model of the EIB**. For instance, when supporting private equity funds, the bank has no right to carry out anti-money laundering checks on investee companies. While this is a black box in tracking how EIB funds are being ultimately used, to date this has not caused serious reactions from the bank's shareholders and the European Commission.

85 - Decision in case 1316/2016/TN on alleged shortcomings in the European Investment Bank's Transparency Policy, 23 May 2018

86 - The CJEU recognizes the possibility that access to investigation documents is granted if there is an overriding public interest in disclosure. The overriding public interest in disclosure should not be expressed in generic terms (C-271/15P Sea Handling SpA v. Commission, p95) as "the onus is on the party arguing for the existence of an overriding public interest to rely on specific circumstances to justify the disclosure of the documents concerned and that setting out purely general considerations cannot provide an appropriate basis for establishing that an overriding public interest prevails over the reasons justifying the refusal to disclose the documents in question". The requester must demonstrate that "principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question" (C-514/11P and C-605/11/P, LPN and Finland v. Commission, p.93).

87 - http://www.eib.org/en/infocentre/publications/all/audit-committee-annual-reports-2017.htm

The EIB itself acknowledges in its Right to Reply response to this draft report that "the legal framework for certain business lines (e.g. contributing to investment funds) does not allow the EIB (like any other investor) to refuse to contribute when there is a call for capital. That is the nature of the project and once the EIB signs the agreement, the Bank is committed, unless certain events occur, as specified in the investment agreement. A general policy principle committing the Bank to stop disbursements in case of suspicions of Prohibited Conduct is therefore not realistic". So once the EIB supports an equity fund, it is problematic that it claims that it cannot refuse to contribute to a call for capital if corruption allegations emerge. Actually, it seems possible for a call for capital to be conditioned on no allegations of corruption. "Certain events" – using EIB's wording – could well refer to an investigation. But this would probably mean that the investor gets a lower rate of return. And if it is not really not feasible for a public institution to stop disbursements when corruption allegations emerge, then public money should simply not be channelled through such investment funds.

The EIB argues that investment funds it supports are subject to the surveillance of the relevant national financial regulator where the fund is established – meaning that Anti-Money Laundering / Combating the Financing of Terrorism controls should be systematically and continuously carried out by the regulated entities, as required by law. But numerous money laundering and corruption scandals at European and international level involving investment funds and private banks show that there are serious shortcomings in surveillance taking place at national level.

The fact that the EIB performs a "Know Your Customer" due diligence on all new EIB clients in order to detect possible compliance or integrity concerns is supposed to complement regulation at national level. But as the examples below show, this is not always sufficient to avoid prohibited conduct and ensure a sound monitoring of intermediated projects.

Financial operations going through commercial banks bear serious risks for the EIB. A January 2018 evaluation from the EIB focuses on its operations via financial intermediaries in the Africa/Caribbean/Pacific (ACP) region, under its so-called Investment Facility. Its findings confirm our analysis about the lack of control, monitoring and reporting on intermediated operations:

"In ACP, where there is no obligation to transfer the interest rate advantage, it is ***very difficult to trace EIB funding to specific final beneficiaries, let alone projects****."*

"Moreover, ***as money is fungible and allocation lists are found to be interchangeable, ensuring the compliance with Environmental & Social safeguards at the allocation level is no guarantee against reputational risk****. The intermediary could be engaging for the most part in funding projects that do not meet the EIB's E&S standards or are in non-eligible sectors, while submitting the sample of its funding for eligible projects to the EIB. It would be difficult to imagine that the EIB's reputation would remain unblemished if it emerged that one of the financial intermediaries it financed was involved in such activities."*

"The coverage and quality of ex-post reporting on allocations, through the mandatory annual allocation reports, was found to be very weak."

These findings contradict one of the arguments often used by the bank: the EIB's participation in these funds lead to a significant improvement of their practices and E&S standards. This also casts serious doubts about how much control the EIB really has over the intermediary institution, and if any solid mechanisms are in place to avoid EIB funds being misused.

In its right of reply response to this draft report, the EIB indicated that this EIB's independent evaluation mentioned above "does not include any recommendation regarding fraud and corruption" and that using it in this report leads to draw unfounded conclusions. However, our take is that it is legitimate to mention the conclusions of this evaluation in this section, as it testifies for the lack of control of the EIB over its intermediated lending. This weakness certainly opens the door to misuse of the Bank's funds.

The case study below, extracted from the EIB 2017 Anti-Fraud report, also shed lights on serious issues. While it is welcome that pro-active integrity reviews (PIRs) were recently covering intermediated operations, its findings are clear: intermediated operations using EIB funds face serious risks of misuse and money laundering practices. And these types of practices have been proven via successive PIRs.

Case Study: PIR on intermediated loans for SMEs

IG/IN recently carried out several PIRs on intermediated loans, both in EU Member States as well as outside the EU.

Multiple Beneficiary Intermediated Loans (MBILs) are lines of credit extended to Financial Intermediaries – banks, leasing companies, public support institutions, or any other entity qualifying for the role ("FIs") – which on-lend the proceeds made available by the EIB in the form of "allocations" (sub-loans) to a large number of final beneficiaries (FBs) such as small and medium-sized enterprises (SMEs).

At a number of FIs, IG/IN reviewed the loan files and inspected the credit and loan approval process. IG/IN also conducted on-site visits of the respective projects and FBs.

The irregularities and schemes identified in the sample of operations reviewed included:

1. weaknesses of internal control systems at the levels of the FIs reviewed, such as: i) deficient "know your customer" and anti-money laundering due diligence; and ii) inadequate monitoring of related parties and politically exposed persons (PEPs);
2. indications of money laundering: i) some of the FBs used the allocations to finance the purchase of goods and services from related parties registered in non-cooperative jurisdictions; ii) existence of high-value loans with the ultimate beneficial ownership potentially linked to organised crime figures; iii) allocations were used to finance poorly documented high-value transfers and transactions with related parties, thus indicating the usage of the FBs as front companies; and iv) loans given to FBs linked to PEPs;
3. ineligible purposes: some allocations were partly used for ineligible purposes such as refinancing of pre-existing long-term loans with other banks, or payment of dividends and overdue taxes;
4. the FIs reviewed by the PIR sometimes granted loans to FBs that were not compliant with SME eligibility criteria; and
5. these FIs provided the EIB with misleading and false information when communicating with the EIB on the nature of the projects and FBs to be financed.

Based on these findings, the EIB concluded that a number of the sub-loans granted were ineligible and requested a partial prepayment of the loans to the relevant FI. In addition, a remediation plan has been implemented at the EIB to strengthen the controls over the allocations made by the FIs under these MBIL operations.

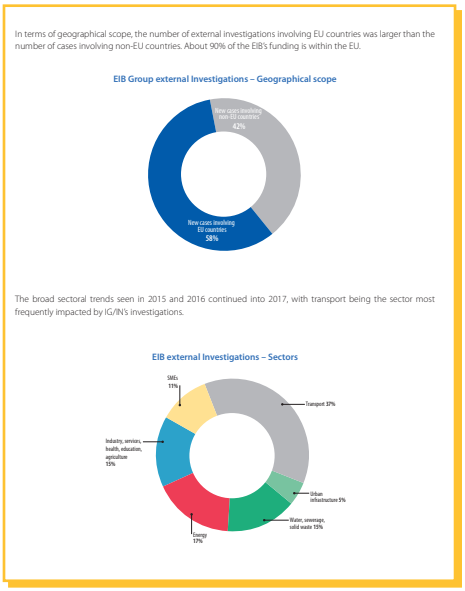


Figure 5: Extract from the EIB Anti-Fraud Activity Report 2017

- Despite recognising the efforts made by the Office of the Chief Compliance Officer (OCCO) in performing its duties, it is also important to acknowledge that its advice on projects to be approved by the EIB Board of Directors are purely optional. Indeed, red flags that could be highlighted in OCCO advice are there to inform the decision of the Directors, but do not mean that a project will not be backed by the Bank.

- The conclusion we draw from the cases we monitored is worrying: the EIB only applies a weak due diligence to some of its loans going to the private sector, like in the case of carmakers linked to the Dieselgate scandal. Our findings so far suggest the EIB has demonstrated a particularly poor oversight on the way its multi-millioneuro loan was used, as well as a worrying lack of accountability despite its mandate as an EU public institution.

3) LACK OF EXTERNAL CONTROL AND GOVERNANCE ISSUES:

– An inefficient relation to European anti-corruption authorities?

From the cases described in this report, one may draw an abrupt conclusion: the EIB seems to be often "hiding" behind OLAF, which is itself not always acting as much as it could when corruption cases

emerge. This practice of "hiding" behind OLAF is not an illegal behaviour though, unless it results in a specific damage to the EU's financial interests.

A reason for this critical conclusion revolves around the priority given to the protection of EU's financial interest when understood as simply getting money back from investments in corrupt projects. Indeed, even if the EIB and the European Commission are not always losing money through having their funds misused – and cynically could potentially gain money out of a corrupt investment – still they may be supporting a corrupt system that diverts public funds from where they are needed the most and fuel corrupt schemes having major social and political harmful impacts at local, regional or national level. Unfortunately, there is in the mere concept of the "EU's financial interest" a weakness that materialises when looking into how corruption issues are tackled jointly by OLAF and the EIB.

As demonstrated above, the way the EIB Fraud Investigations Division (IG/IN) deals with fraud and corruption cases does not work properly in many regards. Hence, it is crucial that OLAF effectively controls the integrity of EIB operations. In the case of EIB loans to Volkswagen, MOSE and Sostanj, OLAF did open investigations – despite a lack of transparency. But in the sensitive Passante di Mestre, it decided not to open an investigation following a preliminary assessment, leaving the EIB in the driving seat, without providing convincing arguments.

Looking at the outcomes of OLAF's interventions, only on one of the cases examined in this report (for loans to Volkswagen) it led to sanctions taken by the EIB towards the entities having allegedly misused EIB funds.

– **The protection of the Union's Financial: a concept limiting the EIB's fight against corruption**

The European Economic Community obtained financial autonomy from its Member States in the 1970s with the creation of own resources feeding its budget. Since then, the protection of financial interests against economic losses and shrinkages due to illegal activities gained importance. At the core of the "protection of EU's financial interests" are the techniques for ensuring the integrity of the EU budget, and particularly those designed to counter fraud, corruption and any other illegal activities affecting the resources of the Union.

A set of rules have been designed to ensure this protection, and the concept has been integrated in Article 325 TFEU which now represents the legal basis for combating illegal activities against the finances of the EU – but not for fighting corruption across the European Union. One objective of this Article is for EU Member States to ensure the EU's financial interests benefit from the same level of protection as national financial interests. The Article further requires the European Parliament and the Council to adopt the necessary measures with a view to affording effective and equivalent protection of the financial interests of the Union in all the Union's institutions, bodies, offices and agencies.

Hence, the EU and the Member States share the responsibility to protect the EU's financial interests and fighting fraud. This is logical given the fact that Member States authorities manage around three quarters of the EU expenditures and are in charge of collecting the Union's own resources. It is in this context that OLAF is mandated to exercise its powers of investigations. The scope of the OLAF Regulation is then limited to investigations concerned with irregularities affecting the financial interests of the Union.

In case of funds wrongly paid or incorrectly used or funds lost as a result of irregularities or errors, each institution, body, office and agency established by the EC Treaty has the obligation to recover them. Any irregularity shall involve the withdrawal of the wrongly obtained advantage by an obligation of beneficiaries to pay or repay the amounts due or wrongly received.

As a matter of fact, the protection of the EU's financial interest is satisfied simply by preventing and fighting any decrease in the EU budget due to illegal due to illegal expenditures, and does not cover the appropriate use of European resources by beneficiaries.

Put in the context of the EIB, this is a very limiting framework, as the EIB does not have a specific obligation of fighting corruption across Europe, but rather has the precise duty to protect the EU's financial interest against fraud and corruption.

What the bank mainly does is to provide loans, and given the high level of safety of its investments it almost always gets its money back[88]. Hence, the rule of simply recovering money is ill-suited for a banking institution like the EIB.

Our cases study on projects in Italy is quite telling: the EIB loans fuelled a corrupt system to finance an allegedly failed infrastructure, but as the EIB is getting its loans repaid, there is legally no damage to the financial interest of the EU, and the story can be closed.

Fortunately, there are discussions about the broadening and clarification of the concept of "protection of EU's financial interest". For instance, the European Court of Auditors (ECA) recommends that the notion should be clearly defined and highlights that there is a need for clear rules to investigate internal cases of serious misconduct which do not concern the financial interests of the Union but are liable to result in disciplinary and/or criminal proceedings before the European Court of Justice. The ECA believes that the legislator ought to consider what options are available under the EU Treaties in order to ensure that all cases of serious misconduct are properly investigated[89] [90] .

– An unclear traction on national authorities

Under its Anti-Fraud policy and under EU law, there is no obligation for the EIB to refer suspected prohibited conduct to national authorities and prosecutors when investing outside of the European Union.

And in the case of OLAF's involvement, it is up to OLAF to transmit its final report to the national authorities.

Then, regarding an investigation carried out by a national authority which may involve EIB financing, the EIB shall liaise and assist the national authority, but prompt action is not guaranteed since the EIB "*may decide to await the results of such an investigation and request a copy of their findings before taking further action*".

The EIB's reading of this provision is more positive though, since "*it allows the bank to take action in case of Prohibited Conduct in its operations (if it has enough supporting elements) without awaiting the results of a national investigation. This can apply in countries where there is no efficient law enforcement mechanisms and the bank should be able to take action without binding itself to the outcome of a national investigation. On the other hand, where a competent national authority, in particular in an EU Member State, has launched an investigation, this provision allows the bank to await the results of the national investigation before taking action, in compliance with the fundamental right of presumption of innocence.*[91]"

While we acknowledge the flexibility offered by this provision, there is still a risk that cases do not get investigated and/or prosecuted for one of the following reasons: the EIB is not a police authority; the remit of OLAF is limited; national authorities can ignore the information received from the EIB.

Despite the valuable efforts of the EIB to enter into cooperation agreements with law enforcement and anti-corruption agencies to facilitate the exchange of information on cases of mutual interest concerning suspected prohibited activities, it is still to be seen to which extent such mechanisms are bringing results. In the case of Italian projects like MOSE or Passante di Mestre, no loan suspension or sanctions have been taken by the EIB despite the information that is supposed to have been exchanged with the Italian agency ANAC. And the EIB refused to share a record of its interactions with national authorities in the case of MOSE following our request.

On a more positive note, the case below, extracted from the EIB 2017 Anti-Fraud Activity Report, shows that cooperation with the Malawi Anti-Corruption Bureau helped uncover a case of fraud.

88 - See this recent article in Financial Times, European Investment Bank: the EU's hidden giant, Rochelle Toplensky and Alex Barker, 15 July 2019, https://on.ft.com/2YRbCJ3 which states that "even after a period of backing more risky projects, [the EIB] remains a uniquely safe lender. Over the past decade the EIB set aside reserves for 0.1 per cent of its loan book to go wrong: German development bank KfW expected 0.8 per cent; the China Development Bank 3.1 per cent; and the EBRD 4.4 per cent".

89 - European Court of Auditors, Opinion No 6/2011, 30 August 2011

90 - See also ECA's Special report No 01/2019: Fighting fraud in EU spending: action needed

91 - Right of Response reply, January 2019.

Support for Malawi authorities in tackling corruption

Region	African, Caribbean, Pacific Countries (ACP)
Source	External (informant)
Red flags	Non-competitive Contract Award

An EIB loan to the Government of Malawi for the optimisation of water resources showed irregularities pointing to alleged corruption on the part of a public official at the Lilongwe Water Board, a public entity within Malawi's Ministry of Transport. In the initial stages of the investigation, IG/IN's collaboration with Malawi's Anti-Corruption Bureau had led to the execution of search warrants and the arrest of those allegedly involved. In 2017, investigators continued to provide specialist assistance to the Malawi Anti-Corruption Bureau. As a result, one additional person was identified as allegedly being involved. At the end of 2017, the case had been listed for trial before the Court and IG/IN will provide evidence to assist the court in determining the facts.

– A lack of teeth in other EU institutions

Currently, the European Parliament only has extremely limited competences towards the EIB. Despite regular calls for the Bank to up its game on topics such as transparency, accountability and corruption, the Parliament's recommendations are non-binding and remain largely ignored by the EIB. This represents a genuine democratic deficit but is unlikely to change without modifying the EU Treaties.

In the European Parliament, the Budgetary Control (CONT) committee has been the most active in the field, for example by organising a public hearing in 2016 on the "Control of projects and implementation of EU funds in the area of infrastructure and transport - effectiveness and problems" which was largely devoted to challenges for the EIB.

In parallel, it remains unclear what the European Commission's impact on the EIB could be in the field of fraud and corruption. While OLAF is part of the Commission, in theory the Commission could also oppose projects which bear fraud and corruption risks via the so-called "Article 19 procedure", under which the Commission is to provide an opinion on all EIB projects before they go to the Board of Directors for approval. But such opinions do not represent a formal veto on EIB operations, even though in the event that the Commission is against a proposed operation, then the unanimity of the remaining Board members (the 28 Directors nominated by the Member States) is required to authorise the operation.

Finally, a look at another controversial project supported by the EIB in Hungary demonstrates that the lack of inspection rights for the European Court of Auditors for EIB own-funded projects is problematic.

92 - Leaked OLAF report, p. 3

93 - Idem, p. 3

94 - Information received from OLAF, 21 December 2018.

95 - Leaked OLAF report, p. 103

96 - Finally, OLAF has submitted judicial recommendations to Hungarian and to UK authorities in the context of the judicial proceedings that were on-going in both countries.

97 - See: http://www.eib.org/en/infocentre/press/news/all/eib-and-siemens-settlement-agreement.htm

The corruption scandal surrounding the Budapest Metro Line 4 project reveals serious gaps in the EIB's ability to safeguard its lending activities from fraud and underlines the need to expand the European Court of Auditors' (ECA) inspection rights to include all EIB projects.

In 2005 the EIB signed two loan agreements with the Hungarian state and Budapest municipality for the value of EUR 530 million to finance the metro line, while the project also benefitted from EU cohesion funds - EUR 696 million[92]. Eventually the line opened in 2014 after long construction delays - well over its initial EUR 1.7 billion budget - and by now mired in a corruption scandal.

In 2012 OLAF received several allegations from the EU Commission Directorate General for Regional Policy (DG REGIO) and the European Court of Auditors (ECA) regarding fraudulent and corrupt practises in the project's implementation.[93] After launching an investigation OLAF uncovered substantial bribes, fraud and artificial contract inflation in relation to contracts signed between the Hungarian authorities and the German and French multinationals Siemens and Alstom. In addition, the investigation discovered a corruption network profiting from the project connected to prominent Hungarian political parties and politicians including the former Hungarian Prime Minister Péter Medgyessy. According to OLAF, serious irregularities – fraud and possible corruption – have been uncovered in all phases of the project[94].

OLAF's report concluded in December 2016 that out of the EUR 1.7 billion in project finance, EUR 1 billion was affected by irregularities including EUR 228 million in cohesion funds and at least EUR 22 million in EIB loans.[95] It recommended to DG REGIO to recover its EUR 228 million, and made a financial recommendation to the EIB in relation to EUR 55 million which formed part of the various EIB loans the project was awarded[96].

Shortly after OLAF report's publication, the EIB and Siemens announced a settlement agreement for an undisclosed amount "addressing alleged past violations of the EIB Anti-Fraud Policy."[97]

What is worrying about the OLAF report is the circumstances in which the discovery of fraud and corruption affecting the EIB loans was discovered. Under the present architecture at EU level, the ECA does not have audit rights on EIB projects its finances from its own resources – instead, the ECA can only do so when the EIB is administering EU budget funds. Since the majority of EIB lending activity is self-financed, the ECA only inspects a fraction of EIB activities – a clear blackspot in the EU's fight against corruption. In this case, it was only through the OLAF investigation triggered by DG REGIO and the ECA that the EIB loans were subject to inspection and the fraud identified.


KNIN
Mokronoge
Vidovo Selo
Ljeskovica
Jezero Gusića
Poljice
Resanovci
G. Tiškovac
Donji Tiškovac
Peći
Lisina
1650
Maleševci
Malo Tičevo
Preodac
Crni Vrh
Srekerovci
Rore
Perduhovo
Selo
Otric
Rastičevo
Žarčak
Bosansko Grahovo
Obljaj
G. Galići
Marinkovci
Crnac
1872
Popovići
Vagan
Sumnjaci
Glavice
Medena
Zrmanja Vrelo
Plavno
Strmica
Korita
Luka
Gornje Peulje
Podgora
Crni Lug
Bastasi
Halapić
Prijevo
Potkom
Radljevac
Golubić
Nadvodn
Kašte
Padene
Žagrović
Dinara
1831
V. Bat
1851
Rogdaše
1634
Glamoč
Komaz
Veinovići
Radučić
Kovačić
Pržine
G. Kazanci
D. Kazanci
Vrbica
Parčić
Selo
Vrbnik
Polača
Kijevo
Cetina
Sajković
Troglav
Bjelina
Orlić
Bat
1207
Bojmunto
Puljane
Ramljane
Čitluk
Lukar
Zvjerinac
Civljane
Gubin
Ježević
Dobropoljci
Varivode
Smrdelj
Bribirske
Mostine
Laški
Sukno
Vrlika

RECOMMENDATIONS

The report shows that the EIB is not equipped to effectively tackle fraud and corruption, and currently lacks political will to do so. Case studies demonstrate that there are structural issues to be addressed, and that these loopholes in fact jeopardize the credibility of the entire EU anti-fraud system. By furthering corruption, the EIB goes against the EU treaties and its mission "to contribute towards the integration, balanced development and economic and social cohesion of the EU Member States". Our key recommendations are listed below:

1) CHANGING THE RULES OF THE GAME TO SET A BETTER FRAMEWORK FOR THE EIB ANTI-CORRUPTION FIGHT

A) A stronger EU legal framework for EIB operations is necessary

- The **concept of the Protection of the Union's Financial Interest needs to be expanded and reinforced**. For the time being, the concept takes a limited view of what constitutes financial risks, at a time when investors (including commercial banks for instance) are broadening the scope of what financial risks entails in order to include corporate social responsibilities considerations and reputational risks linked to corruption and integrity.

- In parallel, the EU institutions should make sure that what falls outside of the "protection of EU's financial interests" is covered under EU law. In this regard, **a new European Regulation on the EIB's due diligence obligations should be adopted**, which could include sanctions in the event of non-compliance with the rules laid down, including those on the obligation to act in the event of Prohibited Conduct. Such Regulation would establish the possibility to bring the EIB (including its Management and staff) to Court in the public interest for not referring cases, or not acting on cases of Prohibited Conduct. At minimum, the **EIB should be included under the scope of the EU Anti-Money Laundering Directive**.

B) Making the best of the cooperation with European authorities: OLAF and the European Public Prosecutor's Office

As explained in this report, the EIB is working in close relationship with the European Anti-Fraud Office (OLAF), which is to control the integrity of EIB operations. However, our case studies show that there is limited transparency about both EIB's and OLAF's investigations, and about the influence of OLAF's findings on the EIB's behaviour. For instance, in the case of Passante Di Mestre, OLAF's decision not to open an investigation has been repeatedly used as a killing argument by the EIB to duck concerns about the companies involved in the project. Ultimately the EIB ended up hiding behind OLAF's inaction.

OLAF reports on EIB operations need to be disclosed, or at least meaningful summaries, as there is an overriding public interest in understanding how public funds are being used and/or misused. OLAF acknowledges that there may, in some circumstances, be a public interest case for disclosing final reports but argues that these circumstances are extremely limited. We accept this but would suggest that a way forward might be to publish meaningful summaries of the final reports.

Then more transparency on the handling of complaints and the division of tasks between the EIB and OLAF is necessary. At the time being, it is impossible to know if the EIB is still investigating once it has handed a case over to OLAF, and how it follows-up on OLAF conclusions.

The new European Public Prosecutor Office (EPPO) could be a game changer for the EIB. Indeed, the EIB is currently dependent on national authorities for judicial investigations, via the national authorities of EIB clients suspected of fraud or corruption. In the coming years, **it will be crucial to ensure that EPPO pro-actively covers EIB cases, by investigating, prosecuting and bringing to judgment the perpetrators of offences affecting the Union's financial interests via EIB operations**. And it should become binding for the EIB to report suspected cases of fraud, corruption money-laundering or financing of terrorism to EPPO. Making sure that this new entity genuinely covers the EUR 75 billion yearly operations of the EIB will be a challenge, but certainly one that could reinforce the accountability and control over the Bank's operations.

C) Clarifying responsibilities towards national authorities

The Bank often hides behind the involvement of national governments in backing controversial projects, like in the case of Italian mega-projects. Hence, it is not sufficient for the EIB to only rely on information provided by national authorities, which could themselves bear responsibilities in corrupt schemes.

Nevertheless, a revised Anti-Fraud policy should make it **compulsory for the EIB to refer suspected prohibited conduct to national authorities and prosecutors, even when outside of the European Union**.

Then, in the case of an investigation carried out by a national authority which may involve EIB financing, the EIB shall do its utmost to stick to its requirement to liaise and assist the national authority and ultimately bear the **obligation to request the findings of the investigation**.

Intensifying and promoting pro-active exchanges with law enforcement and anti-corruption agencies at national level to facilitate the exchange of information on cases of mutual interest concerning suspected prohibited activities will be a complement to the above-mentioned steps.

D) Making the EIB more accountable towards other European Institutions

The European Parliament only has limited competences towards the EIB, and its approach towards the Bank is currently largely fragmented. For instance, it adopts every year two separate resolutions on the EIB which largely overlap. One way to rationalise the Parliament's efforts to hold the bank to account could be to **create a dedicated sub-committee or intergroup to monitor EIB operations and provide political guidance to the EIB**. That way, a set of parliamentarians could gain deep knowledge about the EIB and scrutinize the bank during a full parliamentary mandate.

As far as the **European Commission** is concerned, while OLAF is part of the Commission, in theory the Commission could also **oppose projects which bear fraud and corruption risks via the so-called "Article 19 procedure"**, under which the Commission is to provide an opinion on all EIB projects before

they go to the Board of Directors for approval. The Commission could also use its seat at the Board of Directors to oppose such projects during discussions within the Board.

Then, the Commission should include the EIB in its annual reports to the European Parliament and the Council on measures taken to counter fraud and other illegal activities affecting the EU's financial interests. An "EIB chapter" in the report would highlight cases of incorrect financing practices by the EIB that have effectively led to an increase in the level of corruption in Europe rather than to the adoption of "measures to counter fraud and other illegal activities affecting the EU's financial interests". Similarly, the Commission should include the EIB in its next Anti-Corruption report – the successor of its 2014 report[98].

Finally, under the future Multi-annual Financial Framework – EU budget for the period 2020-2027 – **the European Court of Auditors should be awarded full rights to audit the EIB regarding all its operations**. Back in its 2014 analysis of EU accountability, the ECA[99] has already called for enhanced democratic oversight over EU institutions including the EIB, a position which civil society should support. Increased auditing by the ECA on EIB lending would provide additional safeguards and prevent EIB funds from being used to finance fraud and corruption. The Court of Auditors should also include the fight against fraud at the EIB in upcoming Special Reports, since for example in its report "Fighting Fraud in EU spending: action needed"[100] from 10 January 2019 it focused on the spending of EU funds but did not cover EIB operations.

2/ REINFORCING INTERNAL MECHANISMS TO FIGHT FRAUD AND CORRUPTION AT THE EIB

A) Reviewing and strengthening key internal policies:

– The EIB needs to start by the review of the Anti-Fraud policy, which is foreseen for 2019.

The policy should foresee provisions under which the EIB must effectively **freeze projects in which credible suspicions have been raised and break contracts with corrupt clients**. As requested by the Parliament, the EIB should be in a position to "*stop further loan disbursements to projects under ongoing national or European corruption investigations*" and set this obligation in stone in its Anti-Fraud policy. In case the corruption allegations are assessed as strong enough for the bank and/or OLAF to open the case and start investigation, the contract should be suspended or decision on contract award should be postponed until the case is clarified.

The decision on **suspension of contract and/or recovery of misapplied funds should be possible not only on the basis of final court decision**. It is worth noting that the EIB actually has a financial interest in continuing with contracts in order to profit from them. Recalling loans cannot be considered as a sufficient way to deal with fraud and corruption. In this regard, settlements with fraudulent EIB clients should not become the standard instrument in the Bank's sanctions toolbox, unless they are accompanied with stringent exclusion measures and disclosure of the settlement agreements and compliance programmes of clients that have settled with the EIB – in order to ensure room for citizens' groups to monitor the compliance of these entities.

A renewed policy should also ensure **more transparency on the handling of complaints**. Reports by the IG/IN and OLAF related to EIB operations should be disclosed, and on a case-by-case examination, meaningful summaries should be published at least – and much earlier than in the Volkswagen case. All decisions about exclusions should also be systematically disclosed. The EIB should implement the Ombudsman's recommendation to "*remove the presumption of non-disclosure related to information and documents collected and generated during inspections, investigations and audits, including after these have been closed.*" Finally, the outcomes and main conclusions of Proactive Integrity Reviews should be made public on the EIB's website.

98 - https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report_en

99 - https://www.eca.europa.eu/Lists/ECADocuments/LR14_01/QJ0214776ENC.pdf

100 - https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=48858

This set of information should be included in the annual EIB Anti-Fraud report, together with a table summarizing the number of alerts received, investigations opened by IG/IN, cases transmitted to OLAF and dealt with by OLAF.

– Raising the bar on protection of whistleblowers

The EIB Whistleblowing policy is currently undergoing a revision, even though this process is taking place behind closed doors and to date there has not been room for external stakeholders to provide inputs to this process.

Firstly, the renewed policy should cover both internal and external informants – which is not the case at the time being[101]. Then, it should set-up solid procedures, timelines and guidelines to update the whistleblowers on how its complaints are handled and better include informants within the investigation process. The tools at the disposal of OCCO to provide protective measures for whistleblowers and to penalise any retaliation on whistleblowers should be explicitly described.

In its report "Investing in integrity", Transparency International EU also recommends to include the possibility for the whistleblower to appeal the outcome of the investigation. This right to challenge decisions – for both internal and external informants – should materialize via a legal protocol included in the renewed policy.

A wider dissemination of the reporting channels and protection tools available for whistleblowers, as well as creating a visible digital reporting form to make reporting easier, would encourage informants to contact the EIB.

B) Better implementing existing procedures and demonstrating political willingness

– Making a better use of the EIB Anti-Fraud policy and sanctions toolbox.

A stringent implementation of the EIB Exclusion Policy would be a litmus test: excluding the VW group is a positive signal, but doing so for Italian companies part of the MOSE and Passante di Mestre schemes – and for the new consortiums of which they may be part – would send a strong signal of the political willingness to tackle corruption and fraud issues upfront at the EIB.

- Renewed standards on financial intermediaries should be adopted in 2019 and take into account lessons learnt from both the internal EIB evaluation on its activities in the ACP region and its pro-active integrity review on intermediated operations. The standards shall, inter alia, address the need for better due diligence on the fraud and money-laundering risks linked to the Bank's intermediated operations. **The Bank's approach that the responsibility for control of intermediated operations is left to the borrower/financial intermediary poses a serious risk to the EU's financial interest and anti-corruption mechanism as a whole.** We believe the EIB needs to take responsibility to ensure financial intermediaries apply strict anti-fraud policy and show equally zero tolerance for corruption.

- Without further ado, the EIB should **publish on its website the Beneficial Ownership (BO) of its clients** in order to heighten the visibility of its operations and help deter corruption and conflicts of interest. This should be the case for the natural persons who ultimately control or benefit from companies who directly benefit from its loans. This publication of BO information should be made compulsory to EIB clients via its contracts. The 2015 EU Anti-Money Laundering Directive opens up for such possibility with the setting up of national registers of beneficial owners. Although the Directive sets out legal obligation only upon the EU Member States, its importance should not be underestimated. The Directive recognises the principle of transparency of information on beneficial ownership: it is legitimate to make available to the general public a defined array of information regarding the beneficial owner (name, date of birth, nationality and country of residence).

101 - External informants, including EIB's project related parties, other counterparts and partners, or members of the public (including civil society) are invited to use the different reporting channels as defined by the Anti-Fraud Policy, which also contains confidentiality provisions for external informants. But this is not part of the EIB's Whistleblowing Policy.

In its right of reply response to our draft report, the EIB writes "*We would like to draw your attention to the fact that the disclosure of beneficial ownership to the public cannot be unilaterally extended by the EIB beyond the existing legal framework*". It is important to refute this statement, since the EIB could do so, if for example a specific clause was included in the contracts with its clients. Indeed, the disclosure of clients BO information by the EIB could raise issues related to the privacy rights of beneficial owners. Nevertheless, the transparency of BO information can be achieved in accordance with the General Data Protection Regulation (GDPR). There are no legal impediments which prevent the EIB to publish such information if the EIB previously obtains the consent of its clients through a contractual clause.

A more ambitious and transparent approach to corporate welfare should indeed make it possible for a public bank to disclose the identity of those benefiting from public funding. The EIB can legitimately update its policies in order the reflect the evolution of EU law on the subject.

- **Beefing up contractual clauses with EIB clients in relation to fraud and corruption** is a prerequisite for a proper implementation of the EIB policies, standards and sanctions toolbox. Straightforward suspension clauses in case of corruption allegations and opening of investigations at national or European level should be inserted into contracts with clients.

As flagged in the EIB's response to the draft of this report, the EIB does not have the powers, nor the role, of a law enforcement agency or prosecution authority and cannot look into issues that fall outside the scope of its activities. The EIB Fraud Investigations Divisions "*conducts administrative investigations on the basis of the inspection and information clauses embedded in its financing agreements*". This gives another important reason to integrate in contracts with clients strong covenants providing an extensive competence for the EIB to investigate, inspect and publicly report on potential prohibited conduct.

At the same time we would like to reiterate the importance of the disclosure of finance contracts between the EIB and the client – in particular the inspection and information clauses as they form the basis for the EIB's investigations. We believe transparency of these contracts would serve the public interest as well as it would help to clarify the anti-corruption provisions envisaged in the contract agreement between the EIB and the promoter.

C) Revamping internal governance

- A **stronger role for the EIB Board of Directors** in relation to the fight against fraud and corruption is necessary. This implies being properly informed about ongoing investigations, exclusion procedures and their outcomes by IG/IN – and not only by the Management Committee - and on major compliance issues by OCCO. In relation to the case studies from this report, it appears that the Directors of the bank have been little involved, apart from approving loans to the projects. In practice, the EIB Management Committee keeps the control over sensitive cases in order to protect the reputation of the bank and its own reputation. If EU Member States are serious about having their own bank dealing properly with fraud and corruption risks, they should put an end to this situation and reinforce the scrutiny exerted by the Board of Directors.

- The **independence of the Bank's investigative unit** (IG/IN) must be strengthened by having it report directly to the EIB Board of Directors and subject to regular and public external evaluation.

- As recommended by the EIB Audit Committee in its 2018 report published in July 2019[102] , "*the control functions of the Bank need to be appropriately and sufficiently staffed in terms of both financial and human resources. Existing vacancies in the control functions need to be filled and the recruitment process needs to be streamlined to ensure appropriately staffing and decrease excessive reliance on consultancy contracts*".

102 - https://www.eib.org/attachments/general/ac_annual_reports_2018_en.pdf

ANNEX 1:
EIB's viewpoint on confidentiality of investigations

The EIB, in its right to reply response sent to Counter Balance on 18 January 2019, opposed our criticisms about the lack of transparency of its investigations. Below are the key arguments advanced by the Bank:

"The EIB needs to protect its investigative process, the personal data, the legitimate rights of the persons concerned, ensure the confidentiality of OLAF investigations, and of possible follow-up in administrative and on-going legal/judicial proceedings. This confidentiality is a key element when investigating potential fraud and corruption cases, both to gain a full understanding of the case and to be able to secure the best outcome regarding the protection of the EU financial interest."

"Disclosure of information and documents collected and generated during inspections, investigations and audits would have a serious impact on the smooth operatility of the EIB's control functions and the effectiveness of their processes – e.g. risk of destruction of evidence or attempt to influence/intimidate potential witnesses."

"In addition, also when the EIB investigation has been closed, such disclosure might interfere and jeopardise subsequent or parallel investigations by national or EU/international investigative authorities whose existence and timelines might not be known by the EIB. Disclosing such information and documents might also have an impact on the willingness of national authorities to continue to cooperate with the EIB, as the different cooperation agreements are generally based on confidentiality."

"Investigations also serve the purpose of guiding the decision-making process of the Bank. Disclosure of information and documents collected and generated during these activities would affect the freedom to deliver a complete information to the EIB Group's decision-making bodies as a result of a thorough due diligence, requiring analysis and elaboration of data (in terms of quantity/quality), which, compiled together and thoroughly analysed, finally lead to recommendations and/or decisions."

ANNEX 2:
OLAF's viewpoint on confidentiality of investigations

OLAF, in its right to reply response sent to Counter Balance on 21 December 2018, opposed our criticisms about the lack of transparency of its investigations. Below are the key arguments advanced by the European Anti-Fraud Office:

"We would like to clarify once again that due to the confidential nature of our investigative work, there are legal constraints and obligations that prevent us from disclosing information about our work. Indeed, OLAF can often not comment in depth on the outcome of its investigations because of ensuing investigations at national level, by national judiciaries or by international or European bodies such as the World Bank or the EIB for instance. OLAF cannot risk the destruction of evidence of potential investigative interest, and it is also bound by the presumption of innocence.

This is why OLAF final reports are subject to strict rules of confidentiality and are not publicly available in order to ensure the effectiveness of the administrative and judicial proceedings, to protect the legitimate rights of the persons concerned, as well as to protect personal data.

Public access to OLAF's documents is governed by Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

Pursuant to Article 4 of that Regulation, the institutions must refuse access to a document where disclosure would undermine, in particular, the purpose of inspections, investigations and audits or where it would undermine the privacy and the integrity of the individual, also in accordance with EU legislation regarding the protection of personal data. In the former case, documents or their parts may only be disclosed where an overriding public interest has been demonstrated by the applicant.

In this context, the Court of Justice of the European Union has recognised a general presumption of non-accessibility to documents in OLAF's investigation files, including Final Reports and Recommendations, based on the exemption related to the protection of the purpose of the investigation. The presumption is based on the sectorial legal framework (Article 10 of Reg 883/2013 on confidentiality and professional secrecy rules) and applies even after the investigation in question is closed (T-110/15 IMG v Commission, ECLI:EU:T:2016:322, p. 37).

In addition, the concept of "overriding public interest" has been construed strictly in the case law of the Court. According to the case-law, such an interest would need to be clearly identified and balanced against the interest of confidentiality. Given the preliminary nature of OLAF's findings, this balancing of interests also has to take account of the requirements arising from the presumption of innocence which is protected by the EU law (Art 48 European Charter of Fundamental Rights).

Public disclosure of OLAF's final report might create a serious misconception on the part of the public. Apart from causing harm to OLAF's investigative function, it could also undermine the protection of legitimate interests of persons concerned, informants, witnesses and staff of the Office in this regard. Even the removal of personal data from the document could not prevent possible misrepresentations about the persons concerned, in particular when the identity of persons can be derived from the context or information that is known.

OLAF's final reports are not decisions. OLAF addresses its final reports to competent EU and/or national authorities in view of them taking further action. Any exchange of information between OLAF and these authorities must respect the principles of confidentiality and the rules on data protection laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (New data protection Regulation 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies entered in force on 11 December 2018).

Where an OLAF Final Report and Recommendations are transmitted to the competent authorities for a possible follow-up, it is up to those authorities to ensure an equivalent level of protection to the information contained in the report in accordance with their applicable provisions related to professional and judicial secrecy and other provisions guaranteeing the protection provided for in Article 10 of Regulation (EU, Euratom) No 883/2013.

Those authorities should assess any application for access to OLAF documents under their applicable provisions while ensuring full respect of the objectives laid down in Regulation (EC) No 1049/2001, including the protection of particular public interests referred to in Article 4 thereof.

Regulation 1049/2001 is not directly applicable to the EIB, however, it has to be taken into account by the latter when asked to disclose an OLAF report as document originating from a third party.

From all the above-mentioned arguments, we believe it is apparent why we cannot give more transparency to our final reports, beyond short summaries of our findings that we do give out on request when there is public interest. For example, the OLAF press office has issued replies on the findings of OLAF in all the cases you mention in your draft report. Such replies indicated the results of OLAF's activities, be it the dismissal of a preliminary assessment, or the outcome of an investigation or coordination case."

ANNEX 3:
EIB's first reply on the report, January 2019

Dear Sir,

We thank you for giving the European Investment Bank (EIB) the opportunity to review the Counter Balance draft report "Is the EIB up to the task in tackling fraud and corruption? Challenges for the EU Bank's governance framework" prior to publication.

While the EIB welcomes constructive comments and criticism from all stakeholders regarding its activities, we would like to point out that, notwithstanding the clarifications already provided by the Bank on earlier occasions, the draft contains several inaccurate and misleading statements. We also note that these statements are the basis for some of the unfounded conclusions and unsubstantiated recommendations made in the draft report.

In that respect, we are pleased to provide you with our key comments both in this letter and as comments directly in the draft report when more convenient. We would be very grateful if you could give due considerations to our comments and would welcome the opportunity to react on the revised version of the report.

General remarks

The draft report illustrates an apparent misunderstanding of the nature of the EIB's investigation and sanction possibilities. The Bank's Fraud Investigations Division conducts administrative investigations on the basis of the inspection and information clauses embedded in its financing agreements. The EIB does not have the powers, nor the role, of a law enforcement agency or prosecution authority and cannot look into issues that fall outside the scope of its activities. In this context, the EIB fulfils its role by investigating suspected Prohibited Conduct (fraud, corruption, coercion, collusion, obstruction, money laundering and financing of terrorism) within the context of the Bank's activities and, whenever needed, referring to competent authorities and taking actions within the remedies available under the Bank's policy framework.

Similarly, the report consistently assimilates an alleged lack of disclosure of investigationsrelated information, to a lack of action. The Bank handles requests for disclosure of investigation reports and information in accordance with its Transparency Policy, and in consultation with OLAF whenever applicable, taking into account the public interest in such disclosure. As confirmed in its Transparency Policy, the EIB needs to protect its investigative process, the personal data, the legitimate rights of the persons concerned, ensure the confidentiality of OLAF investigations, and of possible follow-up in administrative and on-going legal/judicial proceedings. This confidentiality is a key element when investigating potential fraud and corruption cases, both to gain a full understanding of the case and to be able to secure the best outcome regarding the protection of the ED financial interest.

Considering the above, we take this opportunity to remind you that the EIB has a comprehensive anti-fraud framework in place with anti-fraud measures applicable throughout its project cycle, as developed notably in its Anti-Fraud Policy. In order for this framework to be implemented efficiently, the Bank has an independent office within the Inspectorate General to investigate allegations of Prohibited Conduct reported by any person within or outside the EIB. This office, the Fraud Investigations Division, staffed with experienced investigators and former national prosecutors, works in close partnership with OLAF and national authorities to undertake objective fact-finding investigations.

In addition, the Bank implements a risk-based approach called Proactive Integrity Reviews to detect potential Prohibited Conduct proactively, and implements a fraud awareness programme to equip its staff members with the ability to recognise red flags of Prohibited Conduct.

This framework and its related resources provide the EIB with the capacity to professionally and objectively investigate allegations of Prohibited Conduct involving EIB financed projects and ensure that the zero tolerance principle enshrined in the EIB Anti-Fraud Policy is applied in its day-to-day business.

Beyond these comments at a general level regarding this report, we also would like to provide you with some detailed comments regarding assertions that in our view would need to be amended in the final report.

Chapter 1 – Internal EIB handling of fraud and corruption

When presenting the Anti-Fraud Policy, the report implies that the Policy is applicable to OCCO and IG/IN. We would like to clarify that the Policy is a global principle-based policy document applicable to all EIB's services and operations. It is not a procedure setting out in detail the work of OCCO and IG/IN. In the same way, we are pleased to note that report refers to the "proactive integrity reviews", but would like to clarify that these are carried out solely by the Fraud Investigations Division of the Inspectorate General and not by OCCO as inadvertently stated in the report.

The report also contains some factual errors regarding the reporting obligations of EIB staff and clients. Any suspected prohibited conduct must be reported to the Inspectorate General, or OLAF (not to the Secretary General). In the same way, please note that the notice of exclusion proceeding is sent to the Exclusion Committee (section 5.02 of the Exclusion Policy), and that the Exclusion Committee is involved in all exclusion proceedings.

Finally, please note that the appointment of a compliance monitor, as part of the outcomes of the exclusion procedures, is an obligation, and not just a possibility, as implied in the report. Please also note that a revised EIB Group Staff Code of Conduct and a revised EIB Group Whistleblowing Policy are currently under review.

RELATIONSHIP WITH OLAF

When presenting the relationship between the EIB and OLAF, the report states that the Investigation Division acts as a filter, potentially involving OLAF if an initial suspicion of fraud or corruption leads to opening of an investigation. We would like to clarify that the Fraud Investigation Division actually promptly notifies OLAF of any case of suspected Prohibited Conduct, in line with the Bank's Investigation Procedures. In addition, and as mentioned above regarding reporting lines, allegations of Prohibited Conduct can be reported directly to OLAF.

RELATIONSHIPS WITH NATIONAL AUTHORITIES

The report insinuates that even when national authorities are investigating suspicion of Fraud or Corruption in cases that may involve EIB financing, the Bank's Anti-Fraud Policy would allow the Bank to take a passive approach by not involving itself. This is an erroneous understanding of the Policy. The Anti-Fraud Policy, as the report itself also points out, provides that EIB "shall" provide assistance to national authorities, and to do so whenever required, and also proactively. However, the EIB does not have the authority to impose its contribution to investigations which are in the hands of national authorities.

When discussing the possibility for the EIB to sign cooperation agreements with law enforcement and dedicated anti-corruption agencies, the report includes the following statement: "Nevertheless, there is no necessity for the EIB to relate to national law enforcement agencies, and especially to dedicated anti-corruption units which are non-existent in a vast majority of EU Member States, where the bulk of EIB operations take place." Please note that, while some countries have specifically designed anti-corruption agencies, all EU Member States have relevant national authorities and law enforcement agencies dedicated to investigating corruption. The EIB liaises and collaborates with such agencies and bodies, either upon their request for assistance, or by actively referring suspected Prohibited Conduct to them and liaising with them as needed.

EUROPEAN PUBLIC PROSECUTOR OFFICE

When welcoming the future EPPO, the report states that it would hold the EIB accountable on fraud and corruption cases at European level, and not anymore at the level of Luxembourg Authorities. Please note that the EIB already refers suspected Prohibited Conduct to the relevant national authorities within and outside the EU.

Case studies

As an introductory comment regarding the case studies presented in the draft report, we would like to mention that the analysis is based on a misunderstanding of the nature of the investigations carried out by the Bank (i.e. administrative investigations on the basis of finance agreement's clauses), and the role of transparency/confidentiality in the handling of such cases, as also explained at the beginning of this letter.

EIB LOAN TO VOLKSWAGEN

The draft report makes the following statements in relation to the EIB handling of the VW case:

- *" The EIB got its loan repaid few years ago, so considers itself safe from a financial perspective. Here, protecting EIB's financial interest seems the most important issue at stake for the EIB"*;

The EIB disagrees with this statement, and we would like to refer to the following EIB statement: http://www.eib.org/en/infocentre/press/news/all/eib-statement-following-the-finalisation-ofthe-olaf-investigation-into-the-possible-misuse-of-eu-funds-and-european-investment-bankloans-by-the-volkswagen-group.htm

- *"Not to impact its reputation, the EIB refuses to disclose the conclusions of the OLAF report"*;

The EIB has duly examined requests to disclose the OLAF report under the applicable provisions of its Transparency Policy, and provided its reasoned explanations in these cases. We disagree with the above statement that the decisions in relation to such requests have been made not to impact the EIB's reputation.

- The Olaf report *"concludes that the EIB needs to take concrete steps to better implement its Anti-Fraud policy - implying that this is not the case at the time being"*;

We would like to point out that the draft report misinterprets OLAF's recommendation. OLAF recommended that the EIB applies all relevant measures vis-à-vis Volkswagen AG as provided for under the Bank's Anti-Fraud Policy on the basis of OLAF's findings. The recommendation does not call for, nor does it imply, any improvement in the implementation of the EIB's Anti- Fraud Policy.

• "The claim that there is no overriding public interest in disclosing more information about this report is unacceptable. If the report shows that the EIB did little monitoring of how hundreds millions of Euros of public money were actually awarded to carmakers supposedly for fighting climate change, there is a strong public interest in knowing about that'.

Please note that, as stated above, the OLAF report does not identify any fault in EIB's procedures and processes.

• "The Bank keeps repeating that its internal investigation is still ongoing – despite OLAF having already concluded its part. But one may wonder if this is not simply a technique to delay the EIB conclusions and hope that media coverage of the Dieselgate will slowly come to an end by then".

Please note that the EIB has come to an agreement with Volkswagen AG regarding this case. According to this agreement, the EIB will conclude its investigation and Volkswagen AG will in turn voluntarily not participate in any EIB project during an exclusion period of 18 months. Since October 2015, the consideration of loans by the EIB to Volkswagen AG had been under suspension. In addition, Volkswagen AG is committed to its sustainability initiatives including environmental protection activities and, in this context, will contribute EUR 10 million to environmental and/or sustainability projects in Europe. Volkswagen AG will continue to inform the EIB regarding its Compliance Programme and cooperate with the EIB in the exchange of best practices in relation to compliance standards and the fight against fraud.

PASSANTE DI MESTRE & MOSE

We would like to highlight that the allegations raised by NGOs regarding Passante du Mestre have been systematically contradicted by all the relevant authorities. The EIB's own investigations, OLAF and the Italian Authorities have all concluded that no link could be established between the fiscal fraud allegations and the project financed by the EIB. In addition, please note that contrary to what is stated in the draft report, the Italian Court of Auditors never stated that the project was infiltrated by criminal organisations.

To the Bank's knowledge, the allegations made in the draft report are not directly linked to the Passante di Mestre project financed by the EIB, butto other infrastructure projects where some subcontractors contracted in the framework of the Passante di Mestre project were involved; these other infrastructure projects took place three/four years after the completion of the Bank's project. The Bank does not have any evidence at this stage of any misuse of EIB funds in relation to this project.

Regarding the MoSE System project, the EIB opened its own investigation in March 2013 and is closely following the developments of the ongoing criminal proceedings by the Italian judicial authorities in coordination with OLAF. The EIB will consider any follow-up once all ongoing proceedings are concluded. It is worth noting that the EIB participates in the financing of this project following a scheme under which the Italian Ministry for Infrastructure certifies the expenses incurred and to be financed by the EIB.

In addition, the draft report refers to two resolutions of the European Parliament (in 2015 and 2016), and that "unfortunately it seems that no one in Brussels or Luxembourg, where the EIB is headquartered, listened to this call since the support to the project continued". This is incorrect. The Bank replied to the EP resolution 2015/2127(INI) on the control of the financial activities of the EIB on 28 April 2016.

THE ŠOŠTANJ LIGNITE PLANT IN SLOVENIA (TEŠ6)

Regarding the TEŠ6, the Project is completed and in commercial operation since June 2016. There is an on-going criminal investigation and the EIB is monitoring developments.

Setting aside the issues flagged with the draft report's analysis of the cases above, the Bank would like to take this opportunity to clarify that it always draws lessons from difficult cases.

Naturally, should Counter Balance have any specific new allegations of actual corruption cases, we would encourage you to report these to the EIB Fraud Investigations Division, via the reporting mechanisms set out on the EIB website, or to OLAF (http://www.eib.org/en/about/accountability/anti-fraud/reporting/index.htm).

Chapter 2 – A Dysfunctional system & Recommendations

We would like to draw your attention to some unfounded statements included in the draft report such as *"the EIB is not up to the task in tackling fraud and corruption", "The EIB does not act when aware of Prohibited Conducts", "Political willingness to act in highly political cases is very limited on EIB's side", "The fact that its loans may have supported corrupt practices becomes a negligible side story", "the EIB did not make a systematic use of the clauses it inserts in contracts with its clients in the cases covered by this report"* etc. In our view, these statements are a result of the flaws in the report's analysis of the EIB's Anti-Fraud framework. As you will notice in our specific comments on the report, we did not provide specific wording suggestions as we profoundly disagree with these statements.

Other statements and/or recommendations, while worded less strongly, are incomplete and/or unrealistic. For instance, the report calls for the Bank to go beyond recovering its funds. In fact, the EIB does not only apply the remedies available under its Anti-Fraud Policy, such as recalling a loan, in case of Prohibited Conduct, but it can also enter into negotiated settlements with entities or individuals found to have engaged in Prohibited Conduct. The EIB also refers suspected Prohibited Conduct to the relevant national authorities for prosecution. This being said, the EIB does not have any authority to conduct criminal investigations or proceedings, which is the task of law enforcement and judicial bodies.

We have commented below on both the statements included in Chapter 2 of the draft report and the related recommendations to avoid repetition.

INDEPENDENCE OF THE ELB'S DECISION-MAKING PROCESS

The independence of the EIB's decision-making process is of essential importance to the Bank. In that respect, its governing bodies have agreed on a revision of the Management Committee and Board of Directors Codes of Conduct in the coming months.

THE EIB EXCLUSION POLICY

The Bank welcomes the comment that the EIB Exclusion Policy is considered as "a promising step forward". However, we note that the limitations you are identifying are not correct.

Regarding the alleged lack of openness of the process, please note that the Exclusion Policy draws on both the EU exclusion process and the Multilateral Development Banks' (MDBs) debarment procedures. Proceedings instigated under this Exclusion Policy follow a threestage review process to determine whether the evidence presented convincingly supports the conclusion that an entity or individual engaged in Prohibited Conduct. It provides the necessary due process rights to respondents to respond to the allegations.

Similarly, the draft report states that "the policy does not make it binding for the bank to publicise its early suspension of exclusion decision". Please note that the exact term is "Early temporary suspension" and that, in line with best practices from the MDBs, the EIB does not make public early temporary suspension. In addition, in line with the EU practice (please see the EU Financial Regulation), the Bank does not automatically publish its exclusion decisions. Such publication is subject to a case-by-case assessment mirroring in that respect the provisions of the EU Financial Regulation.

Finally, the draft report states that EIB's sanctions are limited to having its loans being repaid. We invite you to read our exclusion webpage: http://www.eib.org/en/about/accountability/antifraud/exclusion/index.htm. The Exclusion Policy of the Bank and its possibility to enter into settlement negotiations with entities which committed Prohibited Conduct, was in fact put in place to provide the Bank with the possibility to go beyond the recall of a loan. Settlements, as demonstrated in the past, allow the Bank to negotiate voluntary exclusion periods, financial contributions to finance projects supporting good governance and the fight against corruption, rehabilitation and compliance programme to be put in place by the concerned companies under the supervision of a compliance monitor.

Related recommendations

Without prejudice to the above, there is certainly room for further improvement in the Bank's existing anti-fraud and governance framework and we remain available to discuss with all interested stakeholders any such possible improvement. In that respect and as indicated in the draft report, the review of the Anti-Fraud Policy is foreseen for 2019 and internal consultations within the Bank are already underway. It will be an excellent opportunity to further discuss and consider your relevant recommendations.

However, we would like to draw your attention to the fact that the EIB Anti-Fraud Policy has to comply with laws and regulations. For instance and conversely to what the draft report recommends, the EIB cannot suspend disbursements or freeze projects based on mere suspicions of Prohibited Conduct. For such decisions to be made by the Bank, there is a need (at the very least) for a finding if not a criminal court judgement. The presumption of innocence is a fundamental principle of the legal process and one of the most important rights of the defence (see article 48 of the European Charter of Fundamentals Rights). Imposing penalties or sanctions on the sole basis of suspicions would not only erode due legal process but would also pave the way to arbitrary decision making at the level of EIB projects.

You further recommend that "The decision on suspension of contract and/or recovery of misapplied funds should be possible not only on the basis of final court decision but also in case of clear administrative decisions, like presence of a client on the Commission's exclusion database". We would like to remind you that exclusion decisions, such as the exclusion decisions made under the Early Detection and Exclusion System (EDES), are forward-looking measures that can only apply to future contracts and cannot apply retroactively to ongoing contracts.

We would also strongly encourage you to reflect the recent developments of the EIB's antifraud and corruption framework under which the Bank can apply a wide range of sanctions including freezing disbursements, entering into settlements negotiations or excluding entities having committed Prohibited Conduct.

TRANSPARENCY

Disclosure of information and documents collected and generated during inspections, investigations and audits would have a serious impact on the smooth operability of the EIB's control functions and the effectiveness of their processes - e.g. risk of destruction of evidence or attempt to influence/intimidate potential witnesses. In addition, also when the EIB investigation has been closed, such disclosure might interfere and jeopardise subsequent or parallel investigations by national or EU/international investigative authorities whose existence and timelines might not be known by the EIB. Disclosing such information and documents might also have an impact on the willingness of national authorities to continue to cooperate with the EIB, as the different cooperation agreements are generally based on confidentiality.

Investigations also serve the purpose of guiding the decision-making process of the Bank. Disclosure of information and documents collected and generated during these activities would affect the freedom to deliver a complete information to the EIB Group's decision-making bodies as a result of a thorough due diligence, requiring analysis and elaboration of data (in terms of quantity/quality), which, compiled together and thoroughly analysed, finally lead to recommendations and/or decisions.

WHISTLEBLOWING POLICY

Regarding your recommendation that the EIB Whistleblowing Policy *"should cover both internal and external informants - which is not the case at the time being"*, please note that external informants, including EIB's project related parties, other counterparts and partners, or members of the public (including civil society) are invited to use the different reporting channels as the Anti-Fraud Policy, which also contains provisions on confidentiality provisions for external Informants.

In addition, there is an avenue provided for external informants under the remit of the Inspectorate General, Complaints Mechanism Division (IG/CM). In this respect, IG/CM handles allegations of maladministration, covering situations where the Bank fails to act in accordance with the applicable legislation and/or policies, fails to respect the principles of good administration or violates human rights. Some examples of failure to respect the principles of good administration, as defined by the European Ombudsman (EO), are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, undue refusal of information, unnecessary delay. As such, while reports from external informants are not catered for in the Whistleblowing Policy, any complaint regarding maladministration may be addressed to the Complaints Mechanism.

EIB BUSINESS MODEL

The report presents private equity funds as "black box" for the EIB. Please note that Private equity, and equivalent private investment vehicles are habitually managed by an Investment Manager or Management Company which is regulated and under the surveillance of the relevant national financial regulator. AML/CFT controls are systematically and continuously carried out by the regulated entities, as required by law. Further, the EIB performs a "Know Your Customer" ("KYC") due diligence on all new counterparts and a due diligence of all new operations in order to detect possible compliance or integrity concerns. Such due diligence is performed in accordance with the core requirements of the AML-CFT Directives.

Also, the legal framework for certain business lines (e.g. contributing to investment funds) does not allow the EIB (like any other investor) to refuse to contribute when there is a call for capital. That is the nature of the project and once the EIB signs the agreement, the Bank is committed, unless certain events occur, as specified in the investment agreement. A general policy principle committing the Bank to stop disbursements in case of suspicions of Prohibited Conduct is therefore not realistic.

In addition, the report states that "intermediated operations using EIB funds face serious risks of misuse and money laundering practices". However, it does so by mixing the insights of a published report carried out by the EIB's independent Evaluation Division, which does not include any recommendation regarding fraud and corruption, with an unrelated case study from the EIB Anti-Fraud Activity Report for 2017. The conclusion drawn by the draft report on the basis of these two unrelated publications is unfounded. Having said this, although the Evaluation report's recommendations are not related to fraud and corruption (and therefore are not related to the topic of the draft report), please note that the EIB's standard procedures already provide for a systematic follow up on recommendations stemming from evaluations. EIB Services systematically establish an action plan in response to recommendations agreed by EIB Management. These action plans define how and by when each recommendation agreed by EIB Management will be addressed. The Evaluation Division approves the action plans, and monitors their implementation on a quarterly basis, for a duration of three years. This procedure also applies in the context of the EIB evaluation on its intermediated lending in the AGP region, where the implementation of the action plan is ongoing and being monitored by the Evaluation Division.

With regard to the case study from the EIB Anti-Fraud Activity Report for 2017, please be informed that the Bank is following up on the conclusions and lessons learnt from the Proactive Integrity Reviews of intermediated lending. As of today, the remedial measures strengthening the EIB controls and procedures in this area are being implemented. Hence, the recommendation of the draft report is already implemented by the EIB (pg 32: *"An **Action Plan on financial intermediaries** should be created and use lessons learnt from [...] pro-active integrity review on intermediated operations."*)

CONFLICT OF INTEREST ISSUES

When commenting on preventing potential conflicts of interest at the Bank, the report does not take into consideration the measures put in place by the EIB.

Pursuant to Article 1.13 of the Code of Conduct of the Management Committee, Management Committee members are obliged to make an annual declaration of interest, covering, to the best of their knowledge, their own and their spouses' or partners' activities and holdings that may entail a

conflict of interest, and to update the declaration in case of a material change in their situation. The declarations are published on the EIB website. Published declarations of interests of Management Committee members are an important component in the EIB's overall approach to addressing possible conflicts of interest. They are complementary to other components, notably the diligent application of the Code of Conduct of the Management Committee as well as the oversight role of the Office of the Chief Compliance Officer and of the Board of Directors including its Ethics and Compliance Committee.

Unlike Management Committee members, members of the Board of Directors of the EIB are not obliged to file a declaration of financial interests. However, there are a number of safeguards in EIB's internal rules that mitigate conflicts of interest in this non-resident governing body composed of members who have full-time occupations outside the EIB which are described in the article 4 of the Code of Conduct for the Members of the Board of Directors.

In addition, the Ethics and Compliance Committee (ECC) has a broad remit. Board members are obliged to declare to the ECC any conflict of interest in a decision taken and submit to it any envisaged activity or position that may give rise to a conflict of interest. In accordance with the ECC Operating Rules, the ECC rules on conflicts of interest upon request not only of the Board member concerned but also upon request of any ECC member, any current or former Board, Management Committee or Audit Committee member, the Secretary General or the Chief Compliance Officer. Finally, the ECC remit has been enlarged to all ethics matters with effect on 1 September 2016, and the ECC may now be requested to rule by the Chairman of the Board of Governors and, on fraud-related matters, by the Inspector General.

BEEFING UP CONTRACTUAL CLAUSES WITH EIB CLIENTS IN RELATION TO FRAUD AND CORRUPTION

This is a very general recommendation and lacks the required substantiation for the Bank to be able to comment on it. However, please note that the Bank's financing agreements already include a stringent set of contractual clauses aimed at implementing its Anti-Fraud Policy. .

We would like to draw your attention to the fact that the disclosure of beneficial ownership to the public cannot be unilaterally extended by the EIB beyond the existing legal framework. The EIB complies with the applicable EU legislative framework on personal data protection, which also covers personal data of beneficial owners. Those data can be made accessible only for very specific and predefined purposes. Therefore, the EIB cannot disclose such information publicly.

REVAMPING INTERNAL GOVERNANCE (STRONGER ROLE FOR THE EIB BOARD OF DIRECTORS, INDEPENDENCE OF THE BANK'S INVESTIGATIVE FUNCTION)

Regarding your recommendation to revamp the Bank's internal governance in relation to fraud and corruption issues, please note that the current Bank's policy framework already provides for the complete independence of the Bank's Fraud Investigations Division in the exercise of its responsibilities. In addition, the Fraud Investigation Division has been subject to an external evaluation, and these exercises are repeated periodically.

INEFFICIENT RELATION TO EUROPEAN ANTI-CORRUPTION AUTHORITIES AND LIMITED RIGHTS (AND APPETITE) TO RELATE TO NATIONAL AUTHORITIES

The draft report opines that the Bank would lack the appropriate framework and willingness to engage with national authorities based on the following erroneous statements:

- *"Under its Anti-Fraud policy, there is no obligation for the EIB to refer suspected prohibited conduct to national authorities and prosecutors."*

We would like to draw your attention to the fact that the Bank's anti-fraud provisions related to cooperation with national authorities have been carefully designed taking into consideration the global nature of EIB's operations and on the basis of the International Financial Institutions Uniform Framework for Preventing and Combating Fraud and Corruption. For instance, please note that considering the EIB's worldwide activities, including in countries where respect of human rights are at stake, the Bank shall not put itself into an obligation to refer suspected Prohibited Conduct, and the related persons concerned, to authorities not complying with basic due process and human rights. Within the EU, the EIB systematically refers suspected Prohibited Conduct to national authorities.

- *"And in the case of OLAF's involvement in a case, it is up to OLAF to transmit its final report to the national authorities".*

If OLAF has opened its own investigation, it is appropriate and the right course of action that OLAF takes the lead in referring its conclusions to national authorities in line with the OLAF Regulation.

- *"Then, in the case of an investigation carried out by a national authority which may involve EIB financing, the EIB is not bound to liaise and assist the national authority"* [...]

As already explained above, the Anti-Fraud Policy already provides that EIB "shall" provide assistance to national authorities, and does so whenever required, and also proactively. In this context, we do not understand the recommendation that the "the EIB shall be bound to liaise and assist the national authority. Furthermore, please take into consideration that EIB can of course offer its cooperation to national authorities but does not have the authority to impose its contribution to investigations which are in the hands of national authorities.

- [...] *"and "may decide to await the results of such an investigation and request a copy of their findings before taking further action". "*

We note that you have misinterpreted the purpose of paragraph 68 of our Anti-Fraud Policy. This provision is two-fold: on one hand, it allows the Bank to take action in case of Prohibited Conduct in its operations (if it has enough supporting elements) without awaiting the results of a national investigation. This can apply in countries where there is no efficient law enforcement mechanisms and the Bank should be able to take action without binding itself to the outcome of a national investigation. On the other hand, where a competent national authority, in particular in an EU Member State, has launched an investigation, this provision allows the Bank to await the results of the national investigation before taking action, in compliance with the fundamental right of presumption of innocence.

- *"Such passive role is reinforced by the fact that the EIB is subject to the Financial Intelligence Unit (FIU) of Luxembourg for cases of money-laundering or financing of terrorism. As an "EU body" under the EU Treaties, the EIB has no liability to report somewhere else than to the FIU in the country where it is established."*

The EIB, as an EU body, is not subject to Luxembourg FIU. The EIB proactively decided to cooperate voluntarily with the Luxembourg FIU. The FIU is a central, national unit that is responsible for receiving and analysing information from various entities on financial transactions which are considered to be linked to money laundering and terrorist financing. The FIUs disseminate the results of its analyses to the competent authorities where there are grounds to suspect money laundering, associated predicate offences or terrorist financing (see the 4th AML Directive). Further, the EIB does not carry out financial transactions, cash transaction reports, wire transfers reports or other threshold-based declarations/ disclosures, as defined by FATF recommendation 29 on reporting obligations to FIUs.

Furthermore, EIB can report suspicions to any relevant authorities within and outside the EU.

Please erase erroneous reference to the EIB being subject to Luxembourg FIU authority throughout the draft report.

- "Despite the valuable efforts of the EIB to enter into cooperation agreements with law enforcement and anti-corruption agencies to facilitate the exchange of information on cases of mutual interest concerning suspected prohibited activities, it is questionable to which extent such mechanisms are bringing results to date. "

We would be grateful if you could provide us/the readers with supporting elements regarding your statement that concludes the paragraph above.

Related recommendations

The report's recommendations focusing on a more efficient cooperation with national and European authorities are based on a flawed understanding of the Bank's operating framework.

For instance, OLAF does not act as a "second layer of controf' as incorrectly underlined in several instances in the draft report. OLAF is directly and independently competent to assess allegations of fraud impacting EIB's operations. In this context, the Fraud Investigations Division of the Bank works in close cooperation with OLAF and promptly notifies OLAF if it has grounds to suspect any Prohibited Conduct. The Bank also duly reports to OLAF on the implementations of its recommendations.

Regarding your recommendation to make "compulsory for the EIB to refer suspected prohibited conduct to national authorities and prosecutors", please note that, as explained in our previous comment, the Fraud Investigations Division of the Bank systematically refers suspected Prohibited Conduct relevant to the authorities of the EU Member States. In addition, please note that the recommendation to intensify and promote pro-active exchanges with law enforcement and anti-corruption agencies at national level, is already a strategy endorsed by the Fraud Investigations Division of the Bank for several years. It has resulted so far In the signature of cooperation agreements with authorities in the United Kingdom, Senegal, Romania, Italy, Latvia, Malawi, Tunisia, Hungary, Moldova, Ukraine and France. The Bank's 3rd Anti-Corruption conference, held on 4 December2018, focused on the crucial role that cooperation plays in addressing corruption in projects financed by international financial institutions, and included prominent speakers from various national law enforcement and anticorruption national agencies.

In relation to your recommendation for more transparency on the handling of investigations, and as previously indicated, we shall stress that, while the Bank is committed to a presumption of disclosure and transparency, it also has the duty to respect professional secrecy in compliance with laws and the confidentiality of its investigative process. In this context, the Fraud Investigations Division of the Bank seeks the appropriate balance between transparency and confidentiality when disclosing information on cases it has investigated, for example in its annual anti-fraud activity report.

LACK OF TEETH IN OTHER ED INSTITUTIONS

Please note that, while the EC's opinion "do not represent a formal veto on EIB operations", in the event that the European Commission is against a proposed operation, then the unanimity of the remaining Board members (the 28 Directors nominated by the Member States) is required to authorise an operation.

In addition, we would like to draw your attention to the fact that the draft report provides in its introduction a biased presentation of the European Parliament resolution of 3 May 2018. The report fails to report that the European Parliament "positively notes the importance given by the EIB to its policy of zero tolerance of fraud, corruption and collusion".

Regarding your recommendations, please note that the EIB reports to and works with other European institutions and bodies within the institutional framework enshrined in the ED Treaty and the Bank's Statute. On this basis, we trust you understand that the EIB is not in a position to further comment on these recommendations.

Finally, the EIB remains open to a constructive dialogue and cooperation with all stakeholders on these important matters, based on mutual trust and benefits. In that respect, we would like to invite you to analyse Transparency International's (TI) report "Investing in Integrity? Transparency and Accountability of the EIB". published on 15 November 2016. This report provides constructive recommendations and commends the Bank for its high level of transparency, as well as for its high standards on several areas related to integrity and accountability

We would appreciate if you could take into consideration the comments above and the ones made directly in the report annexed to this letter, and if you could give us the opportunity to comment on a revised version of your report.

ANNEX 4:
EIB's final reply to the report, September 2019



Dear Mr Sol,

Thank you for giving the Bank the opportunity to analyse and comment on a revised version of your report. Let us first underline that the Bank welcomes that some comments from its letter from 18 January 2019 were taken into account in the revised version of the report and therefore allowed for the clarification of some statements. We especially welcome that charts, statistics and case examples from our recently published Fraud Investigations Activity Report 2018 were included and served as a basis for your analysis. We also welcome that the report contains in an Annex excerpts from our letter of 18 January concerning the confidentiality of EIB investigations.

As previously stated, the Bank is open to comments and criticism and relies on a constructive and trustful relationship with its civil society partners. In the consultation process on this report, the Bank has provided extensive input and written comments and has answered to questionnaires. Therefore, we would like to express our regret that although we provided clarifications on several occasions, the majority of our comments, including factual key elements, were not taken into account. The report unfortunately still contains inaccurate and misleading statements that considerably weaken both its analysis and recommendations.

General remarks

The report still reflects a misunderstanding on the exact nature of the EIB's investigation and sanction possibilities. The Bank's Inspectorate General through its Fraud Investigation Division conducts administrative investigations on Prohibited Conduct on the basis of its Anti-Fraud Policy which states that the financing agreements shall contain appropriate anti-fraud/inspection clauses. Contrary to your statement that when it comes to anti-fraud and anti-corruption activities "under current EU law, the EIB is in effect a "free zone" where staff have very wide powers of discretion in respect of the enforcement of anti-corruption policies' the Bank has a legal duty to act when becoming aware of fraud and corruption and other forms of Prohibited Conduct and to take



measures to counter fraud and corruption in its activities. This legal obligation stems from Article 325 of the TFEU, Article 154 of the Financial Regulation and the EIB Statute laid down in a Protocol annexed to the Treaties. Based on this legal basis, the EIE has developed a comprehensive anti-fraud policy framework through notably:

- Its Anti-Fraud Policy[103], which applies to all its activities, members of governing bodies and staff, as well as counterparties and other relevant project related parties. It contains anti-fraud measures applicable throughout the project cycle in order to ensure that its funds are used as rationally as possible and in the interest of the EU;

- The IG/IN Charter[104], which sets out the scope of work, the authority and core principles of the Fraud Investigations Division of the Inspectorate General fIG/IN). IG/IN provides the FIB with the capacity to professionally and objectively investigate allegations; and

- The EIB Group Investigation Procedures[105] which set out the methodology and procedures for conducting investigations under IG/IN's mandate.

A careful analysis of the above policy documents clearly indicate that:

(i) The FIB has the statutory obligation to ensure its financing is used for its intended purposes and the legal authority to carry out investigations. Following an investigation, if the Bank determines that an allegation of Prohibited Conduct has been substantiated and requires follow-up actions, the findings are referred to the relevant authorities within and/or outside the Bank for further action, including potential exclusion proceedings. The FIB does not have the powers, nor the role, of a law enforcement agency or prosecution authority, and cannot look into issues which fall outside the scope of its activities;

103 - https://www.eib.org/en/publications/anti-fraud-policy.htm

104 - https:l/www.eib.org/en/publications/fraud-investigations-charter.htm

105 - https://www.eib.orp/en/ublications/anti-ftaud-rocedures.htm

(ii) However, it is important to mention that the FIB, through IG/IN shall assist national authorities and shall do so proactively and whenever requited. Even if it does not have the authority to impose its contribution to investigations which are in the hands of national authorities, and it cannot oblige national authorities to follow-up on referrals following an FIB investigation, the cooperation between FIB and national authorities remains a key aspect in the fight against prohibited conduct in the context of FIB operations.

(iii) OLAF is directly and independently competent to assess allegations of fraud impacting FIB operations. The Fraud Investigations Division of the FIB works closely with OLAF, notifies it promptly, according to its obligations, of any suspicions of Prohibited Conduct and informs OLAF on the implementation of its recommendations;

(iv) While the Bank is committed to a presumption of disclosure and transparency, it has a duty to protect the confidentiality of the investigation process and comply with professional secrecy. Disclosing information and documents collected and generated during inspections investigations and audits during or after an FIB investigation is closed, would have a serious impact on the effectiveness and efficiency of FIB's control functions.

With regard to your statements on the "large discretion for the EIB on how it investigates corruption cases" and the "variable geometry to tackling fraud and corruption', the Bank regrets that you draw these over-simplified conclusions from the analysis of four cases which are very different in their nature and chronology.

The Bank would like to underline that it systematically draws lessons from its investigations. While noting that each case is usually unique, the lessons learned are fed into our policies and frameworks, red flags are shared with EIB Group staff and are built in targeted fraud awareness trainings and workshops for FIB Group staff. As a best practice, the Bank also published in its Fraud Investigations Activity Report 2018 real case examples including their results and the red flags.

Case studies

In addition to the general remarks above, the Bank would like to provide more in depth comments to the case studies in the report:

ON THE "DIESELGATE"

EIB and Volkswagen AG negotiated an agreement that is based on two pillars. On one side, the VW Group will provide a financial sum to environmental and/or sustainability projects in Europe, in consultation with the EIB. On the other side, Volkswagen AG will not participate in any EIB project during an exclusion period of 18 months. This brings the effective exclusion period to a total of 4 years and 8 months[106]. This agreement is robust and fair. It only affects relations between the EIB and VW AG. It is not designed to bring a solution to the overall issues raised by Volkswagen AG's use of defeat devices. That is the task of regulatory and judicial bodies.

106 - Since October 2015 the consideration of loans by the EIB to Volkswagen AG had been under suspension.

Regarding the European Ombudsman (EO)'s recommendation, the EIB was willing to grant public access to a version of the OLAF report that balances fairly the public interest in disclosure and the protection of other legitimate interest. On the basis of the principles set by the EIB Group Transparency Policy, our published letter to the EO contains a detailed assessment of the legitimate interests, which would have been undermined if the documents concerned were to be disclosed with only the redactions recommended by the EO.

ON PASSANTE DI MESTRE & MOSE

Although underlined in our letter of 18 January 2019 the Bank would like to reiterate that the allegations raised by NGOs regarding the Passante di Mestre have been systematically contradicted by all the relevant authorities. The EIB investigation, OLAF and the Italian Authorities concluded that no link could be established between the fraud allegations and the project financed by the EIB.

The report makes reference to the two resolutions of the European Parliament (2015 and 2016) regarding the Passante di Mestre mentioning that "unfortunately it seems that no one in Brussels or Luxembourg where the EIB is headquartered, took into account this call, since the support to the project continued". The Bank would like to reiterate that it replied to the EP resolution 201512127 (INI) on the control of the financial activities of the EIB on 28 April 2016, which was also provided to you.

THE ŠOŠTANJ LIGNITE PLANT IN SLOVENIA (TEŠ6)

With regards to your statement that "The environmental dimension of the complaint is still being handled by the EIB Complaints Mechanism, with extensive delays", the Bank would like to clarify that the conclusions report was released in March 2019 and is available online: https://www.eib.orq/en/about/accountability/com plaints/cases/sg-e-201 I -02-tes-thermal-power-plantsostanj

In addition, with regard to the outcome of the EIB-CM's inquiry into the governance-related complaint on TES, the Bank would like to highlight that EIB-CM's findings and recommendations were addressed to the EIB services (and not to TES6). Therefore, the statement that "the EIB-CM found that TES6 should have been more economically diligent" is factually incorrect.

We would appreciate if you could take into consideration the comments above, as well as those made directly in the draft version of your report and in the Bank's letter dated 18 January 2019. In any case, we would be grateful if you could publish this letter and the previous one in the annexes of the report as offered in your email dated 11 September 2019.

Finally, we would like to invite you to further discuss on these important topics on the occasion of the next revision of the EIB Anti-Fraud Policy.

Yours sincerely,

European Investment Bank

Bernie O'Donnell
Head of Division
Fraud Investigations Division
Inspectorate General Directorate

Hakan Lucius
Head of Division
Civil Society Division
Secretariat General

ANNEX 5:
OLAF's final comments on the report, September 2019

OLAF comments of 30 September 2019 on the final draft of the forthcoming Counter Balance report "Is the EIB up to the task in tackling fraud and corruption? Challenges for the EU Bank's governance framework"

As a general remark, OLAF would like to reiterate that we welcome all civil society initiatives aiming to deter fraud and corruption.

We would like to thank you for taking due consideration of our comments on the first draft, which we have sent to you on 21 December 2018, and for the amendments in the text based on our input, as well as for inclusion of OLAF clarifications either in the respective sections of the report (on OLAF mandate, relations with EIB, case-related information, and EPPO); or as an annex (confidentiality of investigations).

Please, see our comments and drafting suggestions both below and in track changes in the report itself.

On page 15, the report writes about a Budgetary Control Committee "meeting behind closed doors on 26 March 2018, during which it the MEPs were granted the possibility to just read the OLAF's report without taking pictures." Please note that in line with the Annex II of the Framework Agreement on relations between the European Parliament and the European Commission, OLAF provided access to the Final Report and recommendations in a secure reading room to CONT Members, officials of CONT Secretariat and to the persons from political groups designated by the coordinators (from 21 January to 21 February 2019).

On page 26, it is stated that "in March 2014, OLAF decided in a relatively short time not to open any investigation about the allegations tainting Passante di Mestre." It is important to point out that selections always take a "relatively short time," roughly two months to be precise.

On the same page, it is written that "OLAF failed to draw consequences from the systemic nature of the Veneto system and the numerous illegal activities related to it – which in the end surely affect EU's financial interest." We would like to point out that the conclusion here is an assumption.

On the same page, in footnote 69, we would like to ask you to remove the name of OLAF official who provided information to you upon your request.

Still on the same page, it is stated that "In the case of MOSE, the Italian prosecutor office only focused on the role of Italian companies and public officials, but did not have competence to investigate the potential role of EU officials. Indeed, the prosecutor could only focus on crimes committed on the territory of Venice, or by residents, or by companies registered in Venice. Therefore, there would have been an added-value with OLAF continuing its investigation on MOSE, as it would have been complementary to the proceedings taking place in Italy." The report does not state whether there have been any indication that EU officials were involved.

On page 29, it is stated that "OLAF could have played a stronger role in further streamlining the EU angle into the investigations taking place at national level. Indeed, it remains unclear if the Slovenian judicial authorities are currently looking into the specific issue of EU funding to the project, more than four years after receiving OLAF's judicial recommendation." However, OLAF is not responsible for the follow-up of its investigations. It gave a judicial recommendation to national authorities, so it has in effect fulfilled its role. There is no stronger role that OLAF could have played, in accordance with its mandate.

On pages 35-36, in the columns on OLAF intervention in MOSE, it is stated that "trial in Italy did not cover EU funding of the project." It is important to state that fight against fraud in EU funding is a shared responsibility with the Member States.

On page 48, the report states that OLAF is "not always acting as much as it could when corruption cases emerge." This is an assumption. OLAF is acting within its mandate, and OLAF replies and comments on this report demonstrate due process and consideration when opening investigations.

On page 49, the report states "set of rules have been designed to ensure this protection, and the concept has been integrated in Article 325 TFEU which now represents the legal basis for combating illegal activities against the finances of the EU – but not for fighting corruption." However, OLAF's mandate explicitly encompasses "preventing and combating fraud, corruption and any other illegal activity affecting the financial interests of the Union", Art. 1(2) of Regulation 883/2013.

Counter Balance
Challenging Public Investment Banks

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Counter Balance – Challenging public investment banks is a European coalition of development and environmental non-governmental organisations with extensive experience working on development finance and the international financial institutions as well as campaigning to prevent negative impacts resulting from major infrastructure projects.

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