

Towards a reinforced accountability architecture for the European Investment Bank

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Introduction

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Counter Balance has been monitoring the operations of the European Investment Bank (EIB) for eight years now. A central pillar of our work has been to improve the accountability of this bank towards European taxpayers and citizens affected by its activities inside and outside the EU.

Until recently, people and communities 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 their activities – was entirely lacking until the establishment of the EIB's Complaints Mechanism Office (CMO). What makes the EIB mechanism unique is that, if not satisfied with the conclusions of the CMO, citizens (even outside of the EU) can turn towards the European Ombudsman for issues related to 'maladministration'.

In a report from May 2014 – "Holding the EIB to account, a never ending story"¹ – Counter Balance analysed the first years of operation of this two-layered accountability mechanism covering the EU bank. While promising on paper, we came to the conclusion that the CMO struggles with structural weaknesses and has not been able to play its role fully: its recommendations are not binding, its independence is jeopardized, it holds a marginalised position within the EIB and it lacks resources. We also showed that the European Ombudsman did not move yet beyond a passive interpretation of its mandate.

This new report comes in a pivotal year – 2015 – with several opportunities to drastically reform the existing

accountability framework of the EIB and make it more meaningful.

First of all, the EIB will revise the rules and procedures of its Complaints Mechanism Office. Also the Memorandum of Understanding between the European Ombudsman and the EIB will be under review. This document outlines the competences of the Ombudsman's scrutiny over EIB operations.

Secondly, the growing macroeconomic role of the EIB – for instance through its role in the newly created European Fund for Strategic Investments under the Juncker investment plan – has only increased the necessity to democratise the "EU Bank" and make it a more accountable institution e.g. by granting more power to the European Parliament to scrutinise its activities and outline its priorities.

Unlike other international financial institutions such as the World Bank Group, the EIB is explicitly bound by the EU legal framework and its set of principles and laws which define concepts such as maladministration. Despite its hybrid nature of being both a bank and an EU institution, there are strong legal arguments to make the EIB a much more accountable and transparent institution, as well as a leader among public investment banks.

This paper will distil precise recommendations to the upcoming policy process of the revision of the EIB complaints mechanism and explore forward-looking possibilities to reinforce the accountability architecture of the EIB – including through a strengthened role for the European Ombudsman and the European Parliament.

¹ <http://www.counter-balance.org/holding-the-eib-to-account-a-never-ending-story/>

Chapter 1: Increasing the independence and efficiency of the EIB internal complaints mechanism

Background: the creation of the EIB Complaints Mechanism Office

The European Investment Bank is an old bank with a recent history of accountability. Founded in 1958 by the Treaty of Rome, it is one of the largest public banks in the world: in 2014 the EIB's lending portfolio totalled EUR 77 billion, with EUR 6,8 billion loaned outside of the EU.

The EIB operates within the democratic framework of the EU. It is guided by EU policies and is politically accountable to its shareholders – the 28 EU member states – and to the EU institutions, the European Commission and the European Parliament. The EIB is both a public institution, an 'EU body' tasked to 'further the objectives of the EU', and a bank providing low interest loans to private and public entities.

In 2008, and following continuous pressure from civil society, the EIB established its own Complaint Mechanism Office (CMO). The functioning of this complaints mechanism is detailed in two documents: "Complaints mechanism, principles, terms of reference and rules of procedure"² of February 2010 and "Complaints mechanism, Operating procedures"³ of August 2013.

The CMO is located within the headquarters of the bank in Luxembourg. To avoid doubts regarding the neutrality and objectivity of the CMO, this unit is housed in the Inspectorate General of the EIB - separated from the units in charge of EIB financial operations – and reports to higher instances in the institution.

This means that since 2008 European citizens and those living outside of the EU have had the possibility to seek recourse and lodge complaints against EIB projects affecting them. According to the procedures of the CMO, "it should be noted that, as part of the EIB horizontal accountability, one of the EIB Complaints Mechanism main objectives is to ensure the right to be heard and the right to complain of any EIB stakeholder, thus giving voice to their concerns". While citizens and affected communities should be involved earlier on in the project planning process, the move to allow them the direct opportunity to lodge complaints post hoc is a significant step forward in the functioning of the EIB. However, it is key to note that complaints may be

2 The EIB Complaints Mechanism - Principles, Terms of Reference and Rules of Procedure, http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf

3 The EIB Complaints Mechanism - Operating Procedures, http://www.eib.org/attachments/strategies/complaints_mechanism_operating_procedures_en.pdf

addressed against cases of maladministration, but not against the policies of the EIB as such. The EIB applies its complaint mechanism to "complaints regarding maladministration", which means "poor or failed administration". This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights"⁴. Consequently, the EIB stated that "decisions concerning the investment mandate of the EIB, its credit policy guidelines or the EIB's participation in financing operations"⁵ fall outside the scope of the complaint mechanism.

The outcome of admissible complaints is to be published on the EIB's website⁶, when the complainant has waived his right of confidentiality. Moreover, complainants are informed of their right to complain to the European Ombudsman, when they are not satisfied with the outcome of their complaint.

Lessons learnt after 7 years of operations: what needs to be fixed

Since 2008, the EIB has received and handled more than 200 complaints filed by individuals, NGOs, companies, own staff, etc.⁷ Civil society organisations have raised a number of cases and time has come to draw the first lessons from this experience. Our 2014 report identified a set of systemic issues which need to be addressed and that are summarised below:

- Non binding recommendations: The decisions on the complaint are not binding and the EIB may ignore or set aside the recommendations which were made by the CM Office. The EIB management did not follow the recommendations of CMO in at least 2 well documented cases in 2014: the Mopani copper mine in Zambia⁸ and a public procurement case in Bosnia-Herzegovina.⁹

4 Ibid

5 Ibid

6 the register of complaints has been created, it has not been a systematic practice though. See the list of complaints here: <http://www.eib.org/about/accountability/complaints/cases/index.htm>

7 EIB CMO activity report 2009-2012 <http://www.eib.org/infocentre/publications/all/complaints-mechanism-annual-report-2009-2012.htm>

8 See Decision of the European Ombudsman closing the inquiry into complaint 349/2014/OV against the European Investment Bank (EIB) <http://www.ombudsman.europa.eu/cases/decision.faces/en/59317/html.bookmark>

9 See Decision of the European Ombudsman closing the inquiry into complaint 178/2014/AN against the European Investment Bank <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58171/html.bookmark>

International commitments under the UN Guiding Principles on Business and Human Rights

The EU has committed to implement the UN Guiding Principles on Business and Human Rights. Therefore the EIB should comply with the criteria for effectiveness of non-judicial grievance mechanisms as included in Article 31 of the guiding principles:

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are

intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed

and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

Later on in those cases, the European Ombudsman made it clear that the EIB should have respected the report of the CM Office.

- A marginalised position within the EIB: Despite its valuable efforts, the CMO seems to be hindered from completing its tasks in an independent and efficient manner that is meaningful for the complainants. In the Bujagali case¹⁰, the significant delay of the issuance of the report by the complaints mechanism was the result of EIB's internal dynamics and non-cooperation of the EIB staff with the CMO. A letter¹¹ in May 2013 from the EIB President to all staff of the bank requiring full cooperation with the CM Office, affirming that "good cooperation and support from the Bank's services is essential" and that "prompt response and exchange of necessary information with the EIB-CM will help respect the required deadlines", illustrates the difficult position of the CMO within the bank.

- A jeopardized independence: There is no system of formal relations between the EIB Board of Directors and the CMO in relation to individual cases dealt with by the CM Office. The findings of the CM Office reports on cases are mostly discussed with the staff and agreed by the Management Committee of the EIB. The Board of Directors receives an annual report which includes only short summaries of cases handled. This means that the EIB Management maintains control over the reports emanating from complaints as it solely takes decision whether to apply the corrective actions proposed. This shows how isolated the CMO is compared to the decision-makers within the bank.

¹⁰ See Decision of the European Ombudsman closing his inquiry into complaint 2288/2011/MMN against the European Investment Bank <http://www.ombudsman.europa.eu/cases/decision.faces/en/51867/html.bookmark>.

¹¹ <http://www.counter-balance.org/wp-content/uploads/2015/04/independenceCMO.pdf>

- A lack of resources: The CM Office is internal and understaffed and its work and independence can be seriously questioned. This results in delays in the handling of complaints while giving timely answers to people's claims is essential in order to address their problems.

Because of its weak position the CMO has not been able to sufficiently implement some core functions so far: the follow-up on recommendations made in its conclusions reports remains extremely limited, and it has not launched a single own-initiative investigation on structural or horizontal issues yet despite the statutory possibility to do so. The pro-activity of the CM Office to disclose information also has to be reinforced. The EIB publishes a report with the conclusions on the complaint on its website, provided the complainant has waived his right to confidentiality. Nevertheless, the amount of information available remains very low, especially compared to the practice of the European Ombudsman and independent accountability mechanisms of other International Financial Institutions. This scarcity of information does not permit any external actor to evaluate and assess the performance of the mechanism and it stands in contradiction to one of the core criteria defined by the UN Guiding Principles (see box above): transparency.

Recommendations for the revision of the EIB complaints mechanism in 2015

The EIB is to launch a public consultation by the end of 2015 in order to revise the policies and procedures of its Complaints Mechanism in 2016. This offers the opportunity to address the main shortcomings of the EIB complaints mechanism and reinforce the accountability and transparency of the EU Bank. This would mean operationalising the call from the European Parliament on 30 April 2015 for the EIB

to “improve the independence and effectiveness of its Complaint Mechanism Office” and for the “EIB Management Committee to take on board the recommendations of that office”¹².

In addition, we recommend the following:

- Tackling the governance issues by ensuring oversight from the Board of Directors over the CM Office reports and recommendations on individual cases.

A mechanism for a systematic flow of information directly between the CM Office and the directors should be established. The Board should be solely responsible for taking decisions on corrective actions proposed by the CM Office. For that purpose, the Board should establish a Board Committee on Complaints to coordinate the work and steer discussions on the systemic issues raised by the CM Office, including its recommendations to the bank.

- Bringing further democratic legitimacy to the CM Office through involving the European Parliament in the hiring process of its chief via creating a selection committee made of external stakeholders. Such selection committee should consist of a representative of the EIB staff, representatives of the EIB Board of Directors, representatives of Civil Society Organisations, academics, the European Ombudsman and representatives of the Petitions Committee of the European Parliament. The selection committee should review application, interview candidates and select three candidates for the position of head of the CM Office. Then, the European Parliament (PETI Committee) would organise hearings with them and express its preference to the EIB Board of Directors which would then appoint the head of the CM Office.

- Preventing conflicts of interests by introducing cooling off periods for the CM Office staff: as for other international complaints mechanisms, the CMO staff should not have worked for the Bank within the last two years of their nomination, and cannot return to the EIB during two years following the end of their duty in the office.

- Empowering the CM Office: the recommendations of the conclusions report linked to complaints should be made binding for the bank. The EIB management should then report annually to the Ombudsman and the Parliament on how the recommendations of its complaints mechanisms have been reflected in the policies and practices of the bank. In addition the

¹² European Parliament resolution of 30 April 2015 on the European Investment Bank - Annual Report 2013 (2014/2156(INI)): <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0183>

head of the CM Office would present to the European Parliament once a year its activity report and its assessment of how the bank is fulfilling the CMO recommendations.

- Providing the CM Office with additional resources so that its activities become more meaningful and efficient: additional staff for the CM Office would mean an enhanced capacity to handle complaints within the timing foreseen by its procedures, to monitor its recommendations and to launch own initiative investigations (OIs). Such investigations should focus on key transversal issues which have not sufficiently dealt with by the EIB so far. For instance, the transparency of the intermediated lending – which has been repeatedly questioned by the European Parliament in its annual resolutions – could be one of such topics to be covered by OIs.

- Stepping up the accessibility and visibility of the CM Office to enable a better access of citizens, communities and companies affected by the activities of the EIB. This is all the more relevant for the EIB operations outside of the EU, where local communities may use this grievance mechanism to challenge financial decisions in countries where government’s accountability and access to justice prove to be complicated. This would concretely mean ensuring a higher visibility of the complaints mechanisms in contracts, announcement on project descriptions and consultations at project level. The bank environmental procedures should include the obligation for the project promoter to inform identified project stakeholders about the grievance mechanism available at the EIB.

- Ensuring regular updated of the online register of all complaints received by the CM Office, their status and all relevant documents. The documents uploaded should go further than short summaries of the CM Office recommendations, a practice already implemented by the independent accountability mechanisms of other MDBs, such as the EBRD.

- Taking the opportunity of this revision to revise the Memorandum of Understanding between the EIB and the European Ombudsman (see Chapter 2).

- Implementing a new form of external supervision over the CM Office through a greater involvement of the European Parliament playing a more direct supervising role (see Chapter 3).

Chapter 2: Revisiting the appeals to the European Ombudsman for a reinforced and pro-active scrutiny of EIB operations

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What competences for the European Ombudsman in the current framework?

The European Ombudsman (EO) was established by the Maastricht Treaty and was first elected by the European Parliament in 1995. It is an independent body which operates outside of the institution or body against which a complaint is filed. The Statutes of the Ombudsman require that a complainant first has to try to obtain satisfaction through the internal procedure of the EU institution or body in question.

Any EU citizen or entity may appeal the Ombudsman to investigate an EU institution on the grounds of maladministration. "Maladministration" was described, in a recent Ombudsman publication, as the failure to respect "fundamental rights, legal rules or principles, or the principles of good administration. This covers administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, and unnecessary delay, for example". This means the Ombudsman is competent to hear complaints arguing that the EIB contradicts its own policy guidelines by financing a given project, but could not handle a complaint aiming to change, correct or improve the policy decisions by the EIB if it is coherent with relevant legal provisions or policy guidelines.

The complaint procedure before the EO has some specific features. The complaints received are published and, at the end of the procedure, details on the position of the different parties involved and the conclusions reached. The Ombudsman may publish own initiatives reports on a case of maladministration, when no or an inadmissible complaint was submitted. There are no timeframes for the Ombudsman, within which she has to handle a complaint.

The Ombudsman's competences are laid down in Decision 94/262 which regulates its activities. There it is stated that "the Ombudsman shall, on his own initiative or following a complaint, conduct all enquiries which he considers justified to clarify any suspected

maladministration in the activities of Community institutions and bodies". It covers "all" enquiries and does not differentiate between activities within and outside the territory of the European Union. The Ombudsman is theoretically not limited in using specific means for conducting her enquiry: she may talk to officials or other people, use documents, visit sites, enquire with scientific or technical experts or with witnesses, proceed to a public consultation, etc. When the Ombudsman considers it necessary, it can also proceed to a site inspection outside the territory of the European Union.

No restriction whatsoever is laid upon it, though, of course, the budgetary provisions which are decided annually by the EU, limit its possibilities as regards the recruitment of staff and the overall size and functioning of her office.

A Memorandum of Understanding signed between the EIB and the European Ombudsman establishes that citizens (even outside of the EU if the Ombudsman finds their complaint justified) can turn towards the Ombudsman on issues related to 'maladministration' by the EIB¹³.

The impact of the Ombudsman's scrutiny over the EIB

When signing the Memorandum of Understanding mentioned above, the previous Ombudsman Mr Diamandouros wanted to set a precedent, a model of how the European Ombudsman can handle complaints about EU institutions and agencies after those complaints have been in the first place dealt with internal grievance mechanisms within those institutions.

What has happened so far is promising. In a few cases, the European Ombudsman took a critical stance over the EIB and ruled maladministration.

¹³ <http://www.eib.org/infocentre/publications/all/memorandum-of-understanding-between-the-eo-and-the-eib.htm>

The Pizzarotti case in Bosnia: maladministration for poor handling of public procurement

In an unprecedented ruling in October 2014, the European Ombudsman concluded at the end of an investigation into the EIB's involvement with a road construction project in Bosnia and Herzegovina that the EIB behaviour was "totally unacceptable" and it "risked putting into question the EU's commitment for strengthening the rule of law in

Bosnia and Herzegovina."
During the investigation, the Ombudsman found that the EIB went on to finance the project to construct a bridge over the Sava river in Bosnia and Herzegovina regardless of complaints from an Italian company Impresa Pizzarotti & C. SpA which had been excluded from the tender despite having offered the lowest bid.
The EIB's Complaints Mechanism had ruled that the complaint of the Italian company was grounded, yet the EIB management chose to

ignore the ruling of its own policy-enforcing body. The European Ombudsman Emily O'Reilly found that the EIB management decision was based on an incorrect interpretation of the tender documents and said she was considering opening an own-initiative inquiry into the systemic issues underlying the EIB's handling of the case¹⁴.

¹⁴ See Press release no. 21/2014, <http://www.ombudsman.europa.eu/en/press/release.faces/en/58173/html.bookmark>

The Bujagali dam in Uganda: delays and internal problems

Paragraph 31 of the decision notes that “as it emerged from the documents in the EIB’s file that his services inspected, the long time it took the EIB to handle the complaint in question may indeed have been partly due to internal difficulties within the EIB that delayed the finalisation of the complaints-handling mechanism’s report. In particular, a number of internal e-mails exchanged between the various departments and services of the EIB involved would appear to confirm the complainants’ arguments in this respect”.

The Mopani copper mine in Zambia: critical remarks on transparency and access to information

In November 2012, the UK based NGO Christian Aid requested access to an investigation report of the EIB’s Inspectorate-General into allegations of tax evasion by a company to which the EIB had granted a loan for a mining project in Zambia¹⁵. The EIB refused access to the report, a decision it maintained in July 2014 following an appeal by the complainant. As the complainant felt the

¹⁵ See Counter Balance report The Mopani copper mine, how European money has fed a mining scandal <http://www.counterbalance.org/counterbalance-eib.org/wp-content/uploads/2011/01/mopani-web.pdf>

EIB’s response was insufficient it turned to the Ombudsman who made a recommendation to the EIB that it should reconsider its refusal and either grant access to a redacted version of the report or, should this not be possible, provide the complainant with a meaningful summary of the main findings of the report. In its reply, the EIB released to the complainant – and published on its website – a summary of the investigation report. However, since the summary did not contain any further information on the findings concerning the allegations, the Ombudsman concluded that the summary could not be considered as a meaningful summary. Furthermore, the Ombudsman noted that the EIB had failed to comply with the rules of its own Transparency Policy in its decision on this case. It therefore closed the investigation with those critical remarks.

Nevertheless, despite this recent activity and appetite to tackle EIB-related issues, much is still to be done. Current limits to the Ombudsman competences and capacity undermine those efforts.

- **The European Ombudsman decisions are non-binding.** In the case of the Mopani copper mine for instance, the EIB did not follow the recommendation to disclose a redacted version of its internal investigation and rather decided to publish a summary of the investigation – which was then to be considered as non-meaningful by the Ombudsman services. This emblematic case demonstrates the need to ensure that the Directors of the EIB are fully informed of the cases being handled by the European Ombudsman and that is not only up to the EIB management to deal with those sensitive cases. 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.

- In her examination, **the European Ombudsman is limited to cases of maladministration.** This means she cannot judge the EIB practices upon their own merits, but only in connection to the EIB policies. However, there is one noticeable exception to this rule to be mentioned here. Indeed, the Memorandum of Understanding makes a specific reference to Human Rights: “the concept of “maladministration” applied by the EO includes failure to comply with human rights, with the applicable law, or with the principles

of good administration”. This means that the European Ombudsman can investigate human rights cases without having to refer to the EIB own policies but referring instead to the European Charter on Human Rights which is an integral part of the EU treaties¹⁶. Nevertheless, to date, the EO has not been seized on strictly speaking human rights cases. This competence is of particular importance for projects financed by the EIB outside of the EU, where human rights issues such as resettlement of populations are often to be dealt with by international financial institutions. Within the existent architecture, the European Ombudsman should play key role in ensuring greater policy coherence with the EU external action objectives and principles.

Recommendations for the European Ombudsman to strengthen its scrutiny of the EIB

The Memorandum of Understanding between the EIB and the EO will be re-negotiated in the framework of the revision of the complaints mechanism of the bank in 2015. A draft Memorandum of Understanding will be presented as part of the public consultation and open for suggestions to all interested stakeholders. This represents a unique opportunity to further empower the European Ombudsman and enhance the accountability of the European Investment Bank.

¹⁶ In fact, the EIB has no stand-alone human rights policy. It would not be advisable for the bank to adopt one since it would mean having discretion in interpreting international human rights law.

Counter Balance recommends the following targeted actions:

- Confirming the mandate of the European Ombudsman by adding specific reference to her role in cases of maladministration AND human rights issues.

- Developing mechanisms to ensure that the Ombudsman recommendations are systematically taken on board by the EIB. For each decision of the EO related to the EIB, a formal note including a summary of the decision and main recommendations should be sent to the Board of Directors of the EIB. The case and needed follow-up by the EIB would then be discussed during their following board meeting. On an annual basis, the EIB should issue a report to the European Ombudsman and the European Parliament showing how it reflected the recommendations of the European Ombudsman at project level, in its operations and in its policies.

- Tasking the Ombudsman with the more specific objective to carry out Own Initiative Inquiries (OII) as concerns specific structural issues linked to the EIB. It would enable the European Ombudsman to finally tackle issues such as public procurement, the use of financial intermediaries or the whistleblowing policies of the EIB. To date, such crucial issues have not been sufficiently addressed by the EU institutions to which

the EIB is accountable, despite signals sent by the European Parliament and the EO herself that these are problematic areas.

- Stepping up the role of the European Parliament in relation to complaints about the EIB. The petitions committee (PETI) – which in charge of relations with the European Parliament – should be constantly informed about EIB-related cases being handled by the EO. On an annual basis, a specific discussion about EIB complaints should take place together with the Ombudsman in the PETI committee. This is all the more relevant in the context of the Juncker Plan in which the EIB will be operating under a guarantee emanating from the EU budget.

- Allocating further resources to the European Ombudsman so that it can develop and increase expertise on human rights issues in its office.

Chapter 3: Raising the bar on accountability: Towards a renewed institutional set-up

The targeted recommendations described in chapters 1 and 2 need to be complemented by a third level of intervention in the mid-term: a structural reform of the architecture of EIB accountability.

The EIB is accountable to a labyrinth of institutions. These are mainly the EU institutions – Commission, Parliament and Council – and bodies such as the European Anti-Fraud Office (OLAF), the European Court of Auditors and the European Ombudsman, as defined in the EU treaties. However, other legal mechanisms or institutions overseeing the EIB's operations appear difficult to access for citizens at the time being. It is certainly time for a broader discussion on these accountability mechanisms at EU level, a challenge that should be taken up by the new European Parliament and Commission – potentially as part of the better regulation agenda. We have identified several options to move forward.

The EIB as a blue print for enhanced Ombudsman's competences

The competences of the European Ombudsman are currently too limited to judge upon the merits of the EIB activities. Indeed, the power of the Ombudsman is limited to cases of maladministration and human rights. 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 order to have a broader impact and bring significant changes at the European Investment Bank we believe its competencies should be expanded. More specifically, article 41 of the Lisbon Treaty on Good Administration covers a wide range of issues and should be regarded in close connection with the European Charter on Human Rights made binding by the same Treaty.

This would concretely mean giving this institution the rights to look at the substance of the EU institutions operations when they are subject to a complaint. In response to project-specific complaints, the Ombudsman should undertake de novo review rather than just review the work of the CM Office. Then the type of complaints accepted should be expanded to include complaints about the EIB's policies themselves, not just the projects. Moving away from the sole concept of maladministration to a broader remit would mean establishing a precedent, creating a blue print for enhanced Ombudsman's competences towards the EIB by actively checking compliance of EIB activities with European law, **and not just with EIB policies interpreting that law**, in particular in several areas:

1/ Enlarging the EO competences to specific fields of EU priority such as environmental protection, including mitigation and adaptation to climate change (like for human rights where it already has special competences) as deriving from the EU Treaty.

Climate change is a horizontal priority of EU action as stated by the EU treaties. The Article 3 of the TEU states the objectives of the EU and defines the principle of sustainable development in Europe: „The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment“.

A novelty of the Lisbon Treaty is the recognition of sustainable development as one of the specific policy goals of the EU in its external relations¹⁷. This reference broadens the Paragraph 5 of Article 3 states: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

The Article 37 of the EU Charter of Fundamental Rights¹⁸ on environmental protection also states that "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

Thus any European institution and body should support the achievement of European climate goals. This is actually recognised by the EIB in its Statement of Environmental and Social Principles and Standards¹⁹ and Statement on Climate Action²⁰.

Based on Article 41 of the EU Charter of Fundamental Rights on the "Right to good administration", the EIB as an EU body should strive to achieve these goals in a mandatory manner. Thus compliance with these goals in all its operations - beyond simple compliance with EIB internal policies - is necessary.

17 <http://www.clientearth.org/reports/clientearth-briefing-lisbon-treaty-impact-on-climate-and-energy-policy.pdf>

18 http://www.europarl.europa.eu/charter/pdf/text_en.pdf

19 http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf

20 http://www.eib.org/attachments/strategies/statement_climate_action_en.pdf

Consequently, the European Ombudsman should be given an explicit mandate by the European Parliament to assess compliance on the merits – and not just procedurally as today in the case of a complaint on alleged environmental violations – as concerns specific operations based on eventual complaints or own initiative reports.

2/ **Transparency issues and access to information.**

As testified by the recent downgrading of its level of transparency by the adoption of a weakened transparency policy²¹, it is key for the EIB to be fully in line with relevant EU legislation on access to information (regulation 1049/2001) and with the Aarhus regulation on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. In this context, the European Ombudsman should assess the compliance of EIB activities in this field with relevant European legislation.

3/ Coherence with the objectives of the European external action. The EIB is a key player in financing development all over the world. Annually it lends over EUR 7bn outside of the European Union. When acting outside of Europe, it is bound by the article 21 of the Lisbon Treaty setting out the objectives of the EU external action and needs to support the cross-cutting EU development and human rights objectives and ensure positive development impacts on the ground. Article 21 of the Lisbon Treaty outlines the objectives of EU external action: according to it the Union's action on the international scene shall be guided by the following principles: "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." This means that sustainable development, eradicating poverty and protection of human rights should be the central aims of the Union's relationships with non-European countries. In this regard, when tasked with addressing complaints on EIB projects outside of the EU, the European Ombudsman should tackle the operationalization on the ground of the provisions set out in this article 21.

Forward-looking ideas for filling in the democratic deficit of the European Investment Bank

In parallel, another solution lies in **a new form of external supervision** being implemented over the existing grievance mechanisms, with, for example,

21 <http://bankwatch.org/news-media/blog/european-parliament-intergroup-itco-condemns-new-transparency-policy-european-invest>

the European Parliament playing a more direct supervising role. This could mean a renewed and extended role for the European Ombudsman for the whole EU development cooperation. A **specific focus on development cooperation** is justifiable since, in its financing operations outside of Europe, the EU institutions are to comply with national legislation and most importantly their own standards and policies rather than EU legislation like when investing within the European Union.

This mechanism would be mandated to cover concerns related to the impact of EU development funding, including both EIB and European Commission funding and for both EU and non-EU citizens. Such mechanism would then also cover the Blending Facilities being set up at European level in order to merge EC grants with loans from International Financial Institutions to support EU external action.

In order to ensure the proper functioning of this external grievance mechanism, a supervisory structure for this (and eventually an appeal mechanism) 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 concrete supervisory role would be given to a European Parliament committee which could act as appeal mechanisms with some investigative powers abroad. Such renewed structure would be a way to increase the independent oversight on EIB activities. Furthermore, the European Parliament could be in charge of appointing a specific Deputy Ombudsman in charge of this new division within the institution.

A similar approach is being proposed at national level by the German NGO "Forum Menschenrechte" about the introduction of a complaint mechanism for the whole pool of German (bilateral) development cooperation.

Then, there is a necessity to **reinforce the scrutiny of the European Court of Auditors (ECA)** over the EIB. The tripartite agreement²² between the European Commission, the ECA and the EIB needs to be revised in 2015. Despite provisions in the current agreement, the Court of Auditors has not so far taken its responsibilities to issue reports over the EIB.

The European Court of Auditors 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). Then, as

22 http://www.eib.org/attachments/thematic/acctrip_en.pdf

Conclusions

claimed by the European Parliament in a 2011 resolution, the ECA 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. With the entry into force of the European Fund for Strategic Investment (EFSI) in 2015, the operations of the EIB under this specific EU guarantee should also be covered.

Finally, **a stronger role for the European Parliament** is needed to bring the EIB closer to citizens and decision-makers. At the time being, the Parliament has limited controlling powers over the EIB, and those powers are fragmented along different legislative files with several parliamentary committees being in charge of them. A priority for this mandate of the Parliament should be to clarify and reinforce its relations with the EIB through:

- A single committee approach and a clear division of responsibilities between the various committees
- A streamlined reporting process from the EIB and Commission to the Parliament
- A mechanism to ensure better follow-up of the annual resolutions on EIB activities
- An observatory role at the EIB board of directors meetings

Such measures would improve the upwards accountability of the EIB concomitantly with a better handling of citizens' complaints in relation to the activities of the bank.

This report makes the case for a reinforced accountability architecture for the European Investment Bank. Three main levels of intervention are identified:

- 1/ Sound improvement of the independence and effectiveness of the current complaints mechanism of the EIB has to be achieved during the revision of its procedures in 2015 and 2016.
- 2/ The European Ombudsman needs to play a more active role in exerting its external scrutiny over the EIB. Such enhanced role shall to be set in stone via a new Memorandum of Understanding between the EIB and the Ombudsman to be signed in the framework of the above-mentioned revision.
- 3/ A blueprint for extended Ombudsman's competences and mandate should be created via setting a precedent with the European Investment Bank. This should go hand in hand with a stronger role for the Court of Auditors and the European Parliament to monitor and democratise further the EIB.

In the context of the Juncker Plan – and the establishment of the EFSI – the EIB will be awarded with even greater macroeconomic role at European level. The increased lending capacity of the bank will mean that there will be more and more controversial projects to deal with, like large infrastructure projects with important environmental, debt and social impacts. New trends in finance, including the use of financial intermediaries to reach out to SMEs and the creation of new financial instruments (blending facilities, investment platforms or risk-sharing mechanisms such as Project Bonds), pose challenges to the effectiveness of accountability mechanisms.

Therefore, the EU institutions to which it 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. It is time to raise the bar on accountability and for a broader discussion on these accountability mechanisms at EU level, a challenge that should be taken up by the European Parliament and the European Commission. Counter Balance invites all concerned citizens, affected communities, Civil Society Organisations and decision-makers to share ideas about how to improve the current system.

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