

A MISSED OPPORTUNITY ON DUE DILIGENCE AT THE EU BANK

An analysis of the
European Investment
Bank's Environmental
and Social Sustainability
Framework

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Counter
Balance Challenging
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ABOUT COUNTER BALANCE

Counter Balance is a coalition of nine NGOs whose mission is to make European public finance a key driver of the transition towards socially and environmentally sustainable and equitable societies.

Over the past decade, we have extensively monitored the operations of the European Investment Bank and led campaigns to make it a more sustainable, democratic and transparent institution.

More information is available at:
<http://www.counter-balance.org/>

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WHAT IS THE ESSF?

On 2 February 2022, the European Investment Bank (EIB) adopted its new Environmental and Social Sustainability Framework (hereafter the ESSF).

The ESSF is composed of an **Environmental and Social Policy** and **11 standards** underneath it. Altogether, they form the bulk of the EIB's approach to act as a responsible lender – or its safeguards, as commonly named for other public banks.

The ESSF was approved following a **public consultation** process in 2021, during which numerous stakeholders, including NGOs, sent inputs and recommendations to the bank. It will apply to all new EIB projects as of 1 March 2022.

This briefing provides a brief analysis of the main strengths and weaknesses of these new safeguards.



WHY DOES THE ESSF MATTER?

The EIB is the bank of the European Union, its financial arm. Its shareholders are the 27 EU Member States. The bank is the largest public international bank in the world. In 2021 alone, the EIB Group (the EIB and the European Investment Fund) invested a total of €94.9 billion into a wide variety of projects and operations.

The bank plays a major macroeconomic role in Europe and beyond. Within the EU, it is central to the recovery efforts put in place under the EU economic recovery package following the COVID-19 pandemic. Outside the EU, the bank is currently seeking to raise its development profile through the creation of 'EIB Global', its new development branch.

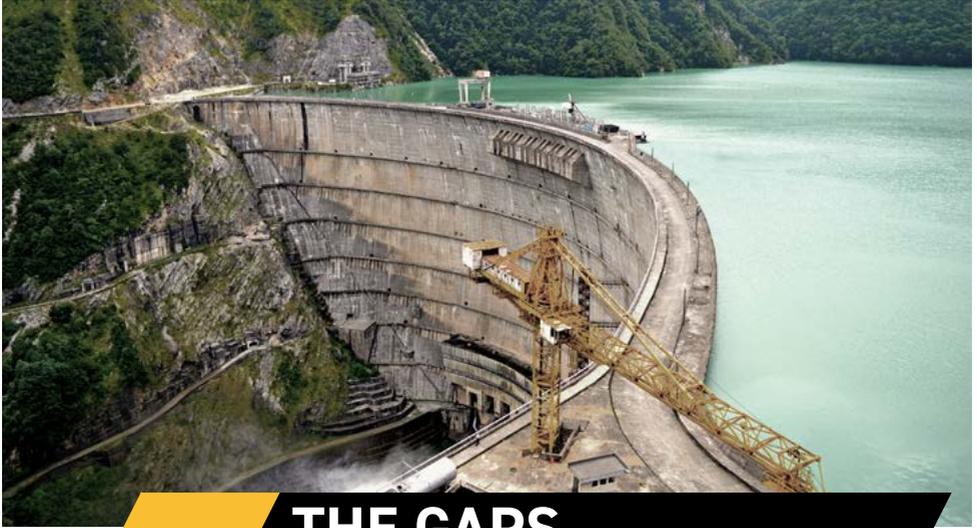
In addition, it is worth recalling that the EIB is bound by a public mission. Since 2019, its shareholders have also initiated its transformation into the "EU Climate Bank". Since then, the EIB has placed itself at the centre of the financing of the European Green Deal.

To implement its mission and deliver on its commitments, the EIB is portraying itself as a responsible lender and a leader in the field of sustainable finance.

A key tool for the bank to deliver on its sustainability commitments is to have in place strong environmental and social safeguards. This is why the ESSF matters: it sets the direction of travel for the bank, and is supposed to clearly establish the responsibility of the EIB and its clients in ensuring that the bank's operations bring positive impacts and "do no significant harm". While a client should be responsible for implementing the policy and standards, the EIB as the lender must be fully accountable for robust checks on the projects financed to guarantee their compliance with environmental and social provisions.

The EIB's **press release** following the adoption of its ESSF states that: *"As part of the framework, for the first time a Group-wide Environmental and Social Policy outlines the Group's vision on how to address the environmental and social challenges we are facing and uphold human rights in all of its activities... Through the ESSF, the EIB Group will focus on sustainable and inclusive development, committing to support the transition to economies and communities that are climate and disaster resilient, low carbon, environmentally sustainable and more resource-efficient".*

The ESSF will guide EIB operations over the coming years. It is particularly important for its investments outside of the EU. Within the European Economic Area and accession countries, the EIB is bound to verify that the operations it finances are in line with EU and national legislation. Outside this area, the bank's Standards – which are supposed to 'translate' EU legislation for wider use – are the main tool which the EIB uses to assess project proposals.



THE GAPS

1. EMPTY PROMISES ON HUMAN RIGHTS

For years, civil society groups have regularly exposed the EIB's problematic track record in the field of human rights. Too often, the EIB has financed projects that have contributed to human rights abuses and has dismissed the voices and concerns of impacted people, as recent cases in **Nepal**, **Georgia** and **Kenya** show. In a joint **report** in November 2020, CEE Bankwatch Network and Counter Balance brought these issues to the attention of the EIB and the public, and formulated a set of demands to remedy them. For instance, in the case of an electricity transmission line financed by the bank in Nepal, the EIB Complaints Mechanism concluded in a **report** that the EIB disbursed tranches of its loan to the project despite a breach of its own environmental and social standards.

Still, no public evaluation or assessment of the state of play has been carried out by the EIB. NGOs only heard about the existence of a study commissioned by the EIB on the review of its social due diligence and internal procedures from a human rights perspective, conducted by the Danish Institute for Human Rights, prior to the ESSF review. We strongly regret that the EIB did not even officially mention the existence of this study, and did not communicate about its findings.

Therefore, a series of letters and written contributions were shared with the EIB ahead of the review of its ESSF (see “references” at the end of this briefing). In addition, the Office of the High Commissioner on Human Rights of the United Nations provided the EIB with many recommendations largely echoing similar concerns as those of civil society organisations.

On that front, the final ESSF is extremely disappointing. Overall, the EIB resisted reinforcing its commitments and procedures on human rights.

Despite this, high-level commitments to human rights are included in the ESSF, for instance in the Environmental and Social Policy: *“The EIB shall not, to the best of its knowledge, finance projects that have the effect of limiting people’s individual and collective rights and freedoms or violating their human rights”*.

But these commitments were already part of the EIB’s previous safeguards, and did little to prevent financing projects with detrimental impacts on human rights.



>> *No specific tool on human rights due diligence*

This issue was identified by CSOs as a central area since the EIB in the past has failed to put its high-level commitments on human rights into practice. Specifically, human rights groups proposed for the EIB to introduce robust human rights due diligence at project level.

In practice, we recommended the EIB to conduct dedicated ex-ante screening and a Human Rights Risk Assessment (HRRRA). When risks are identified under the HRRRA, the EIB should then request its clients to conduct a Human Rights Impact Assessment (HRIA). Ultimately, HRIsAs are not mentioned in the ESSF.

The EIB's approach is to claim that human rights considerations are already properly integrated in the regular environmental and social due diligence it carries out on its operations. For instance, the new Standard 1 includes the following provisions:

“This Standard promotes an integrated approach to impact assessment and risk management by ensuring that environmental, climate, social and human rights [1] considerations are addressed and taken into account in the decision-making processes”, with footnote [1] confirming that “Throughout the Standard, human rights considerations are fully integrated in environmental and social aspects”.

This is far from the reality. There is a blatant gap in human rights protections at the EIB which has been well documented for years. The ESSF is a missed opportunity to fill that gap.

The EIB's “human rights-responsive approach” and related language in the ESSF does little to ensure that EIB clients will respect and promote human rights, and that they would be held accountable if they failed to do so. A policy cannot be “human rights responsive” if it does not commit the EIB to conduct Human Rights Due Diligence and take appropriate steps to prevent harm from being done.

>>> *Voluntary guidance notes and position statement on human rights as the way forward*

NGOs also advocated for the development of a specific human rights strategy – and a related action plan – as the EIB has already developed on gender.

This demand has not been met, and the EIB now refers to the future developments of a position statement on human rights and related guidance notes to reinforce the implementation of its various standards.

While the creation of new tools for following up on the adoption of the ESSF is welcome, it is important to bear in mind that guidance notes and position statements are non-binding to the bank and do not hold the same status as an EIB policy or strategy. The EIB's argument that HRIAs could not be included in the ESSF but may be part of the tools identified under these future documents is a tactical one to avoid the inclusion of clear requirements and systematic tools in its actual policies.

All in all, our analysis is that the new ESSF is unlikely to make any difference in solving the human rights issues that EIB operations have been causing over the last decade.





2. NO PROGRESS ON FINANCIAL INTERMEDIARIES

The ESSF review process started with a promising announcement: the EIB would create an 11th standard dedicated to financial intermediaries, on top of its already existing 10 standards.

Supporting SMEs and local private sector development is one of the EIB's core strategic objectives. In order to achieve this, the Bank does not lend directly to a project but instead uses "financial intermediaries". However, this practice comes with a number of significant challenges that may undermine positive impacts, including a lack of transparency, insufficient control over funds and the risk of corruption and fraud, which up to now have not been properly addressed by the EIB.

On this point the outcome of the review process is again disappointing. Instead of committing for the EIB to exert more control over its intermediated operations, Standard 11 actually sets in stone the already weak due diligence and transparency around the use of financial intermediaries currently applied by the bank. This review process once more demonstrated the EIB's fierce resistance to opening up its intermediated operations to more public scrutiny.

The new Standard is particularly problematic as it does not require any disclosure at all by the EIB or its intermediaries on the actual environmental and social risks and impacts linked to intermediated operations, even when the sub-projects financed via intermediaries are classified as “high risk”. In terms of disclosure, what is required is only for intermediaries to disclose their “policies and procedures” to assess and manage environmental and social impacts and risks, which means nothing in terms of information on concrete investments.

For the first time, the EIB is committing to develop a system where higher risk sub-projects are identified, and therefore given higher attention, including by EIB staff. In theory, this is a positive step forward as it could include sub-projects which may have human rights implications, affect indigenous or vulnerable communities, involve displacement of affected communities, support fossil fuels, or sub-projects which impact protected areas and areas of high biodiversity value.

Still, the ESSF does not require any transparency on those high-risk sub-projects, making it impossible in practice for the public to know what level of due diligence the EIB is carrying out on them. Information on the name, sector and location of medium and high risk sub-projects won't be disclosed by either the EIB or the intermediary. This will not allow the relevant information to be brought to the EIB and the intermediary's attention in a timely manner and to enable public scrutiny and accountability. Given that the EIB's recent Transparency Policy adopted in November 2021 (see our [analysis](#)) also did not bring significant progress in this regard, the EIB's intermediary portfolio will remain a black box in the years to come.

Importantly, paragraph 16 of Standard 11 does not firmly require financial intermediaries to refer these high-risk projects to the EIB for due diligence, as intermediaries are only asked to do it “*where appropriate*”. Once more, the non-binding wording of the ESSF risks making this new procedure toothless.

As a consequence, the new Standard brings no guarantee that harm by intermediated projects will be avoided. Just as it was in the past, the EIB's due diligence on its intermediated operations will largely be outsourced to the banks and funds benefiting from EIB funding, with few strings attached and due diligence only optionally carried out by the EIB itself.

As it stands, the EIB will continue to lag behind other financial institutions, with its intermediated operations not being subject to the same due diligence, monitoring and transparency requirements as its direct lending.



3. AN UNSATISFACTORY STATUS QUO

The initial drafts of the ESSF put forward by the EIB in July 2021 were extremely problematic. If they had been approved, the EIB's responsibility for carrying out stringent due diligence on its operations would have been severely diminished.

In part due to pressure from civil society, the final ESSF modified some dramatic omissions made earlier by the bank. For example, the new Environmental and Social Policy now states that contractual clauses will enshrine the Standards in all EIB operations. This was not the case in the initial draft.

Looking retrospectively at the previous standards in place at the EIB, it is mostly the status quo that prevails. Fundamental weaknesses that existed for years remain entrenched in the new ESSF.

On one hand, the new ESSF integrates new policy priorities and concepts that have been developed during the 2010s. For instance, the EIB now reflects in its ESSF the "do no significant harm" principle set by the EU Taxonomy on sustainable investments.

On the other hand, looking at the practical tools in place to deliver on a concept like "do no significant harm", there are no significant changes compared to previous policies in force at the EIB.

In particular, the EIB's responsibility to conduct due diligence and monitoring of its operations has not been reinforced.

This is the case as far as public participation is concerned. Numerous CSOs, including from the Global South, recommended for the EIB to make meaningful public participation a priority area of its planning, appraisal and monitoring processes, without leaving all responsibilities to the project promoter. The EIB was also called to reinforce its monitoring of stakeholder engagement in all projects it finances, with specific attention to the Free Prior Informed Consent (FPIC) of Indigenous communities.

For public consultation to be more than a tick-the-box exercise, the EIB needs to make it a priority area of its planning, appraisal and monitoring processes. As a result, we called on the EIB to clarify its own responsibilities and reinforce its monitoring of stakeholder engagement in all projects it finances. The EIB should always verify the results of public participation, and whether and how the concerns addressed to the competent authority or project promoter were given due consideration and acted on.

The final provisions in the ESSF (including Standard 2 on stakeholder engagement) remain rather vague and require project promoters to both conduct and oversee their community engagement approaches, while the EIB keeps a hands-off approach.

A few examples illustrate the vagueness of the requirements for the EIB:

>> paragraph 4.12 of the Environmental and Social Policy states that ***“A breach of contractual conditions requires corrective measures to be taken by the promoter, in agreement with the EIB. A failure by the promoter to agree to implement such measures will lead to a decision by the EIB to take action, as it deems appropriate.”*** Wording like “as it deems appropriate” and “when relevant” is found throughout the ESSF and undermines provisions that could in theory establish a very clear line of responsibilities and measures to be taken.

On FPIC, Standard 7 on Indigenous People does not clarify what the EIB should do when the promoter fails to undertake a FPIC process (for instance by continuing construction activities without conducting FPIC). For example, the bank could suspend project activities and exercise forms of leverage, escalating to a possible exit.

Besides the issues already mentioned, the EIB is still not requiring Environmental and Social Impact Assessments (ESIAs) before approving a project for financing. The EIB's approach is to instead approve projects and then make an ESIA a condition for disbursing loans. A problem with this approach is linked to the political backing that an EIB-approved project means for the project promoter, as the promoter is then in a strong position which too often leads to carrying out its project without meaningful public participation and a real assessment of alternatives.

Similarly, the new Environmental and Social Policy implies that due diligence and appraisal is required when projects are approved, but key documents like environmental and social management plans, resettlement plans or hazardous waste plans are to be developed and met at an undefined time during implementation. This entails a risk that projects which do not comply with EIB standards are not blocked. Corrective action is unlikely to follow without specific legal provisions in place since the beginning of the project cycle.

Stakeholder engagement, proper risk assessment and ensuring compliance should all be required upfront to inform the EIB Board's approval, and then monitored throughout the implementation process. Managing potentially adverse impacts during the implementation phase does not mean that less requirements should be sought upfront. Ultimately, a combination of deferring compliance from the approval stage to the implementation stage, and the delegation of responsibilities to the project promoter risks placing too much reliance on self-monitoring and self-reporting by EIB clients.



THE GOOD

1. A STEP FORWARD FOR BIODIVERSITY PROTECTION

Standard 4 on biodiversity and environmental protection has been improved compared to the EIB's previous safeguards on the topic.

Particularly positive is the shift from the concept of "no net loss of biodiversity" to "halt and reverse biodiversity loss" as being the primary objective of the EIB. That change took place following the public consultation process, as the initial draft of the ESSF still contained references to "no net loss of biodiversity".

The new standard states: *"Where a project is expected to have impacts that would compromise the viability of a critical habitat and/or a habitat of high biodiversity value or their associated features regardless of any proposed compensation or offset, the promoter shall undertake to redesign the project to avoid the need for such compensation/offset"*.

In times of accelerating mass extinction of wildlife on Earth, this is an important step forward to close the door on biodiversity offsets, as compensations and offsets are placed as last resort options and unlikely to meet the requirements of the new standard.

In addition, the standard mentions that *“as a last resort and in response to residual impacts, compensation measures may be implemented to reach a minimum of no loss of biodiversity overall. If the project is taking place in an area of critical habitat, a Net Positive Impact on biodiversity and ecosystem services must be achieved.”* To further hit the nail on the head, footnote 18 indicates that *“Biodiversity offsets are not an acceptable measure to achieve Net Positive Impact for critical habitat”* and that *‘In the absence of scientific information, the precautionary principle shall apply.’*

This is an important achievement for NGOs who have been calling on public banks and financial institutions to focus on protecting biodiversity instead of betting on problematic offsets while contributing to habitat destruction.

In addition, the new standard sets criteria for projects in critical habitats which are quite tight (for instance in paragraph 17). Similarly, requirements for baseline data and assessment, including for the areas indirectly impacted and impacted by associated facilities, look solid.

Finally, the definition of protected areas is wide and goes beyond legally protected areas (see footnote 21), which should enable the EIB to ensure that its safeguards can be applied to a wide range of biodiversity-rich areas.

However, there are still two downsides to Standard 4.

Firstly, there are no real no-go areas for investments, not even in critical habitats. Still, the various requirements from the standard should make it complicated for the EIB to invest in critical habitats, if the standard is seriously implemented. A more straightforward definition of no-go-zones would have clarified the approach of the bank, by defining areas which are simply off-limits for harmful investments. In our view, the most endangered ecosystems should be no-go areas for financing of extractive, industrial and other environmentally, and/or socially harmful activities – the Amazon, the Arctic, primary and old growth forests, high mountains, free flowing rivers, wetlands, coral reefs, etc.

Secondly, while in the EU, EFTA and Candidate and potential Candidate countries, the EIB will require promoters to carry out “appropriate assessments” for projects with a potential impact on protected areas, no equivalent assessment is required for countries outside of Europe. This risks creating double standards, with less robust due diligence in the Global South, which may result in environmental destruction under certain conditions, while in the EU the EIB would not finance similar types of operations.



2. BETTER INTEGRATION OF GENDER CONSIDERATIONS

Over the last five years, the EIB has made efforts to further develop its approach to gender issues. In particular, the EIB adopted its “Protect, Impact, Invest” strategy in December 2016. Together with a dedicated action plan, it sets the EIB’s direction on gender equality and women’s economic empowerment.

In that context, it was expected that the new ESSF would reflect on these developments and integrate gender more comprehensively than the previous safeguards did.

The outcome of the ESSF review is rather positive in that regard, as gender considerations are now better streamlined in several standards, including in Standard 5 on Climate Change.

In addition, CSOs’ call for the definition of gender to be widened to reflect non-binary and gender non-conforming communities was taken into account by the EIB. For instance, the definition of vulnerable groups now covers *“situations in which individuals could be more adversely affected by project impacts than others due to the existing discrimination, marginalisation, and/or exclusion on the basis of their socioeconomic characteristics, including based on their sex, sexual orientation, gender, gender identity”*.



3. MORE ATTENTION TO LABOUR ISSUES IN SUPPLY CHAINS

Standard 8 of the EIB has been modified so that it can also apply to supply chain workers and not only to the workers directly involved in an EIB-financed operation and employed by the promoter.

Paragraphs 56, 57 and 58 indicate the steps that need to be taken regarding supply chain workers, calling on promoters to assess labour risks associated with their primary suppliers of goods and materials. Then, *“If the risk assessment identifies the presence or a significant risk of child labour, forced labour or sexual exploitation or abuse at the primary supplier, or when risks are known or have been reported in lower tiers of the supply chain, the promoter shall resort to a primary supplier that can prove it is compliant with this Standard”*.

When problematic practices are identified, the promoter *“shall engage with the relevant primary supplier to take the appropriate steps to remediate and eliminate such practices in a satisfactory and reasonably swift manner”* and then shall report to the EIB on the progress made by the supplier and keep monitoring this progress. When progress is insufficient, *“the promoter shall resort, within a reasonably short timeframe agreed with the EIB in consideration of the existing contractual relations, to different primary suppliers that can prove they are compliant with the requirements set out in this Standard”*.

While welcome, the inclusion of these provisions are weakened by the non-binding nature of its wording, for example *“the promoter shall make reasonable efforts to assess if there are labour risks”*, or *“Where the promoter can influence its primary suppliers, the promoter shall aim to ensure that they apply the requirements of this Standard”*.

Overall, the EIB’s willingness to require its promoters to effectively implement this provision, via dedicated clauses of contracts in particular, will be instrumental to ensuring this system is really put into practice. Still, even if imperfect, the EIB has a basis in its standards for its operations to stop relying on supply chains that violate labour and human rights.





4. STRONGER COMMITMENT AGAINST RETALIATIONS AND FOR THE PROTECTION OF HUMAN RIGHTS DEFENDERS

The ESSF provides a clear anti-reprisals statement that *“In particular, in relation to the EIB-financed projects, the Bank shall not tolerate any [...] action that amounts to retaliation and harassment. It takes instances of intimidation or reprisals seriously and takes follow-up actions as and where appropriate. To this end, the EIB expects its promoters to meet their respective human rights duties and responsibilities”*.

This is an improvement compared to the EIB’s previous standards. There is now a mention of the bank itself taking action in response to retaliations, but these actions are unspecified and are discretionary *“as and where appropriate.”*

Following the adoption of that statement, it is now time for the EIB to develop specific procedures on human rights defenders and protocols to prevent and respond to risks of reprisals.

5. A BETTER ACCOUNTABILITY FOR THE EIB IN DETERMINING THE NEED FOR EIA AND ESIA

The ESSF provides clear provisions which make the bank responsible for categorising all projects according to their environmental and social risks, in turn determining the need for an Environmental Impact Assessment (EIA) or an Environmental and Social Impact Assessment (ESIA).

The policy includes a provision which states *“During the pre-appraisal stage, the EIB shall categorise all projects into one of the following categories, using as a benchmark the EU legal framework:”*. The provision clarifies that

the need for an EIA or ESIA may be due to a determination by competent authorities in the host country and/or the EIB, based on a case-by-case analysis which takes into account the nature, scale and location of the project.

We welcome this improvement as a step towards the EIB taking responsibility for projects which carry environmental and social risks, as projects are subject to relevant assessments even in cases where promoters or relevant authorities disregard the need for them.





6. A BETTER DEFINITION OF INDIGENOUS PEOPLES

The EIB-defined Indigenous Peoples criteria included some criteria that did not appear in any other widely accepted definitions of Indigenous Peoples, such as land/natural resources-dependent means of existence and primarily self-sufficient production. They have serious implications for indigenous communities around the world. NGOs were advocating for the EIB to remove unfair criteria because many Indigenous Peoples have suffered land alienation or have become separated from their lands, and may no longer be in a position to 'live off the land'. The old criteria disregarded Indigenous Peoples' right to development, including to be wage-earners and employed by others.

Therefore, the ESSF review brought positive results as the EIB eliminated unfair criteria for determining the presence of Indigenous Peoples. In addition, the ESSF includes a provision preserving the EIB's right to ensure that Indigenous Peoples' rights are observed: *"The EIB reserves the right to determine on its own if the project may have a potential impact on Indigenous Peoples, their traditional ways of life, may threaten the natural resources they rely upon, or may lead to their displacement and to a substantial loss of distinct cultural heritage, both tangible and intangible."*



CONCLUSIONS – THE WAY FORWARD

The review of the EIB safeguards was a missed opportunity for the bank to uphold its commitment to support the sustainable development of the countries where it operates. The new ESSF fails to make the EIB a responsible lender and largely undermines its commitments to become the “EU Climate Bank”.

This sends a disastrous signal at the moment when the EIB launched “EIB Global”, its new development branch, and aims to be a central player in the EU development finance landscape. In practice, the operations of EIB Global will primarily rely on this problematic environmental and social policy.

Still, the EIB can tackle in practice the issues that have been left aside under the ESSF so far. The bank will now develop procedures for its staff to monitor the implementation of the standards, and guidance notes for promoters to help them understand and implement the ESSF. It is regrettable that these procedures have been left out of the public consultation on the ESSF, when in the past they were subject to public scrutiny and external contributions.

Therefore, we call on the EIB to include all our recommendations on the ESSF into its procedures to ensure proper implementation, especially on the following matters:

- >> the need for promoters to undertake a Human Rights Impact Assessment when human rights risks are identified;
- >> the EIB's due diligence responsibilities at pre-appraisal and appraisal stages, which should cover human rights risk assessments, and an analysis of country context and contextual risks;
- >> monitoring carried out through the project life-cycle once the EIB approves an operation;
- >> the implementation of the zero-tolerance policy on retaliations against complainants and human rights defenders;
- >> detailing criteria for Financial Intermediary sub-projects with high environmental, climate and social risks that shall be referred to the EIB for review and approval.

An independent evaluation of the impact and contribution of the new ESSF to the environmental, social and economic performance of EIB operations on the ground should be central in its implementation. So far, there has been a gap at the EIB in the evaluation of its environmental and social policies. The ESSF proposes to organise reviews of the framework every five years. By then a thorough evaluation of the new framework should take place.

Overall, implementation of these safeguards will be key. Currently, a major issue at the EIB is the wide gap between its policies and their implementation on the ground, which is largely explained by the lack of staffing, expertise and dedicated resources.

To credibly implement the ESSF, the EIB should dedicate sufficient budget and increase its expertise, especially on human rights and gender. This crucial dimension was not dealt with during the ESSF negotiations, casting doubts over the bank's capacity – and willingness – to truly contribute to an environmentally and socially just transition.

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