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Brussels, 24 September, 2014

Subject: **A Joint CSO Submission on the Draft Revised Version of the EIB
Transparency Policy**

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1 Introduction

This is a collective Submission by the undersigned CSOs, which all are familiar with the work of monitoring IFI and EU transparency, on the EIB's Draft Revised Version of its Transparency Policy (draft Policy). We very much welcome the undertaking by the EIB to review its Transparency policy. The nearly five years of implementation experience since the Policy was last revised means that it makes sense to review and improve the Policy at this point.

Our comments draw on the experiences of civil society organisations with the existing transparency policy and its use. In EIB-supported activities, transparency can help to better achieve lending goals, reduce corruption, identify potential social, environmental and economic benefits, and avoid adverse impacts on communities and sensitive ecosystems.

Based on our experience, we conclude that the proposed policy could be improved in important ways, as outlined in this Submission. Efforts have been made in the right direction by the EIB over the past few years, like signing the Internal Aid Transparency Initiative (IATI) and the launch earlier in 2014 of an online registry of environmental documents. Nevertheless, structural issues with the existing Transparency Policy need to be addressed through this process of revision.

The draft Policy does not adequately reflect key international standards and principles relating to transparency, as set out in the Global Transparency Initiative's *Transparency Charter for International Financial Institutions*. With this Submission, we hope to help ensure that the final revised Transparency Policy is a more democratic, transparent and effective document.

2 Process

Before addressing our substantive concerns with the draft Policy, we would like to convey a major concern in relation to the consultation process. We believe that a second period for making comments should be added. This will allow stakeholders a chance to respond to the Bank's comments on their original contributions, in November/December 2014, as well to verify the extent to which their comments were addressed in a second draft. Our recommendation therefor would be to adopt the policy on 3rd February 2015 (1st board meeting of the year) at earliest, and to build in a second period for making comment.

3 Analysis

The structure of this Submission follows the division into nine key principles as set out in the Global Transparency Initiative's *Transparency Charter for International Financial Institutions*, namely: 1) the right of access;; 2) automatic disclosure;; 3) access to decision-making; 4) the right to request information; 5) limited exceptions; 6) appeals; 7) whistleblower protection; 8) the promotion of freedom of information; and 9) regular review. The relevant principles from the Transparency Charter are quoted in italics at the beginning of each substantive section of this analysis.

All EU supported Bank activity is required to be in accordance and coherent with EU development policy (Art. 208 of the Treaty on the Functioning of the EU) and the Charter of Fundamental Rights of the European Union. The EU Strategic Framework and Action Plan on Human Rights and Democracy also provides importance guidance following this regard.

The protection of human rights is at the core of EU external policies under the EU treaties,¹ and this must also be respected in EIB operations outside the EU. In view of the huge potential impact of EIB activities on human rights in host countries, and the fact that the EIB is a public institution whose shareholders are EU member states, transparency should be a core principle underpinning all of its operations. The right to access information held by public authorities is an element of the human right to freedom of expression. Specific references to human rights, including the idea that the Policy gives effect to a human right, should therefore be added in the policy.

3.1 The Right of Access

The right to access information is a fundamental human right which applies to, among other things, information held by international financial institutions, regardless of who

¹ The European Union is founded on the value of human rights (art. 2, TEU); The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement – including human rights (art. 21 TFEU)

produced the document and whether the information relates to a public or private actor.

Introduction

The right to access information held by public authorities is a fundamental human right which applies to, among other things, information held by international financial institutions, regardless of who produced the document, when it was produced, the form in which it is held, its official status and whether the information relates to a public or private actor. This is grounded in the right to “seek, receive and impart information and ideas”, guaranteed under international law, and this has been recognised by a number of leading authorities, including the European Court of Human Rights² and the UN Human Rights Committee.³ Openness policies, including the EIB’s Transparency Policy, need to reflect that in practice.⁴

This right applies regardless of which part of the organisational structure of the EIB group holds the information (such as the Boards of Directors and Governors, financial facilities and bodies such as compliance review bodies). It is, therefore, key that in renewing its Transparency Policy, the EIB seeks to give full effect to this human right. In this regard, ensuring a genuine presumption that all information held by the EIB will be accessible is crucial, in line with the principle of maximum disclosure. This presumption means, among other things, that information will be withheld only where this can be specifically justified on the basis of a limited list of exceptions included in the Policy.

The EIB Transparency Policy has to take into account and fully comply with the EU legislative framework on transparency and public disclosure, including Article 15 of the TFEU, which states that “in order to promote good governance and ensure the participation of civil society, the European institutions, bodies, offices and agencies shall conduct their work as openly as possible”.

Human rights basis of the policy

The draft Policy fails to mention explicitly the human right to access information held by the EIB group, but it does at least embrace the wider ideas of ownership, participation, stakeholders dialogue and external oversight. We welcome the fact that Clauses 2.1, 2.2 and 2.3 state the importance of openness and the highest possible level of transparency being principles guiding the policy.

However, Clause 5.2 states: “Every member of the public can request access and receive timely information/documents from the EIB”. In this provision, the right to access should be recognised in a more direct way, by stating: “Every member of the public has the right to request ...”.

² *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application No. 37374/05.

³ UN Human Rights Committee, General comment No. 34 (2011), Article 19: Freedoms of opinion and expression, para. 18.

⁴ Obligations derived from Regulation (EC) no. 1367/2006, known as the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, should be used, among other references, as a basis for drafting of the new policy.

The presumption of disclosure

We welcome the reference to the European Charter of Fundamental Rights in Clause 3.6, which states: "Any citizen of the Union [...] has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium". At the same time, in practice the draft Policy envisages only a restricted presumption of disclosure. For example, Clause 2.1 states that "whenever possible, information concerning the Group's operational and institutional activities will be made available to third parties (the public) in the absence of a compelling reason for confidentiality [...] and in line with EU legislation, those of the EU member states and countries of operation and internationally accepted principles". The term "whenever possible" should be taken out of this provision, ensuring that the EIB adopts a true presumption of disclosure, subject only to a limited regime of exceptions (see Section 5 below). The Policy should state clearly that the Bank will disclose any information in its possession that is not on a list of exceptions.

In this regard, the section "Ensuring trust and safeguarding sensitive information", which is one of the Guiding Principles of the draft Policy, incorporates too broad and vague a notion of what the list of exceptions must be based on:

"2.5 As financial institutions the members of the EIB Group must maintain the confidence and trust of their clients, co-financiers and investors, and it is necessary to allay concerns about the treatment of confidential information which, otherwise, could affect these partners' willingness to work with the Group and thus impede its members from fulfilling their respective missions and objectives. This Policy ensures that information that would undermine the rights of third-parties, and legitimate interests of the Group, is protected from disclosure, in line with the principles, conditions and limits defined in the Policy."

This seriously undermines the presumption of disclosure principle. It is not clear to us why what is treated in other policies and laws as just another exception has been elevated in the draft Policy to the level of a Guiding Principle.

The EIB and administrative tasks

Clause 3.4 refers to Europe's social and economic cohesion and sustainable development, but it should also refer to development outside Europe, i.e. the fight against inequality and promoting democratic governance.

In Clause 3.5, the draft Policy refers to Article 15 of the TFEU, mentioning that the EU Regulation on access to documents applies to the EIB only when exercising its administrative tasks. While this is formally correct, at the same time it is very problematical from the perspective of human rights, which by definition apply to all information held by (under the jurisdiction of) a public authority. Therefore we call for the policy to be applied to both administrative and non-administrative tasks of the EIB.

The approach chosen in the draft is all the more problematic that, throughout the draft Policy, administrative tasks are given a restrictive interpretation. The terms "administrative tasks" are defined neither in the Treaty nor in Regulations 1049/2001 (referred to in Clause 3.7) and 1367/2006 (referred to in Clause 3.8). If the Policy is

limited to administrative tasks, these cannot be limited to the scope of the word "administrative" as understood in common language. In legal terms, this encompasses a much broader spectrum of tasks. The wording of Reg. 1367/2006 reflects this by referring to "administrative acts and omissions" as well as by making it clear that where an institution is acting in its capacity as an "administrative review body", this term includes activities under competition rules and infringement proceedings.

The argument that this policy has to be adapted to the changes brought by the Lisbon Treaty do not stand here, as the current policy was already created after the Lisbon Treaty came to force. The CSOs endorsing this submission strongly oppose the EIB proposal to impose a restrictive interpretation on Regs. 1049/2001, 1367/2006 and the Aarhus Convention as these relate to their activities.

Third-party information

The Policy should include a commitment by the Bank to make an effort to ensure that it holds information relevant to its operations and activities, even if this information is normally created or held by another actor, such as a contractor. This could be achieved through inserting transparency and/or access to information clauses in contracts, so as to require third parties to provide key information to the Bank, either automatically or upon request. This would include access to key documents held by borrowers or direct service providers created or obtained pursuant to a contract with the Bank.

European Parliament resolution 2013/2131(INI), adopted on 11th March 2014, "reiterates with concern that a considerable number of outstanding issues remain unresolved in this area [use of financial intermediaries], notably the lack of transparency (especially concerning information about the final beneficiaries), the difficulty in assessing the economic and social impact of the loans (resulting in a flawed targeted approach) and the reliance, via outsourcing of responsibilities, on financial intermediaries for carrying out the due diligence".

The current version of the draft policy is quite weak in terms of requirements for the Bank's private sector business partners to give open access to information, as set out particularly in Clauses 4.6 to 4.9. Project information should be available at an early stage of negotiations. The current draft states that "certain private sector projects are not published before Board approval and, in some cases, not before loan signature to protect justified commercial interests."

More information is also needed regarding Clause 4.7, for example on ecological footprint, impact on land tenure/access to land, and so on. Clause 4.8, regarding financial intermediaries, is also restrictive; it says that information should be available "to the extent possible" and "on request", while this information should be broadly available.

The Bank should impose more detailed transparency obligations on its business partners. Borrowers should be required to disclose environmental and social information, which is an internationally recognised standard which the Bank refers to in its Policy. Public disclosure requirements should be made part of binding language in all contracts, partnership agreements and legally binding documents between the EIB and others, and a commitment to include such language should be set out in the Transparency Policy.

Access by affected people to project information

The Policy should impose a direct obligation on the EIB to provide information to communities affected by EIB projects, and in a manner and format which is accessible to them. Complete and timely information should be made available at the local level and key information should be produced in an accessible language and form.

A mechanism for early public notice should be established. This should require the Bank to indicate how and when it and the borrower will notify a community that a project or program expected to affect them is under preparation and require that such communications form an integral part of publicly available preparatory project documents.

Information for affected people should not only be provided through the website; the Bank should also be required to put in place other communication means which are suitable for affected communities which may not have access to electricity, let alone the Internet.

Right of Access Recommendations:

- Clause 3.4 should refer to development outside Europe, including the fight against inequality and promoting democratic governance.
- Clauses 4.6 to 4.9 should include stricter, binding requirements for business partners to provide access to project information.
- Clause 5.2 should be rewritten so as to conform that the public has the right to request (instead of *can* request).
- The Policy should state clearly that the Bank will disclose any information in its possession that is not on a list of exceptions. Clause 2.1 should be rewritten. The wording "whenever possible" is vague and should be replaced by a reference to the list of exceptions.
- In Clauses 2.5 the reference to "Willingness to work with the Group" should be replaced by a commitment to apply harm-based exceptions as clearly defined in the list of exceptions.
- The right to access information should not be limited to information about administrative tasks. If this notion is referred to at all in the Policy, a clearer and broader definition of "administrative tasks" is needed. At this stage the non-existence of a definition at European level represents a significant obstacle to refer to this limitation.
- Public disclosure requirements should be required by the Transparency Policy to be included in binding language in all contracts, partnership agreements and legally binding documents between the EIB and third parties.
- Complete and timely information should be made available for (potentially affected) communities at the local (project) level and key information should be produced in an accessible (local) language and form.
- A mechanism for early public notice should be established at the local level to announce the investment to the public.

3.2. Automatic Disclosure

International financial institutions should automatically disclose and broadly disseminate, for free, a wide range of information about their structures, finances, policies and procedures, decision-making processes, and country and project work.

The EIB's policies are currently accessible through the publications sections on the EIB's website. Their purpose is to guide the Bank's lending and they therefore also serve as important reference points for assessing the Bank's work. As a result, these

policies should be featured much more prominently on the website, for instance in a separate page under the About Us section.

The EIB should routinely disclose information on anticipated environmental and social impacts of projects in a timely manner, before project approval.

Consideration should be given to having project-specific databases that are updated as soon as project changes occur, rather than publishing different pieces of project information in different places. The documents in these databases should be easily downloadable in commonly available formats (PDF, Txt, .csv and so on).

The following project information (documents) should be disclosed routinely:

- 1. Project Summaries
- 2. Environmental Impact Assessment (EIA) of the Project that includes Non-Technical Summary (NTS) or Environmental Impact Statement (EIS)
- 3. EIB's environmental and social assessments of projects
- 4. The proposal of the Management Committee to the Board of Directors
- 5. That part of the project contract referring to environmental and social conditions applied to the project
- 6. Reports from monitoring missions
- 7. Project completion reports and project evaluation reports
- 8. Justification for any deviation from EU implementation standards for projects conducted outside of the EU (a document produced pursuant to p. 40 of the Bank's statement on Environmental and Social Principles and Standards (ESPS))
- 9. Methodology used for evaluation, such as the Result Measurement Framework and Three-pillars assessment (3PA); the Bank has indicated that it has a set of cross-cutting and sector specific indicators for measuring the impact of their operations, but this list is not available on their website
- 10. The contact details of EIB and the person at the investor who is responsible for the project should be automatically released.

According to Regulation (EC) No 1367/2006, apart from environmental impact assessment studies, data derived from monitoring activities, especially those which impact on the environment, should be published through the public register of documents. However, the EIB website does not include relevant environmental information from monitoring reports or similar data collected through monitoring activities. The Bank should make all of the types of documents specified in Regulation (EC) No 1367/2006 available.

The public register for documents is existing since January 2014 and still has to publish project documents 2013 onward. Also a list of all documents related to projects financed still has to be made available in the Public Register, this in accordance with Regulation (EC) 1367/2006.

Overall, the website should provide more prominently guidance to visitors on the rights of individuals to request documents, the deadlines involved and the appeal/complaint mechanisms.

Automatic Disclosure Recommendations:

- All existing policy requirements regarding a public register and publications of monitoring reports as requested in Regulation 1367/2006 and in the current External Lending Mandate should be implemented. Implementation is now lacking.
- Policy information must be made available at a more prominent and visible location on the website.
- The Bank has indicated that it has a set of cross-cutting and sector specific indicators for measuring the impact of their operations, but this list is not available on their website

3.3 Access to Decision-making

International financial institutions should disseminate information which facilitates informed participation in decision-making in a timely fashion, including draft documents, and in a manner that ensures that those affected and interested stakeholders can effectively access and understand it; they should also establish a presumption of public access to key meetings.

As a first step here, the EIB should clearly describe its decision-making processes on its website. In addition, the Bank should publish on a monthly basis a list of upcoming opportunities to provide public input, release consultation and communication plans, and identify decision benchmarks (for example, dates of key meetings in project preparation). The public should be able to anticipate when and how they will be able to access decision-making.

Enhanced transparency rules for EIB governing bodies should replace the current overly broad exceptions relating to these bodies. For example, more information about governing body meetings should be available, and Board of Directors meetings should be opened to external observers. Documents should be made public well in advance of Board hearings, generally at the same time as they are sent to the Board.

The Policy should include separate provisions regarding access to information about the work of the Bank's governing bodies.

Board of Governors

We welcome the EIB's commitment to improve the transparency of the work of its governing bodies. The Bank should consider implementing the Council of European Union procedures⁵ regarding access to Council documents and transparency of the Council work, especially in relation to information concerning the Board of Governors, who are also Ministers from the Member States. In accordance with Article 15(3), third subparagraph, of the TFEU, specific rules governing public access to Council documents are established in Annex II to the Council's rules of procedure. These rules apply *mutatis mutandis* to European Council documents, as stipulated in Article 10(2) of the rules of procedure of the European Council.

We recommend including something along the lines of the following provision in the Policy:

"The Bank shall publish on its website information about the Annual Meeting of the Board of Governors. The Bank shall publish the agenda of the Board of Governors meeting at least 14 days before the meeting. The agenda shall be accompanied by the

⁵ <http://www.consilium.europa.eu/documents/legislative-transparency?lang=en>

supporting documents for the Board of Governors meeting. Minutes of the meeting should also be disclosed at the latest 20 days after the meeting.”.

Individual statements by the Member States at Board of Governors meetings should be made public unless there is a compelling reason for confidentiality. The EIB should also make public provisional agendas of Board of Governors meetings, background documents and minutes.

Board of Directors

The EIB should continue to publish agendas and minutes from the Board of Directors meetings, subject only to confidentiality provisions as described in the exceptions section of the Policy.

The EIB should formalise the way it discloses information about its Board of Directors meetings. In order to fulfil its commitments on transparency, the Bank should routinely disclose project information before decisions of the Board of Directors. The current Policy does not sufficiently allow stakeholders to take actions and decisions on an informed basis. Relevant information is disclosed too late and usually only on request. Therefore, we recommend including something along the following lines in the Policy:

“The Bank shall publish on its website the annual calendar of the Board of Directors meeting. At least 14 days in advance of the Board of Directors meeting, the Bank shall publish the agenda of the Board meeting. The agenda shall list the individual financial activities proposed to the Board for approval as well as plans or programmes relating to the environment and institutional documents of public interest which are proposed to the Board for approval”.

Taking into account the content of the “Proposals from Management Committee to the Board of Directors”, released by the bank on request, such documents should be routinely disclosed at least 30 days before Board consideration. Confidential information as defined in exceptions may be redacted from the published document.

Proposals should continue to include general information including: a description of the project; the financial proposal (amount of loan, co-financiers, project promoter, project term, security conditions, Member States opinion, Commission opinion, financing plan, information on approval process); value-added identification; key environmental, social, human rights, procurement issues; information about risks and mitigation; and information on the previous relation with the borrower/promoter.

In this regard, we propose to include the following provisions in the policy:

“The results of votes and explanations of votes by members of the Board of Directors, as well as their statements relating to the adoption of the plans or programs relating to the environment and institutional documents of public interest, shall be made public.”

“The Bank shall publish on its website the minutes of the Board of Directors meetings subject to the disclosure constraints listed in section 5 of the Policy. The minutes shall as a general rule indicate in respect of each item on the agenda: the documents submitted to the Board of Directors and the decisions taken or the conclusions reached by the Board, the statements relating to the adoption of the plans or programs relating to the environment and institutional documents of public interest”.

Consultations

Clauses 7.10 and 7.11 on Public Consultation should provide more details about the timing of consultation announcements and standard consultation processes (such as two rounds of consultations for sectorial and horizontal policies).

Involved communities and CSOs should be able to be involved in Bank policy processes, and measures should be taken to enable participation by community members and CSOs in providing input into policy documents. Public consultations should not be restricted to a limited (or selected) number of documents and policies, but should be conducted for all of the Bank's plans, policies and strategic documents.

Meetings – which automatically involve the exchange of information and ideas – fall within the scope of the right to information. All formal meetings with decision-making powers, such as Board meetings, should be open for attendance by members of the public. At a minimum, the Bank's Board should launch a pilot program of conducting selective meetings in public and test the effects open meetings have on the free exchange of opinions and ideas during meetings and the quality of the deliberations.

To facilitate attendance by external stakeholders, notice should be provided in advance of meetings, indicating the time and place, as well as the topics to be discussed. Meetings may be closed to protect legitimate interests but any decision to close a meeting should itself be taken in public and reasons for closure should be provided. Information about a meeting, even a closed meeting, should be made available after the meeting, for example through press conferences and by circulating summaries, minutes and transcripts as soon as possible. Legitimately confidential information may, carefully and narrowly, be redacted from these documents.

Formalising Stakeholder Engagement

In addition to the above mentioned consultation processes, specific meetings to engage with civil society organisations should be organised, including the annual meetings between the EIB Board of Directors and CSOs. This proposal is in line with the commitment of the EIB, as set out in Clauses 2.6, 2.7 and 7.2, stating that "more than simply disclosing standardised information and more than just a one-way flow of information, the EIB aims to provide stakeholders with the information they require, thereby positively contributing to enhancing the quality of the Bank's activities. Such transparency requires an ongoing dialogue between the Bank and stakeholders over information provision."

At a project level, the policy should impose binding requirements in terms of outreach, accessibility, format and frequency of consultation and participation of stakeholders with project implementers and financial intermediaries. The non-binding language of Clause 7.6 should become binding, so that the EIB can play a stronger role in case the promoter does not sufficiently fulfil the conditions set out in the EIB Handbook:

The primary responsibility for information and engagement with local stakeholders on a project basis lies with the project client or borrower in line with the Bank's Environmental and Social Handbook. If deemed necessary the EIB would facilitate to organise meetings, through or in cooperation with the project promoter, with concerned parties to better understand the issues regarding the specific project.

Towards Effective Dissemination

Information needs to reach those likely to be affected by decisions. The EIB should utilise dissemination mechanisms that most appropriately deliver the information to the relevant community. For project documents, for example, this might imply dissemination via a local newspaper or a local contact point.

Dissemination should be in a form that is understandable to those affected. This implies, at a minimum, that the information is available in local languages but, in appropriate cases, it will also require technical or statistical information to be 'translated' into lay language and appropriate background or contextual material to be provided.

The draft Policy fails to acknowledge the all too real barriers faced by marginalised communities and individuals in accessing information and participating in development decisions. There is also no acknowledgement of potential gender differences in accessing and utilising information.

Access to Decision-making Recommendations:

- The Bank should refer to Council of European Union procedures when developing the rules relating to Board of Governors meetings.
- The Bank should publish the annual calendar of the Board of Directors meeting on its website.
- At least 14 days in advance of Board of Directors meetings, the Bank should publish the agenda of the Board meeting.
- All documents that are needed for informed decision making should be made public well in advance of Board meetings, at the same time as they are sent to the Board.
- The results of votes and explanations of votes by members of the Board of Directors should be made public.
- The Bank should publish the minutes of the Board of Directors meetings on its website.
- Proposals from Management Committee to the Board of Directors should be routinely disclosed at least 30 days before Board consideration.
- Clauses 7.10 and 7.11 on Public Consultation should provide more detail about the timing of consultation announcements and consultation processes.
- All formal meetings with decision-making powers, including Board meetings, should be open for attendance by members of the public. Any decision to close a meeting should itself be taken in public and reasons for closure should be provided.
- The non-binding language of Clause 7.6 about primary responsibility for information and engagement with local stakeholders on a project basis should become binding.
- Dissemination of information to people likely to be affected by decisions of the bank should be done in a way that they can effectively access this information, such as via a local newspaper or local contact point
- Information should be disseminated in a local languages and in a gender sensitive manner. In appropriate cases, technical or statistical information and other appropriate background or contextual material should be provided with explanations.

3.4 The Right to Request Information

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

The mechanisms for the practical exercise of the right to request and to receive information are central to the effective functioning of access to information policies. This should conform to a number of international standards including that the process should be simple, rapid and free or low-cost; where access to information is refused, notice in writing should be provided, specifying the particular exception upon which the refusal is based, as well as the right of appeal; access should be provided in the form requested (for example, an actual copy, an opportunity to inspect a document, an electronic copy or some other form); access should include, as necessary, extracting relevant information from databases and reasonable processing/collating of such information to provide it in a form which is accessible for the requester; and, where reasonably possible, information should be provided in the language requested and translation should always be provided where this is in the public interest, for example because the information is of interest to a whole community.

In general, we welcome the fact that the draft Policy sets out in some detail the manner in which requests for information shall be processed. A specific concern remains regarding the Clause 5.24, which stipulates that "in exceptional cases, for example in the event of an application relating to a very long document or when the information is not readily available and complex to collate, the time-limit may be extended and the correspondent shall be informed accordingly at the earliest possible date," while Clause 5.25 indicates that the Bank shall endeavour to comply with these requests within an additional 30 days.

The limit of ten working days to notify a requester about an extension of the deadline for EIB's reply would be replaced by a provision stating that notification of this would be done "at the earliest possible date". This is problematic, since this new provision is vague and would jeopardise the current practice determined by a clearly identified timeline for handling time limit extensions.

Right to Request Information Recommendations:

- The limit of ten working days to notify an extension of the deadline for EIB's reply as in the existing Clause 5.24 should remain.
- Access to information should be given in the form requested and translation provided on request in accordance with available resources.

3.5 Limited Exceptions

The regime of exceptions should be based on the principle that access to information may be refused only where the international financial institution can demonstrate (i) that disclosure would cause serious harm to one of a set of clearly and narrowly defined, and broadly accepted, interests, which are specifically listed; and (ii) that the harm to this interest outweighs the public interest in disclosure

One of the most important tests of the strength or weakness of a right to information (RTI) framework is the breadth and scope of its exceptions. International human rights guarantees mandate that exceptions should be narrowly crafted, and interpreted in a manner which facilitates the principle of maximum access. This, in turn, requires exceptions, which represent restrictions on a fundamental human right, to meet the following three-part test. Exceptions should: a) protect only legitimate interests; b) be engaged only where release of the information would cause harm to one or more legitimate interests; c) be subject to a public interest override whereby in-

formation covered by an exception should still be disclosed if the public interest in disclosure outweighs the likely harm that would result.

These standards are set out clearly in the Global Transparency Initiative's (GTI) Transparency Charter for International Financial Institutions:

The regime of exceptions should be based on the principle that access to information may be refused only where the international financial institution can demonstrate (i) that disclosure would cause serious harm to one of a set of clearly and narrowly defined, and broadly accepted, interests, which are specifically listed; and (ii) that the harm to this interest outweighs the public interest in disclosure.

Previously, the EIB's transparency policy largely met these standards, albeit not without some problem areas. In fact, it is worth noting that the Commentary to the GTI's Transparency Charter references aspects of the EIB policy as an example of good practice. The proposed changes to the EIB's Transparency Policy represent a significant departure from better practice and open the door for the withholding of information in excess of what is justified or necessary.

The existing policy requires access to be refused where disclosure would undermine the protection of international relations, financial, economic or monetary policies, personal privacy, the commercial interests of natural or legal persons, intellectual property, court proceedings and legal advice, and the purpose of investigations, inspections and audits. All of these exceptions include harm tests and, broadly speaking, all describe legitimate interests.

The draft amendments add new exceptions for information the disclosure of which would be harmful to: (i) the environment (clause 5.4), (ii) the objectivity and impartiality of selection procedures for awarding contracts or grants or for assessing candidates for an office or position (clause 5.5), (iii) compliance due diligence (clause 5.5); and (iv) internal deliberative documents (clause 5.6). The first of these, environmental protection, and the third, compliance due diligence, are legitimate interests but the other two require closer consideration.

In terms of selection procedures for awarding contracts or grants, it is accepted that there could be a legitimate need to protect this process while it is ongoing. However, once a competition has been completed it is difficult to understand the harm that might result from disclosing information about how a decision was reached. Indeed, there is a heightened public interest in promoting this type of openness for two reasons. First, the selection process for awarding contracts or grants has the potential to be a magnet for corruption, cronyism or nepotism. There is, as a result, a heightened need for openness in order to ensure that the decision-making criteria are fairly applied. Second, in competitive processes, there are substantial benefits to providing unsuccessful candidates a clearer insight into knowing exactly why they were not selected, so that they can improve their bids in future tenders. In other words, opening the process up will lead to stronger applications, to the benefit of all involved. As a result of these openness benefits, better practice among both national governments and IFIs is to be very open about competitions.

In some instances, personal privacy interests may be engaged as part of selection processes, but this information is already addressed in clause 5.4(b), and hence does not require additional protection.

It is legitimate to withhold information the disclosure of which would seriously undermine the deliberative process, and it is welcome that the proposed amendments limit

this exception to cases of serious harm. However, practice in other contexts suggests that this exception is often the subject of abuse, being relied upon to withhold information even when no harm would be likely to result. The first part of this exception is limited to the period before a final decision has been adopted, which is the only time when harm to the actual decision is likely to occur. Once a policy has been adopted, the extant risk is only to the future provision of advice by officials. In recognition of this, clause 42(b) of the GTI's Model World Bank Policy on Disclosure of Information is limited to information the disclosure of which would:

Significantly undermine the deliberative process within the Bank by inhibiting the free and frank provision of advice or exchange of views.

By continuing to refer to the vague notion of harm to the "decision-making process", the second part of this proposed amendment fails to limit this exception to the specific category of information that remains sensitive after a decision is made.

The amendments also expand the exception in clause 5.5 by adding in a presumption that "all information and documents collected and generated during inspections, investigations, audits and compliance due diligence shall be presumed to undermine the protection of the purpose of the inspections, investigations, audits and compliance due diligence even after these have been closed." This is profoundly illegitimate and such presumptions are not found in better practice access to information laws or policies. It also runs counter to the claims, found in clauses 2.1 and 5.1 of both the existing and proposed Policies that they are founded on a presumption in favour of disclosure.

Specifically, the effect of creating a presumption of harm largely undoes the very benefits of having a harm test. Instead of requiring officials to consider, on a case-by-case basis, whether specific harm would result from disclosure of certain information before access can be denied, it allows them to assume that such harm would result. Given the unfortunate tendency of many officials to be reluctant to release information in the first place, it is reasonable to assume that only those with an exceptionally strong commitment to openness will really bother to go through the process of considering whether arguments against harm exist. As a result, in practice this reversal of the presumption in favour of disclosure will effectively place an impossible onus on requester to show that disclosure will not lead to negative results.

The introduction of this presumption of secrecy may be motivated in part by the Bank's discomfort in relation to the Mopani case, which involves the Bank's report of its investigation into allegations of systematic tax evasion by Mopani Copper Mines plc in Zambia. In that case, the Bank refused to follow its own Complaints Mechanism's recommendation to publish a redacted version of the report. In its letter communicating its refusal to provide a redacted report to the complainant in that case, the Bank made clear its intention to amend its policy in response to the case, stating:

The EIB Management acknowledges the challenges raised by this complaint, which represents the first case received by the Bank concerning the public disclosure of its own investigation reports. Within this context, the EIB Management welcomes that this complaint and the EIB Complaints Mechanism's work has provided the Bank with an opportunity to identify a number of issues related to its policies and procedures which go beyond this particular case and needs to be improved and clarified in order to ensure a swift and comprehensive response to future similar requests.

We do not regard the facts of this case as in any way warranting such a presumption of secrecy, noting that the current rules allow for adequate protection of all legitimate interests. We note that the World Bank pursues a significantly less secretive approach to its investigations into allegations of fraud and corruption within Bank-funded projects. The World Bank's Integrity Vice Presidency publishes redacted versions of its reports of investigations which exclude the identities of companies and individuals concerned.

The existing policy includes a potentially weak formula for the public interest override for clause 5.4(a), by incorporating this directly into the main body of the exception, which the amendments do not propose to change. This may lead to a conflation of the idea of harm with the idea of the public interest, which would not be conducive to the proper application of these as separate assessments.

No public interest override currently applies to the exception in favour of privacy, found in clause 5.4(b), a rule the amendments would retain. This is contrary to international standards, which mandate that all exceptions should be subject to a public interest override. Thus, when privacy concerns come into conflict with freedom of expression, which includes the right to information, international courts invariably consider the overall public interest when deciding which value should prevail.

The proposed amendments also introduce a potential lack of clarity in relation to the ability of Member States to oppose the disclosure of information. According to clause 5.10, a Member State may request the EIB not to disclose a document originating from a Member State without its prior agreement. The amendment specifically allows Member States to refer to domestic legislation in explaining their position. This language, which does not apply to other third parties (who must, however, be consulted pursuant to clause 5.9), suggests that the EIB is proposing to give Member States a veto over the disclosure of information. This is not only inappropriate but would presumptively be contrary to European Union rules which bind the EIB.

There is no need to provide Member States with opportunities to object to disclosure over and above what is already provided. The Policy should make it quite clear that the final decision on disclosing documents lies with the EIB, and will be made in accordance with the EIB's Transparency Policy rather than the domestic laws or policies of relevant Member States.

Clause 5.12, which the amendments do not propose to change in its essence, protects certain types of information by referring generally to 'confidentiality'. This fails to meet the conditions of the three-part test, outlined above. This exception should be rewritten to describe a clear interest which needs to be protected and to apply only where harm would be caused to that interest from disclosure of requested information.

Clause 5.13, which the amendments do not propose to change, effectively excludes information exchanged between financial intermediaries and their customers from the scope of the policy, while committing the EIB to encourage intermediaries to be open about their relationships with EIB. The EIB could use its influence and position to promote openness by intermediaries; indeed, this is precisely the sort of crucial issue in relation to which the policy review could and should deliver improvements. Various possibilities exist here. The EIB could, for example, treat any information that it holds under its own policy, subject to the exceptions, and it could even make sure, via its contracting and other procedures, that it will hold key information about the work of intermediaries. It could also make a commitment to openness, perhaps subject to national laws in the countries in which intermediaries work, a condition of doing business with and one of the criteria of selection for intermediaries. The European Parliament

has in the past expressed concern about the lack of transparency of the EIB in relation to final beneficiaries.

Clause 5.14, which the amendments do not propose to change, provides for an overall maximum time limit of 30 years for most exceptions. In the modern era, this is a rather long period and some national governments have reduced their overall limits for exceptions to 20 years or less, despite the fact that they hold often highly sensitive defense information. A proposed amendment to this clause notes that the Bank will only hold information until "retention requirements have been reached". This is not unreasonable but the Bank should also commit to preserving important historical information.

Pursuant to clause 5.16, which is not proposed to be changed, the Bank commits to release Framework Agreements "unless the country concerned has formally opposed such disclosure". As part of its commitment to increase transparency, the Bank could remove this clause, and instead treat strong objections to releasing these documents, on an exceptional basis, under the international relations exception.

Exceptions Recommendations:

- The proposed new exception in clause 5.5 for selection procedures and comparative assessments of candidates should cease to apply once the competition has been completed.
- The second part of the proposed new exception for internal documents in clause 5.6 should be limited to information the disclosure of which would cause serious harm to the free and frank provision of advice.
- The proposed addition of a presumption of harm in the exception to protect the purpose of inspections, investigations and audits should be removed.
- The public interest override found in clause 5.7 should apply to clause 5.4 and the references to the public interest in that latter clause should be removed.
- Proposed new clause 5.10 should either be removed or the policy should make it clear that final decisions on the release of information will be made in accordance with the EIB's Transparency Policy (i.e. that Member States do not have a veto over the disclosure of information).
- Clause 5.12 should be rewritten so as to conform to the three-part test by describing an interest and applying only in the context of a risk of harm to that interest.
- The EIB should consider how it could make a stronger commitment to promote openness on the part of financial intermediaries through its Transparency Policy.
- Consideration should be given to reducing the overall time limits for exceptions to 20 years or less.
- The EIB should make a commitment to preserve important historical information.
- Consideration should be given to removing clause 5.16.

3.6 Appeals

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

This section addresses our concerns with the Provisions for Appeals section of the draft Policy (chapter 6). (i)The Complaints Mechanism and its procedures should be

presented to affected people as early as possible, at least at the time when a project is introduced to affected people; (ii) information about the Complaints Mechanism should be provided in a manner that is accessible to affected persons, in the national language; and (iii) for financial intermediaries, an obligation to provide affected people with information on the appeals mechanism should be included in the loan agreement and mandatory for the third party also in the case of intermediated loans.

The Policy should include clear deadlines for responses and detailed descriptions of the procedures for processing complaints. This should include an obligation to respond to complaints in a more timely manner than has so far been the case, for example, during the period 2010-2013, in relation to the Bujagali Dam in Uganda and CHP Bielsko Biala in Poland. Adherence to specified deadlines should be mandatory and respected.

The new proposals seek to remove Clause 9.1.3 of Part B-Practices of the existing Policy, which states that the EIB Complaints Office will acknowledge the receipt of the appeal within 10 working days from the receipt of the complaint and will provide a reply by no later than 40 working days following the acknowledgment of receipt. For complex cases that cannot be processed within this timeframe, the complainant will be informed of the reason of the delay and the deadline for reply can be extended to a maximum of 100 working days following the acknowledgment of receipt.

The current policy states that complaints must be lodged within one year from the date on which the facts upon which the allegation is grounded could be acknowledged by the complainant. We recommend that this be extended. The deadline should run to at least beyond the date of project completion. New project information establishing grounds for a complaint might become available after a year, or new information might become available during project implementation, which might provide new grounds for complaints and the complainant should be able to amend their complaint at this point. Furthermore, the burden of proof in cases of complaints should lie with the EIB, not the complainant.

The Bank should commit to maintaining an online-register of all complaints received by the Complaints office, their status and all relevant documents. The complaint cases page accessible through the Accountability tab on the Bank's website does not contain information about all complaints. It currently lists only five cases while the Complaint Mechanism Annual Report for 2009-2012 lists a total of 122 cases submitted in this period. It is thus obvious that this page needs regular updating of information about past and present cases. Remarkably, in the draft Policy, the existing Clause 9.5.1 of Part B-Practices about reporting has been deleted. We recommend to maintain the existing clause, here below.

"9.5.1 The Bank publishes an annual report of the complaints submitted under the Complaints Mechanism. Complaints submitted to the European Ombudsman are also published on the Ombudsman's website and in its Annual Report. The deliberations of the European Court of Justice and of the Aarhus Convention Compliance Committee are also published on their websites."

Appeals Recommendations:

- Clause 9.5.1 should be retained and an online-register of all complaints should be maintained in an up-to-date fashion.
- Adherence to the deadlines specified in Clause 9.1.3 should be respected.
- Providing affected people information on the Appeals Mechanism should be mandatory included in the loan agreement for financial intermediaries.

- The deadline for lodging complaints should extend beyond project completion.
- The burden of proof in a complaint should be with the EIB, not with the complainant.

3.7 Whistleblower Protection

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

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

The Bank’s whistleblowing arrangements should be underpinned by clear information and transparent procedures to ensure consistent and systematic treatment of whistleblowing reports, and the equal treatment of individuals coming forward with information.

Anchoring whistleblowing rules in both the transparency and anti-fraud procedures at the Bank will help to ensure that they are effective and that staff and individuals providing contracting or consultancy services to the Bank have the confidence to step forward and make use of reporting channels.

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

Whistleblower Protection Recommendations:

- The EIB should reintroduce specific reference to its whistleblowing arrangements in the revised TP, in order to ensure wide promotion of the possibilities for both external and internal reporting.
- Explicit commitment should be made to disseminating information on:
 - the range of reporting channels available, including mechanisms to report information to regional offices;
 - how whistleblowers will be protected; and

- the outcomes of fraud and corruption investigations resulting from whistleblower reports.
- The EIB should make a specific commitment to provide information on the possibilities to report 'Prohibited Conduct' to communities affected by EIB projects.
- The information called for above should be made publicly available on the EIB website and, where pertaining to external whistleblowing, in a dedicated and accessible form.

3.8 The Promotion of Freedom of Information

International financial institutions should devote adequate resources and energy to ensuring effective implementation of their access to information policies, and to building a culture of openness.

Given the importance of transparency and access to information, the EIB should commit to the active promotion of these important values. As part of this, the EIB should devote adequate human and financial resources to ensuring effective implementation of the Policy and to building a culture of openness within the organisation.

The following promotional measures have proven effective:

- senior management making statements and taking other actions that make it clear that access to information is an organisational priority;
- providing targeted training on access to information to staff and building access to information elements into other training activities;
- incorporating access to information into corporate incentive structures and appraisal systems;
- educating the general public and particularly communities in project affected areas, about their right to access information and how it may be exercised; this could be implemented through closer coordination with EU Delegations;
- putting in place a central system for tracking requests – when they are made, who receives them, what response was provided, any appeals, and so on – which should itself be made public;
- publishing and widely disseminating an annual review of implementation of the access to information policy;
- putting in place an effective and progressive system of auditing and record management; and
- providing for individual sanctions for wilful obstruction of access to information.

We welcome the inclusion of the EIB's commitment to implement the International Aid Transparency Initiative (IATI) in the Transparency Policy. IATI is an open data standard for publishing information on activities with a developmental impact. The inclusion of IATI in the policy reflects EIB's commitment to proactively disclose its information on development spending in a standard format that is timely, comprehensive, accessible and comparable. However, the EIB has yet to begin to publish its data to IATI or even its plans to do so, meaning it is lagging behind other major European donors and IFIs in this area. In line with the EU Transparency Guarantee, the EIB should begin to publish to IATI in 2014 and should update clause 8.7 of the policy to clearly state that:

- o It aims to implement IATI fully by the end of 2015;
- o It will produce an implementation schedule by end 2014, with specific timelines and delivery targets for its IATI publication, which will be updated regularly;

o It will take steps to use its IATI data in its own programming and coordination processes and actively promote that use of this information by others, in the first instance via an open data portal.

Promotion of Freedom of Information Recommendations:

- The EIB should coordinate more closely with EU delegations in relation to promoting and educating citizens about the right to access information.
- The EIB should put in place a central system for tracking requests.
- The EIB should disseminate an annual review of its efforts to implement the access to information policy.
- The EIB should put in place a system of auditing (monitoring and evaluation) and record management.
- Sanctions should be provided for in case of willful obstruction of access.
- IATI needs to be fully implemented by the end of 2015.

3.9 Regular Review

Access to information policies should be subject to regular review to take into account changes in the nature of information held, and to implement best practice disclosure rules and approaches.

Standards of transparency and openness evolve over time, and an effective access to information framework needs to be reassessed regularly to ensure that it remains current and in line with better international practice. For example, overall time limits on disclosure are being brought down in many countries and new information technologies allow for more sophisticated and powerful forms of proactive disclosure. Periodic review is also important as a means of evaluating the efficacy of particular policy choices, and to solicit feedback from stakeholders about what is working and what is not.

As an example of this, clause F.5 of the European Bank for Reconstruction and Development's Public Information Policy requires the policy to be reviewed every five years, after going through a process of public consultation.

Clause 9.3 of the EIB's existing Transparency Policy states that it will be subject to continuous internal review and quality assessment, and that a formal review will take place every five years. The amendments remove the defined time period for a formal review, stipulating instead that a formal review will take place "in case of changes to the EU's policy and legislative framework on transparency and disclosure of information, changes to policies and procedures within the EIB that require an alignment of this Policy, and any other changes the EIB judges necessary and appropriate."

This standard is far too vague to provide for effective review. Experience suggests that if a defined time period is not set for a formal review, authorities will delay carrying them out or even avoid them entirely. Moreover, linking the review process to other policy amendments misses the point that a formal review should be an opportunity to re-evaluate the system and propose improvements. While continuous internal reviews can allow for incremental improvements, they are not a substitute for regular formal reviews and external consultations. Ongoing processes lack the specific focus and breadth of a formal review, and are unlikely to lead to major reforms. In short, these amendments may lead to stasis and will likely fail to provide for a robust review process as required by international standards. Ideally, the transparency policy should

provide for a review every two to three years, with five years being a maximum period.

Regular Review Recommendation:

- Clause 9.3 should be amended to provide for a formal review every three years or, at the very least, every five years.

4 Conclusion and Summary of Recommendations

We hope that you find the comments and recommendations in this letter useful and constructive and we urge you to take them into consideration as you move forward with the revision of the Transparency Policy.

The recommendations we put forward in this letter for reform of the Policy can be summarised as following:

- A second period for making comments should be added to the consultation process. This will allow stakeholders a chance to respond to the Bank's comments on their original contributions, in November/December 2014, as well to verify the extent to which their comments were addressed in a second draft.
- It is key that in renewing its Transparency Policy, the EIB recognises and seeks to give full effect to the human right to access information. All EU supported Bank activity is required to be in accordance and coherent with EU development policy (Art. 208 of the Treaty on the Functioning of the EU) and the Charter of Fundamental Rights of the European Union. The EU Strategic Framework and Action Plan on Human Rights and Democracy also provide importance guidance following this regard.
- We call for the Policy to cover both administrative and non-administrative tasks of the EIB.
- As with the EU Bank, enhanced transparency rules for the governing bodies should replace the currently overbroad exceptions relating to these bodies in the current Policy. For example, more information about governing body meetings should be available, and Board of Directors meetings should be opened to external observers. Documents should be made public well in advance of Board hearings, generally at the same time as they are sent to the Board.
- Full public disclosure should be the norm, subject only to the regime of exceptions in the policy. When disclosure is denied, the EIB should bear the burden of showing that the information requested falls within the scope of one or more exceptions. All of the exceptions in the policy should adhere to strict standards of harm.
 - the policy should make it clear that final decisions on the release of information will be made in accordance with the EIB's Transparency Policy (i.e. that Member States and other third parties should not have a veto over the disclosure of information).
- All exceptions should be subject to a public interest override.
- The proposal to create a presumption that harm exists in relation to the exception to protect the purpose of inspections, investigations and audits should be dropped and harm should need to be shown, as for all exceptions.
- Public disclosure requirements should be made part of binding language in all contracts, partnership agreements and legally binding documents between the

- EIB and others, and a commitment to include such language should be set out in the Transparency Policy.
- As a public institution with a commitment to transparency, the Bank should not do business with financial intermediaries which refuse to make data on their beneficial owners or their investors publicly available.
 - The new policy should impose a direct obligation on the EIB to provide information to communities affected by EIB projects in a manner and format which is accessible to them. Complete and timely information should be made available at the local level and key information should be produced in an accessible language and form.
 - A mechanism for early public notice should be established. This should require the Bank to indicate how and when it and the borrower will notify a community that a project or programme expected to affect them is being prepared and require that such communications form an integral part of publicly available preparatory project documents.
 - Anyone who believes that the EIB has failed to respect its access to information policy has the right to have the matter reviewed by an independent and authoritative body. The burden of proof in a complaint should be with the EIB, not with the complainant.
 - For both internal and external whistleblowing mechanisms to be truly effective, individuals need to be provided with adequate, clear and accessible information on how to report so-called 'Prohibited Conduct', on how whistleblowers will be protected, and to be aware of how the information they report will be dealt with by the EIB.
 - EIB should fully implement IATI by the end of 2015.
 - formal reviews of the Policy should be undertaken every three years or, at the very least, every five years.

It is in our common interest to ensure that the new policy is in line with people's human right to access information.

List of signatories:

Action Aid International

Africa Freedom of Information Centre, Uganda

Arab NGO Network for Development

Article 19

Bangladesh NGOs Network for Radio and Communication

Both ENDS

CEE Bankwatch network

Centre for Law and Democracy

Christian Aid

Center for International Environmental Law, US

Counter Balance

Eurodad

Freedom of Information Center of Armenia

Institute for Development of Freedom of Information, Georgia

Publish What You Fund

Sherpa

Transparency International (European Union office)

World Wildlife Fund