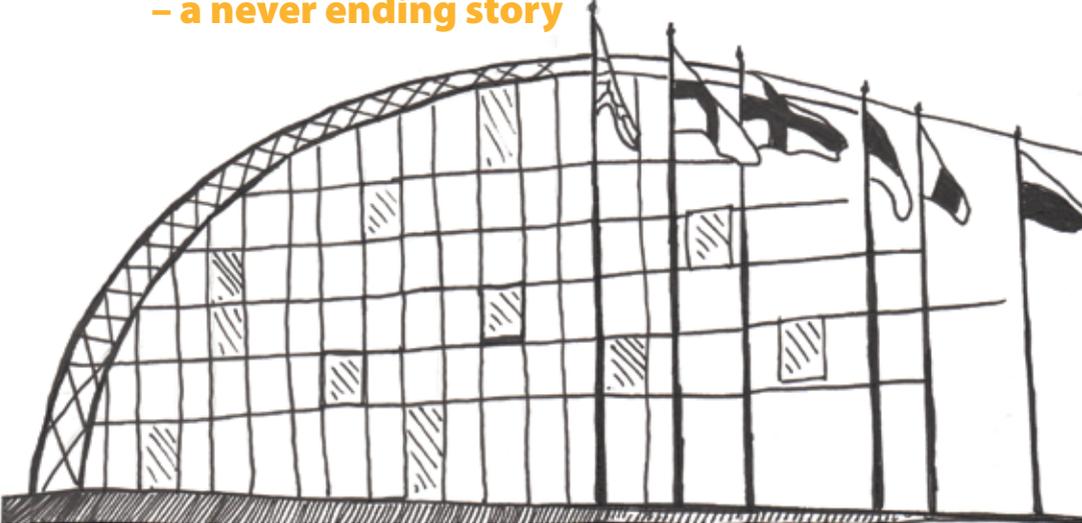


Counter

Balance

Challenging
Public
Investment
Banks

Holding
THE EIB TO ACCOUNT
– a never ending story



May 2014

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

Our members are:



the **EUROPEAN INVESTMENT BANK**

an old bank with a recent history of accountability

Founded in 1958 by the Treaty of Rome, the European Investment Bank is one of the largest public banks in the world. The 'EU bank', as it calls itself, is now 55 years old – a good age, yet the EIB remains still rather young and shy when it comes to both integrating and implementing principles such as transparency, public participation and accountability into its operations.

In 2012 the EIB's lending portfolio totalled EUR 52 billion, with EUR 7.4 billion loaned outside of the EU. The EIB operates within the democratic framework of the EU. It is guided by EU policies and works in close cooperation with the European Commission. As such, the EIB is politically accountable to its shareholders – the 28 EU member states – and to the EU institutions, the European Commission and the European Parliament. This factsheet explains how the EIB relates to these institutions, to ordinary citizens and to those affected by the bank's operations.

Surprisingly, until recently, people impacted by the EIB's activities had nowhere to go to lodge a complaint. While upward accountability – vis-à-vis the EU institutions – was arranged more or less at the time of the legal foundation of the EIB, downward accountability – towards taxpayers and citizens affected by its activities – was entirely lacking until the establishment of the EIB's Complaints Mechanism Office in 2008.

Since then European citizens and those living outside of the EU have had the possibility of seeking recourse and lodge complaints against EIB projects affecting them. While citizens and affected communities should be involved earlier on in the planning process, the move to allow them the direct opportunity to lodge complaints ex-post is a significant step forward in the functioning of the EIB. At least in theory...



The **RIGHT** to **COMPLAIN** – *The saga of the Bujagali dam, Uganda*

In 2007 the EIB agreed to invest EUR 92 million in the Bujagali dam in Uganda. It did so following the lead of the World Bank, the African Development Bank and other bilateral financial institutions. The dam was officially inaugurated in 2012.

The Bujagali hydropower project has turned out to be a highly controversial project for a variety of reasons including its very high cost, steadily rising over the years to reach USD 862 million at completion.¹ The dam has had significant impacts on nature and the livelihoods of people, affecting 6,800 individuals, with fertile agriculture land being submerged and the Bujagali falls being flooded, thus also impacting fisheries.

The project has been strongly criticised by the complaints mechanisms of both the African Development Bank and the World Bank that identified numerous areas of non-compliance with both banks' internal policies and guidelines, such as problems with consulting the affected communities, inadequate resettlement and insufficient compensation to impacted people.

A crooked path: the complaint to the EIB and the European Ombudsman

In November 2009, following a field mission in Uganda, a complaint was submitted to the EIB's CM office by 557 affected persons, including the Jaja Bujagali cultural and spiritual leader, communities from resettlement camps, CSO organisations and lawyers both from Uganda and Europe, among them National Association of Professional Environmentalists, Uganda, CLAI (Centro Legale pro Afro-discendenti ed Indigeni-Onlus, Italy), Sherpa and Counter Balance.

The complaint both addressed issues related to resettlement and lack of compensation for local people, as well as the failure of the EIB to meet European development objectives.

How long can you wait?

Instead of the stipulated 40 days (or 100 working days for complex issues), it took the CM office almost three years to issue the conclusions report from its investigation. During this period a series of meetings took place between the complainants and the CM office (also involving the European Ombudsman's office), email correspondence and telephone conversations, with repeated requests for the final conclusions report. Promises and reasons for the delay were provided, but not the report itself.

The justifications given for the delay were the complexity of the case, an understaffed CM office that had a lot of cases pending at the time and the fact that, simultaneously, the EIB was facilitating compensation processes with local communities and the company.

Until the money is disbursed and the dam is built

In the meantime, the EIB continued to disburse money to the Bujagali dam project. At the time of the filing of the complaint, the EIB had disbursed EUR 42.5 million of the total amount of the agreed loan (EUR 95 million). Amongst the requests set out in the complaint, the plaintiffs had asked the EIB not to disburse any more money until their concerns were addressed. Nevertheless, while the investigation and the issuance of the final conclusions report continued to be delayed, and despite the promises of the complaints officers not to disburse additional money before the investigation was concluded, the EIB continued to support the project. –By January 2011 a further EUR 40 million was disbursed by the EIB for the Bujagali dam, the full amount of the loan.

The unsuccessful attempt of the Ombudsman to remedy the situation

By that time, the complainants had lost confidence that the CM office would finalise its work, and in November 2011, two years after they submitted their complaint, they contacted a second independent redress entity to seek resolution – the European Ombudsman.

A complaint against the EIB for maladministration was lodged, signaling also the internal problems hindering the EIB's CM office and asking the Ombudsman to issue recommendations *"so as to prevent future maladministration and ensure the proper and effective functioning of the EIB Complaints mechanism"*.

However, in a report issued a year later, the Ombudsman concluded that no maladministration had been conducted by the EIB, and that *"the EIB has apologised to the complainants on several occasions for the time it took to complete its assessment"*. Meanwhile, the CM office finally issued its conclusions report (in August 2012), before the Ombudsman's conclusions were released.

The EIB's own CM report concluded that: *"In some cases the negative environmental and social impacts found on the ground have not been adequately mitigated, which suggested that these impacts and related mitigation measures may have not been fully assessed ex-ante..."*

Such issues that seem to have been under-estimated were land expropriation and compensation process, implementation of the Resettlement action plan, and the cultural and spiritual value of the Bujagali river.

Yet this failed to bring about any changes on the ground. At the time of writing the Bujagali dam is built and the money transferred, yet some of the affected communities' complaints are still pending. Ultimately they are faced with the reality that, in spite of the EIB's much touted standards and an independent Complaints Office, the bank financed a dam project that neglected the obligation to properly inform and involve affected communities and failed to respect people's rights and environmental considerations.

The **RIGHT** to **COMPLAIN** – *The Rivne-Kyiv High Voltage Line, Ukraine*

In July 2012, the Ukrainian NGO National Ecological Centre of Ukraine (NECU) submitted a complaint to the EIB's CM office regarding the bank's loan for the Rivne-Kyiv High Voltage Line signed in October 2008. NECU alleged that the EIB failed to comply with the provisions of the Aarhus convention on access to information, public participation and access to justice for environmental matters, and with its own Environmental Statement in force at the time of project approval.

At the time of the EIB's green light for this project, the promoter of the EIB-sponsored transmission lines in Ukraine provided the compulsory environmental impact assessment (EIA) only to parts of the project. Two 60 kilometre, 330 kilovolts (kV) lines, and the modernisation of the Kyivska 750/330 kV substation were not included in the EIA.

This violates EIB policies requiring that *"all projects that have a significant effect on the environment require an EIA, including public consultation..."*, and which should be made public at least 30 days before the project is presented to the EIB's board for approval.

Another problem was related to the failure of the EIB to provide updated environmental information on their website during the different stages of the project cycle. The project description was limited to two paragraphs while important developments were taking place. This, according to the complainant, resulted in providing misleading information about the state of the project and violation of the Aarhus convention which requires active dissemination of information.

A Complaint Mechanism only active in the margins of the bank

In this Ukrainian case, the EIB's CM office provided their draft report relatively quickly, six months after the complaint was lodged, and even earlier than the bank announced in a letter to the complainant. NECU received the conclusions report of the office in January 2013, which surprisingly stated that no maladministration by the EIB had been found.

NECU learned that, in an internal document, the Environmental Handbook of the EIB, specifying how bank staff should in fact implement the EIB's environmental and social policies, the bank introduced the term *Multi-Scheme project*, which is how the Rivne-Kyiv High Voltage Line Project was defined (as opposed to a *Stand-Alone Investment Loan*). These rules, previously concealed, allowed the EIB to justify signing the project contract while the environmental and social impact assessment was still under preparation. *It was only following this complaint that the Handbook became publicly available.*

Regarding the second part of the complaint, the EIB claimed that it updated its information about the project as soon as the complainant asked them to, and the CM office issued the recommendation that it should do better.

But without clear incentive or potential sanction, it is far from convincing that the EIB will now fulfill a pledge on something that it did not do for years.

So, indeed good work, but, in practice, nothing has changed substantially on the ground. People remain poorly informed in due time, a duty perhaps of the project promoter, but this duty should be guaranteed by the EIB, the institution providing the means to make this Ukrainian project – and others – happen.

Can the Ombudsman help non-EU citizens?

Not satisfied with the EIB's response, in May 2013 the complainants turned to the European Ombudsman. He expressed willingness to receive and accept the first complaint regarding EIB maladministration submitted by non-EU citizens.

NECU submitted the complaint only with regard to the breach of the application of the Aarhus convention for the rules of active dissemination of environmental information ("Regulation 1367/2006"), asking the Ombudsman to recommend that

"for future projects, the EIB should publish all information relating to environmental impact studies and risk assessments concerning environmental elements and authorisations with a significant impact on the environment, and environmental agreements in accordance with Article 4(2)(g) and (f) of Regulation 1367/2006".

The Ombudsman had in fact asked the EIB for a response to this allegation and has transmitted the response of the EIB to the complainant. Six months later due to a delay from the side of the EIB, taking currently no position, NECU has still been given the opportunity to provide its response and reaction to the Ombudsman and the Ombudsman's conclusions are still to come. While in its response the EIB has promised to make a public register of documents in 2014, it is unclear how long this will take, while loans are being disbursed in the meantime.

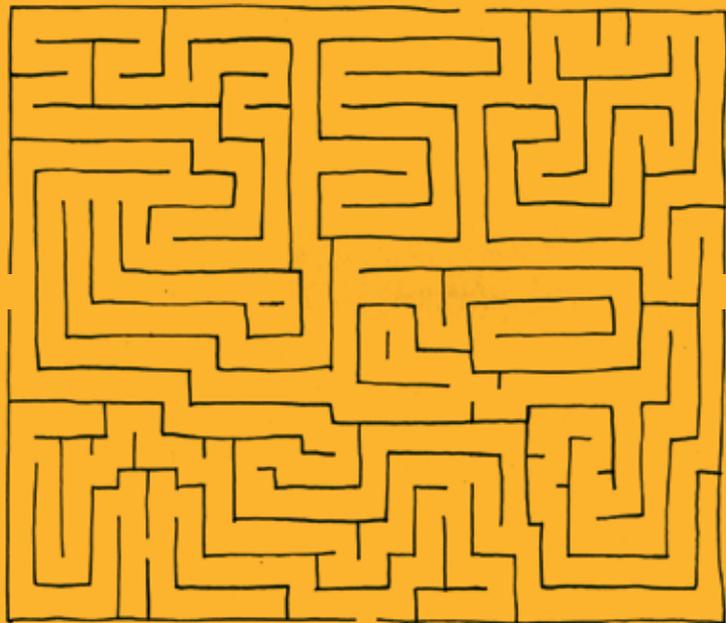


high voltage line / photo by Phototropy

HOW to hold the EIB to ACCOUNT?

A labyrinth of institutions

The EIB works with several institutions, to which it should be accountable. These are mainly the EU institutions – Commission, Parliament and Council – and bodies such as the European Anti-Fraud Office (OLAF) and the European Ombudsman, as defined in the EU treaties. But what about the responsible or recipient national governments, the national parliaments of the EIB's shareholders or the ordinary citizens and project affected people?²



Curia Rationum



European Commission



Aarhus



European Parliament



CVRIA



EU memberstates



1. Access to the European Court of Justice

As the EIB is not a fully-fledged European Community institution, the EU Court of Justice is in theory not able to hear complaints brought by the members of the public (Art. 263 of Treaty of the Functioning EU). Under article 271 of the Treaty (TFEU), only Member States, the Commission or the Board of Directors of the Bank can institute proceedings against the EIB. However, a recent case of EIB staff standing against the EIB in front of the ECJ may affirm this theory.

The Commission has used this possibility on several occasions. For example for the case "Commission v. European Investment Bank, 2003", the ECJ ruled that "it is clear ... that the EIB is intended to contribute towards the attainment of the European Community's objectives and ... [is therefore] exceeding its margin of autonomy of organisation".

2. The Aarhus convention and EU law on citizens rights in environmental matters

The EIB is subject to the Aarhus convention under Regulation 1367/2006 adopted by the European Parliament and the Council, providing its application on access to information, participation in decision-making and access to justice in environmental matters. The Aarhus convention is binding on all institutions and bodies of the EU and Member States. When failing to fulfill the requirements of the Aarhus convention, members of the public, including environmental organisations, have the opportunity to address the Compliance Committee of the Convention.

There has been a complaint to the Aarhus Convention Compliance Committee related to the Vlora Thermal Power Plant in Albania, financed by the EIB among others, for failure to consult and inform the public about the project. In 2007 the Compliance Committee confirmed the allegations and, after several years of discussions, Albania forwarded an action plan and has continued to provide reports to the Committee.

3. The Court of Auditors

The European Court of Auditors is an EU institution examining the accounts of all EU bodies and tasked with providing independent external financial scrutiny of and promoting accountability and transparency in the EU institutions.

The Court provides additional scrutiny to the public funds of the EU or the European Development Fund managed by the EIB. The Court issues annual and special reports, with statements related to the compliance of activities with the policies of the Community. According to the agreement between the EIB, the European Commission and the Court³, it would be possible for the court to issue a statement on the EIB's specific sectoral policies, or for an NGO to suggest to the Court to audit the EIB.

In a special report from 2009 covering financing for the Mediterranean countries, the Court concluded that there was a lack of coordination between the EIB's activities and those of the Commission, especially at the local level, and provided recommendations to the bank and the Commission.⁴ However, apart from oral interventions where the Court has been very critical of the EIB, it has its own agenda and a more consistent approach seems unlikely.⁵

In addition, national courts of auditors in EU member states also play a role regarding the EIB. Some of those national institutions are engaging with the European Court of Auditors via Memorandums of Understanding in order to scrutinize the use of EU funds (possibly channeled through the EIB) in their countries.

² Kramer, L., Mechanisms at EC level to hold the European Investment Bank accountable, Background paper for conference "Right to Appeal", 30 November 2006, Brussels
³ http://www.eib.org/attachments/thematic/acctrip_en.pdf
⁴ Banking Measures in the Mediterranean Area in the Context of the MEDA programme and the Previous, European Court of Auditors, 2009, Special Report N1, http://www.eca.europa.eu/Lists/ECADocuments/SR09_01/SR09_01_EN.PDF
⁵ *ibid* 4

4. Complaint to the European Commission

As a 'guardian' of the Treaty, the European Commission should be responsible for the coherence and alignment of the EIB's operations with EU policies. The Commission provides its opinion on EIB projects according to Article 19 of its Statute⁶ – requesting a formal opinion of the Commission within two months of the submission and giving it the formal right to veto a project.

The veto is not a common practice, though, as the Commission claims that projects that are not in compliance with EU policies never make it to the public space and are rejected at an early stage. This is, however, a matter between the EIB, its clients and the Commission – both citizens and affected communities are excluded from this process.

5. Petition to the European Parliament, oral and written questions

EU citizens or citizens residing in an EU country can submit a complaint to the European Parliament's Petition Committee in relation to the EIB's activities. The Parliament then submits the petition to the relevant services of the Commission, and requests written or oral comments. In the event of such a petition being taken on, the EIB could also be invited to submit its position or be present for a public hearing in the parliament.

6. Complaint to member states

As the EU's member states are the shareholders of the EIB and they vote to determine the EIB's policies and loans, citizens could turn to their own states to challenge the EIB. This still remains hypothetical for the moment and member states could argue that a complaint should be addressed directly to the EIB.

There have been cases when specific questions have been raised in national parliaments towards the representative of the country in the EIB, such as in Sweden when MPs questioned the vote of their representative on the Sostanj Lignite Coal Power Plant project in Slovenia financed by the EIB.

CONCLUSIONS and LOOKING FORWARD

Taking the Bujagali dam and the Ukrainian transmission lines as test cases, the result is telling – the recourse mechanisms available for the EIB are good on paper, but poor in practice, doing little to improve the situation of those that turn towards them. At the same time, other legal mechanisms or institutions overseeing the EIB's operations appear difficult to access for citizens.

Our current experience shows that:

— Despite its good efforts, the CM office seems to be hindered from completing its tasks in a manner that is meaningful for the impacted communities in both cases. The significant delay of the Bujagali dam report, for example, seems to have been more a result of EIB's internal dynamics with staff that does not like to be criticised. This questions the ability of the CM office to implement its task in an independent and efficient fashion. Giving timely answers to people's claims is essential in order to address their problems.

— There is no system of formal relations between the EIB board of directors and the CMO. This shows how isolated the CMO is compared to the decision-makers within the bank. Indeed, the findings of the CMO reports are mostly discussed with the staff of the EIB, and only in case of escalation are those issues handled by the EIB Management Committee.

— Despite the existence of the European Ombudsman as an independent, second level to seek recourse, it seems that a stronger stand in resolving issues between the CM and the complainants is needed. The current role of the Ombudsman is strictly to review the work

of the EIB complaints mechanism to assess if there was maladministration in the handling of complaints. However, it has so far never ruled maladministration and does not take proactive initiatives regarding ongoing investigations. The consequence of this problematic relation between the CMO and the Ombudsman is that there is no real independent appeal mechanism at the time being.

— The CM office and the Ombudsman can only give recommendations but cannot force the EIB to take steps. In this regard, the general line of argumentation of the CM office is to say that its participation in the decision-making process of the EIB compensates for their non-independence: its main achievement is not the recommendations issued, but rather the internal work with EIB staff which steers cultural change. However, given the bank's failure to implement the Aarhus convention and make sure communities are actively involved (as seen in both cases), one can question how committed the EIB will be to implement the recommendations of these bodies. And, finally, the inaccessible legal language, the timely process and the weak outcomes can be considered to be important obstacles for affected communities.

When addressing these problems ex-post, there are also serious flaws in the functioning of the current set-up, with the EIB's CM office being internal, understaffed and its work and independence seriously questioned. In our view such outstanding problems are not being sufficiently recognised and addressed by the European Ombudsman, which itself lacks capacity and relies largely on information provided by the EIB

⁶ http://www.eib.org/attachments/general/statute/eib_statute_2013_en.pdf

In the short term, we would recommend that the EIB:

— Finalises the setting up of an online register of all complaints received by the CM office, their status and all relevant documents, a practice already implemented by other MDBs, such as the EBRD.⁷

— Engages a genuine and inclusive public consultation process in 2015 in order to review and reform the policies and procedures guiding the work of the EIB complaints mechanism.

— Takes the opportunity of this revision to revise its Memorandum of Understanding with the European Ombudsman.

— Ensures the full independence of its grievance mechanism and demonstrates clear actions with regard to ongoing complaints, which ensure that there are concrete outcomes of the work of the CM office. A first step was made when EIB's President Hoyer deemed it necessary reminding its staff of the existing CM office as a "key element of the Bank's public accountability" and requiring full cooperation.

— Works further on a genuine improvement of its transparency through the revision of its transparency policy in 2014. This is a key precondition for engaging in a meaningful dialogue with its citizens and affected communities. For instance, the EIB recently signed the International Aid Transparency Initiative and should strongly focus on its implementation.

— Implements the provisions of the Aarhus Convention and Regulations 1367/2006 and 1049/2001 by setting up a public register of documents, since this is crucial to guarantee the right of access to documents for European citizens.

What is further lacking is the legally binding "duty of care"⁸, one of the principles of European Community Law, which means that it is very hard for those impacted to seek damages. Instead, they only have the rather weak mechanism of the CM office.

It is certainly time for a broader discussion on these accountability mechanisms at EU level, a challenge that could be taken up by the next European Parliament and Commission. The institutions to which the EIB is accountable should take such issues seriously and remind the bank about its duty to provide transparency and accountability for citizens from Europe and other continents.

Another solution could be that the role and independence of the EIB grievance mechanism is reconsidered and a new form of external supervision is implemented over it, with, for example, the Parliament playing a more direct supervising role.

The following possible steps are proposed:

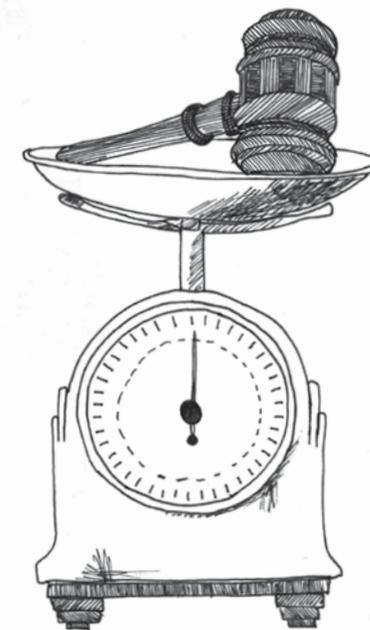
— Consider introducing a legally binding 'duty of care' with regard to the EIB, making it liable for its actions to those affected by its lending.

— A fully external grievance mechanism for both EU and non-EU citizens needs to be set up to implement the duty of care principle. This mechanism would be mandated to cover concerns related to the impact of EU funding, including both EIB and European Commission funding.

— In order to ensure the proper functioning of this external grievance mechanism, a supervisory structure for this (or an appeal court) is also needed. This could be achieved by building on the current structure of the Ombudsman mechanism, but budgeted and appointed by the European Parliament. A supervisory role would be given to a European Parliament committee with also some investigative powers abroad.

— Such structure would represent a major change in comparison to the existing one. Indeed, the current Ombudsman's approach is to exert a function of review of the work of internal complaints mechanisms of EU agencies and financial institutions such as the EIB. In our view, those competences should be enlarged in the framework of a revamped and more ambitious "European Ombudsman 2.0".

— Giving a more prominent role to the European Court of Auditors which should actively carry out assessments on the performance of EIB lending activities when they are directly related to the use of EU budget. This should certainly be the case in the context of the EIB's external lending mandate (a lending guarantee coming from the EU budget) and, as claimed by the European Parliament in a 2011 resolution, the Court of Auditors should assess via a specific report the effectiveness and efficiency of the European Development Funds (coming from the EU budget) managed by the EIB from the perspective of poverty reduction.



Counter Balance invites all concerned citizens, affected communities, CSOs and decision-makers to share ideas about how to improve the current system.

contact information //
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⁷ <http://www.ebrd.com/pages/project/pcm/register.shtml>

⁸ An individual or public body may owe a duty of care to another, to ensure that they do not suffer any unreasonable harm or loss. If such a duty is found to be breached, a legal liability is imposed to compensate the victim for any losses incurred following a negligent act. A duty of care arises where one individual or group undertakes an activity which could harm another, either physically or economically.

