

INVESTING IN INTEGRITY?

**TRANSPARENCY & ACCOUNTABILITY
OF THE EUROPEAN INVESTMENT BANK**

Transparency International EU is part of the global anti-corruption movement, Transparency International, which includes over 100 chapters around the world. Since 2008, Transparency International EU has functioned as a regional liaison office for the global movement and as such it works closely with the Transparency International Secretariat in Berlin, Germany.

Transparency International EU leads the movement's EU advocacy, in close cooperation with national chapters worldwide, but particularly with the 25 national chapters in EU Member States.

Transparency International EU's mission is to prevent corruption and promote integrity, transparency and accountability in EU institutions, policies and legislation.

www.transparency.eu

Authors: Cornel Ban (Boston University), Leonard Seabrooke (Copenhagen Business School)

Editor: Leo Hoffmann-Axthelm (Transparency International EU)

Cover photo: © Alfonso Salgueiro Photography / www.alsalphotography.com

Page 6: © Flickr/European Investment Bank/Drawings 06/section 2

Page 13: © Flickr/matze_ott

Page 18: © commons.wikimedia.org/wiki/channel_tunnel

Page 23: © en.wikipedia.org/wiki/File:SNCF_TGV_Duplex_Viaduc_de_Cize

Page 28: © Flickr/Jon Worth

Page 35: © Flickr/Ingenhoven Architects/European Investment Bank/photo 14

Page 43: © commons.wikimedia.org/wiki/File:Barrow_Offshore_wind_turbines

Page 47: © Flickr/photosmith201/Mopani Copper Mine

Page 49: © Flickr/photos/european_parliament

Printed on 100% recycled paper

Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of 1 November 2016. Nevertheless, Transparency International cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

© 2016 Transparency International EU. All rights reserved.

Funders: This project is funded by the Adessium Foundation, with the contribution of the Open Society Initiative for Europe (OSIFE). This publication reflects the views of the authors only, and the funders cannot be held responsible for any use which may be made of the information contained therein.



CONTENTS

Acknowledgements	4
Foreword	4
Executive Summary	5
Key Policy Recommendations	7
Background	8
Independence (Law)	10
European Investment Bank	10
EFSI	13
Independence (Practice)	15
European Investment Bank	15
EFSI	15
Transparency (Law)	16
European Investment Bank	16
EFSI	19
Transparency (Practice)	21
European Investment Bank	21
EFSI	26
Case Study: Dieselgate emissions scandal	28
Integrity (Law)	31
Integrity (Practice)	34
Accountability (Law)	38
European Investment Bank	38
EFSI	42
Accountability (Practice)	44
Methodology	46
Case Study: Mopani	47
Endnotes	51
Glossary	55

ACKNOWLEDGEMENTS

Transparency International EU would like to thank everyone who provided input, feedback and comment on this study, in particular our colleagues in the International Secretariat in Berlin and the members of the EU economic governance project's Advisory Board:

- Berend van Baak, former Deputy Director-General of Human Resources, European Central Bank
- Michele Chang, Professor of European Political Economy, College of Europe
- Rémy Jacob, former Director-General of the Strategy and Corporate Centre, European Investment Bank
- Philippe Legrain, (former economic adviser to the President of the European Commission and senior visiting fellow at the LSE European Institute
- Nicolas Véron, Senior fellow at Bruegel and visiting fellow at the Peterson Institute for International Economics

We equally want to acknowledge TI EU Director Carl Dolan and our Head of EU Advocacy Daniel Freund, Julian Hale for editorial support on the case studies and Oliver Harrison for the lay-outing. We thank Gerhard Hütz, EIB Chief Compliance Officer, and Hakan Lucius and his Civil Society and Stakeholder Engagement Division, in particular for the facilitation of interviews with EIB Group staff and for the valuable feedback provided.

FOREWORD

The prolonged economic downturn since the onset of the global financial crisis in 2008 and the subsequent European sovereign debt crises continue to take a toll on Europeans. Alongside diminished growth and depressed rates of public and private investments, the erosion of public trust in national and EU institutions has been one of the most striking features of the post-crisis world.

The European Investment Bank (EIB) as the EU's development bank has a particularly important role to play in this context. The 2012 capital increase is testimony to the need to mobilise funds in times of strained public budgets, which may be multiplied via the EIB. Similarly, based on the analysis of persistently low public and private investment as compared to pre-crisis levels, Commission President Jean-Claude Juncker promised an "investment offensive" upon taking office, with the European Fund for Strategic Investments (EFSI) as the main innovation. The investment fund was set up in record time and uses the leveraged EU budget as a guarantee to absorb any first losses private investors may incur under projects selected, so as to mobilise private investments that would otherwise have been discouraged.

The use of the EU budget necessitates a higher standard of accountability, especially in a politically charged environment in which the European Union as a whole is increasingly questioned. The development of elements of participatory democracy can and should be complemented with a demonstrative push for proactive transparency and openness on the part of EU institutions, including the EIB. This push that may well serve the interest of the institutions in ensuring that citizens appreciate their value added more than has previously been the case.

In this context, the present study aims to assess the transparency, integrity and accountability mechanisms in place at the EIB, and make practical recommendations based on remaining challenges.

EXECUTIVE SUMMARY

The European Investment Bank brands itself “the EU’s bank” and deserves more attention in Brussels quarters. Following a slow recovery from a deep economic crisis, the EIB has received two capital increases, emerging as a central actor in delivering much-needed investment to the European economy, which remains below pre-crisis levels. It has taken on ever more roles on behalf of the Union, leveraging limited EU budget funds on financial markets via investment vehicles such as the Project Bonds Initiative, a 2012 initiative designed to promote investment in European infrastructure. In 2014, The EIB was chosen to deliver President Juncker’s landmark investment initiative, the European Fund for Strategic Investments (EFSI), which the Commission recently declared a success and doubled in time and money. It is high time to take a closer look at the EU’s bank and the fund it administers. This report seeks to give an overview of these functions and the context within which the EIB operates. The report is structured around the EIB’s independence, transparency, integrity and accountability, looking at both the legal provisions and their practical application.

The Bank is scrupulous in applying financial safeguards and auditing its accounts. It has developed a multitude of guidelines, procedures and policies, and developed sophisticated internal mechanisms to address cases of fraud as well as complaints from the public, backed up by external institutional watchdogs such as the EU Anti-Fraud Office OLAF and the European Ombudsman. However, these policies mean little if known cases of fraud and corruption are not punished. At the time of publication, only three companies across the globe are currently barred from EIB funding due to corruption or fraud, all as the result of the same case. Compare this to the 820 individuals and firms that are currently listed as ‘debarred’ by the World Bank, despite the fact that the volume of funding by the EIB is roughly twice as large. This suggests a less than proactive debarment policy on the part of the Bank.

Unlike other multilateral development lenders like the World Bank, the EIB is embedded in a far more sophisticated framework of EU regulations and policies, and accountable not only to its shareholders – EU Member States – but also to institutions such as the European Commission, European Court of Auditors, European Court of Justice, European Data Protection Supervisor, and international bodies such as the Aarhus Convention Compliance Committee.

Despite this complex web of accountability, we have identified three main limitations:

First, the EIB’s governing bodies do not yet conform to the highest standards. Progress is possible on all three counts: accountability, transparency, and integrity.

In terms of **integrity**, there is an ongoing risk that senior managers at the Bank have too much discretion to favour companies from their ‘home’ countries. Management Committee members have to disclose their declarations of interest and steer clear of conflicts of interest e.g. with regard to loans applied for by former employers. At the same time its nine members (EIB president and 8 EIB Vice-Presidents), in addition to sectoral responsibilities, are also put in charge of project proposals from their home countries, alongside other country responsibilities. Even accounting for the fact that the Committee decides in a collegial way by consensus or majority vote, this still gives rise to the risk that members may consciously or unconsciously favour companies from their home countries. Additionally, the bank describes its Board of Directors as a non-resident, non-executive Board, which should not be held to the integrity standards of the World Bank’s Board of Directors. The EIB’s board members therefore only have to disclose conflicts of interest on an ad hoc basis, and do not file declarations of assets and financial interests with the Bank, which is insufficient in view of the manifold interests of some Directors.

Additional problems arise in holding the Board of Directors **accountable**. The Management Committee does not take responsibility for the approval of projects, given that final approval is only granted by the Board of Directors. Given that its members, typically high-level officials from national finance ministries, only fly in for meetings ten times a year, they manifestly do not have the time to review all projects approved, while also taking decision on the internal business of the bank.

This lack of scrutiny of Management Committee decisions is exacerbated by a lack of **transparency**, as none of the EIB’s governing bodies publish their minutes. Despite its evident importance, the Management Committee does not even publish the summaries that the Board discloses. Minutes should be made available at the latest when the Board signed-off on loan decisions. The newly established EFSI is already more advanced, with its Steering Board proactively publishing meeting minutes. EFSI’s independent Investment Committee should do likewise, especially as it includes private-sector experts whose expertise is welcome but warrants additional scrutiny.

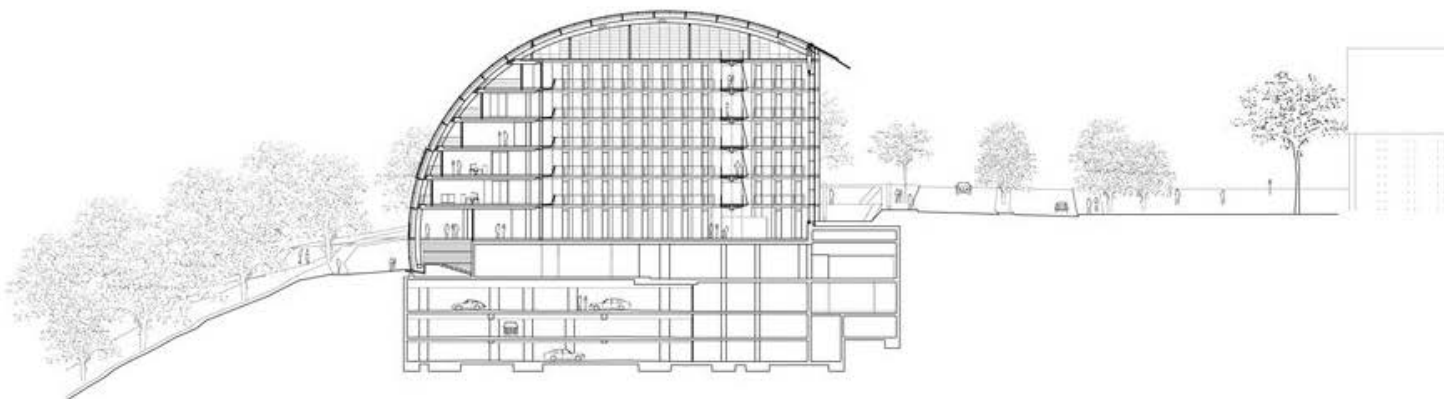
Second, the EIB can do more to assist EU institutions in advancing the development of new standards of corporate transparency, beyond simply abiding by EU law once it is passed, in particular:

The EIB should insist that all companies who directly benefit from its loans provide information on the natural persons who ultimately control or benefit from these companies ("beneficial ownership information"). This information can help detect possible conflicts of interest and deter corruption. The Commission has, as part of the ongoing revision of the Anti-Money Laundering Directive, proposed making beneficial ownership information for all companies public. Given its use of public money, the EIB should require all direct EIB loan beneficiaries to provide BO information and to publish that information. It should also update the EIB procurement guidelines to require the publication of BO information of all legal entities bidding as part of procurement activities financed by EIB loans.

With a view to tax transparency, the Commission has in January 2016 specifically called on the EIB to ensure that EU funds are not invested or channelled through entities in third countries which do not comply with international tax transparency standards, via its contractual clauses.

We agree with the assessment that the EIB should use every margin of manoeuvre at its disposal to position itself as a leader in this field, as it did in 2009 when it was a first-mover in establishing its "non-cooperative jurisdictions" policy, which includes the requirement to disclose the economic rationale for complex multi-jurisdictional structures. This policy should be updated in view of recent legislative activity.

Third, the Commission plays an important part in EIB decision-making without the formal Parliamentary scrutiny that Commission decisions normally enjoy. The Commission's role in the Bank's governance is to ensure the European interest is duly taken into account in its investment decisions: if any proposed project receives negative opinion from the Commission, Member State representatives need unanimity to green-light financing nonetheless. With increasing use of EU budget funds, the EIB had to strengthen its EU-level accountability, in particular to the European Parliament. The Bank's President will appear in Plenary and Committee meetings if invited, and answer questions addressed by MEPs. This good practice should be cemented by signing an inter-institutional agreement with the European Parliament to formalise this accountability relationship.



KEY POLICY RECOMMENDATIONS

ACCOUNTABILITY

- ✓ An inter-institutional agreement with the European Parliament should be negotiated, committing the EIB to (i) attend hearings upon request, (ii) answer parliamentary questions within a strict timeline, (iii) address each European Parliament recommendation in its annual report.

INTEGRITY

- ✓ Management Committee members should no longer be responsible for projects from their home countries. Directors should disclose declarations of interests.
- ✓ The EIB should join the inter-institutional agreement on the EU Transparency Register. The Management Committee should only meet with registered lobbyists and publish its meetings in a way similar to the practice of the European Commission.
- ✓ The EIB should be seen as encouraging a culture that protects whistle-blowers, incentivising those with knowledge of wrong-doing to come forward.
- ✓ The EIB should urgently develop a more effective debarment policy, aligning with the Commission's Early Detection and Exclusion System. It should also join other development banks' cross-debarment networks, and list debarred entities on a dedicated EIB website.
- ✓ The EIB should require the publication of beneficial ownership information of all bidders for any EIB-financed procurement. It should also work towards publishing beneficial ownership information of all beneficiaries of direct EIB loans.

TRANSPARENCY

- ✓ The EIB should publish the minutes of the Board of Directors in a timely manner, beyond the current summaries of decisions taken. Voting outcomes should also be made public. The Board of Governors should adopt the same practice.
- ✓ The EIB should further publish the (i) agendas, (ii) minutes and (iii) voting records of the Management Committee, as the highest governing body based at the Bank in Luxembourg. Minutes relating to loan decisions should be published as soon as final approval is given by the Board of Directors.
- ✓ The EFSI Investment Committee should provide minutes rather than summaries of discussions. The scoreboard of indicators should be made public to enable better accountability to the co-legislators.

BACKGROUND

The EIB is the world's largest public multilateral bank. Recently, it has been strengthened considerably, through capital increases and particularly via its role in the administration of financial instruments on behalf of the EU, such as the 'Investment Plan for Europe.' The EIB's global profile among other International Financial Institutions (IFIs), development and promotional banks as well as its recently increased financial firepower at a time when the EU struggles with an unprecedented mix of economic, social and environmental challenges highlight the importance of proactive and substantial transparency. Greater financial resources come with greater scrutiny.

The EIB is a hybrid international financial institution: First off, it serves as the public bank for the EU. As such, its main policy mandate has been to support socio-economic convergence within the Union, compensate for the effects of trade liberalization and facilitate the functioning of an increasingly integrated market, mostly via integrated cross-border infrastructure.¹ Secondly, the EIB was designed to act as a commercial bank in its day-to-day operations. This means it had to make choices that maintain its credit rating on international financial markets to keep lending costs low.²

The tension between its policy and commercial identities means that for a project to be financed by the EIB, it has to be both financially sound and integrated into the policy objectives of the day, as defined by the EU's political institutions.³ The EIB resembles international development banks, but it has to strike a balance between its status as a public EU body making it accountable to a wide array of EU institutions, and its need to refinance itself on financial markets.

EUROPEAN INVESTMENT FUND

Established in 1994, the European Investment Fund (EIF) is the venture capital and risk finance arm of the EIB, which provides finance to Small and Medium sized Enterprises (SMEs). This function is not performed directly, but via private financial institutions such as banks, guarantee and leasing companies, micro-credit providers and private equity funds.

The EIF's main operations cover mostly venture capital and loan guarantees for SMEs. For example, it provides guarantee facilities, credit enhancement securitisation, social impact funds and equity to Business Angels and other non-institutional investors for the financing of innovative companies. EIF also raises funds from investors to provide risk capital to growing SMEs.

EIF is also part of the implementation of EFSI via the latter's SME Window which, by the summer 2018 should have EUR 75bn available. In this capacity, the EIF appears to be a partner for domestic public banks. Via its recent EIF-NPI Equity Investment Platform, the EIF offers national promotional banks the possibility to match the total investment budget of the EFSI SME Window on a 1:1 basis.

The EIB is the EIF's largest shareholder (with 59.9% of shares), followed by the Commission (28.1%) and privately owned financial institutions based in the EU and Turkey (12.0%). Together, the EIB and the EIF form the EIB Group.

Substantial capital increases in 2009 and 2012 confirmed the EIB's critical role in the EU's economic recovery strategies while highlighting the need to make the EIB less risk-averse.⁴ This came together with institutional changes as well. Set under the EIB umbrella, the European Fund for Strategic Investments (EFSI) was established in 2015 as part of the Investment Plan for Europe (the so-called Juncker Plan).⁵ Its establishment reflected concerns with stagnant investment, a prolonged recession followed by a weak recovery, high unemployment (especially among the young) and legal-political constraints that ruled out the general stimulus favoured in 2008-09.⁶ EFSI is intended to crowd-in additional investment to the tune of EUR 315 bn⁷ over the next three years. The funds to be leveraged stem from the EU budget (EUR 8 bn) and the European Investment Fund (EUR 5 bn for SME financing). The funds are meant primarily for (i) transport, energy and the digital economy; (ii) the environment and resource efficiency; (iii) human capital, culture and health; (iv) research, development and innovation; and, (v) support to SMEs and mid-cap companies.⁸ For example, EFSI funded health care research in Spain, the expansion of Croatian and Slovakian road and airport infrastructures and the technological updating of steel rolling in Italy.

In short, the EFSI is intended as an institution that increases lending in recessions and weak growth economic cycles, when private banks retreat (countercyclical lender) and as a public venture capitalist for high-risk special activities that must be 'additional' in the sense that "they point to a market failure or suboptimal investment situations and therefore would – in principle – not have been financed in the same period by the EIB without EFSI support, or not to the same extent."⁹ Given its critical importance and initial success in reaching the pre-set targets in terms of speedy take-up of investment volumes, the Commission decided in September 2016 to double its duration and financial firepower, extending EFSI until 2020.¹⁰

The bulk of EFSI's daily operations such as information gathering on projects, due diligence, informing EFSI governing bodies about the applicability of the EFSI guarantee, are run by EIB staff. Given the EIB's expertise, as well as the pressure on the Commission President to deliver on an election promise without developing new structures, the EIB was chosen to leverage the EU's limited budgetary commitment into a meaningful investment programme.

This report will be structured accordingly, differentiating between the transparency and accountability requirement of the EIB on the one hand, and EFSI on the other. This will also offer a comparative perspective on the two arrangements, with the EFSI regulation mandating the better and comparatively most up to date standards in transparency and accountability.

Figure: EIB governance

Statutory body	Main role
Board of Governors (BoG)	<ul style="list-style-type: none"> Guiding principles High-level policies Approval of annual accounts Appointment and remuneration of members of the other governing bodies
Board of Directors (BoD)	<ul style="list-style-type: none"> Approval of financing operations Approval of policies and the operational strategy Control of the Management Committee
Management Committee	<ul style="list-style-type: none"> Day-to-day management of the Bank under the authority of the EIB President
Audit Committee	<ul style="list-style-type: none"> Auditing of the annual accounts Verifying that the Bank's activities conform to best banking practice

Source: EIB

INDEPENDENCE (LAW)

The EIB is both an EU body and a financial institution. Though legally accountable solely to the bank, all its governing bodies are composed of Member State representatives or staff appointed by the latter, limiting its independence. A hybrid between an intergovernmental development bank and a supranational EU body, it also reserves a strong role for the Commission, which can de-facto veto loan approvals. In the case of EFSI, its governing bodies are dominated by Commission appointees – but the Investment Committee approving the use of the EFSI guarantee is composed of independent, outside experts.

EUROPEAN INVESTMENT BANK

The EIB has an ambiguous status under EU law: it is not an EU institution pursuant to Article 13 TEU but it is nevertheless defined as an EU body¹¹ and an independent financial institution at the same time.¹²

While not expressly provided for in the Treaties, the independence of the EIB is enshrined in its separate legal personality under Article 308 TFEU. European Court of Justice jurisprudence has also confirmed the EIB's independence as a necessary precondition for the EIB to perform its functions, shielded from outside interference in its financial operations.¹³

The EIB's independence is also bolstered by the fact that it has its own budget and balance sheet. Its profit and loss account is approved by its own BoG. All decisions with regard to individual project selection and granting of finance are taken by the Board of Directors.

Both the general framework of EU law as well as the composition of its governing bodies put limits on the EIB's independence. The EIB capital is paid-in by the Member States according to weights prescribed by the EIB Statute¹⁴ and each Member State nominates one of the 28 directors (plus one nominated by the Commission), with the BoG making the formal appointment decisions for a renewable period of five years. The BoG itself is composed of the nationally designated ministers (usually Finance Ministers) and lays down this governance body's internal charter that specifies its functioning and relations with other governance bodies at the bank (the Rules of Procedure).¹⁵

Double majority is required within the BoG, representing a majority of members and at least 50% of subscribed capital. The Member States (in the BoG) decide over any increases in the Bank's capital in addition to setting

Figure: Members of the EIB Board of Directors

Name	Nationality	Position	Appointment date
Thomas WESTPHAL	German	Director General – European Policy, Ministry of Finance	May 2013
Emmanuel MASSE	France	Assistant Secretary, Treasury	January 2016
Filippo GIANANTE	Italy	Director, Ministry of Economic Affairs and Finance	November 2015
Jonathan BLACK	UK	Director Europe, Treasury	January 2015
José María FERNÁNDEZ RODRÍGUEZ	Spain	Director General, Ministry for Economic Affairs and Competitiveness	October 2014
Elsa RONCON SANTOS	Portugal	Director General, Ministry of Finance	January 2015
Marc DESCHEEMAECCKER	Belgium	Chairman of the Board, De Lijn – Centrale Diensten	April 2015
Arsène JACOBY	Luxembourg	Head International Financial Institutions Department, Ministry of Finance	January 2013
Irene JANSEN	Netherlands	Head of the International Economics and Financial Institutions, Ministry of Finance	March 2015
Julie SONNE	Denmark	Head of Division, Ministry for Business and Growth	January 2016

Name	Nationality	Position	Appointment date
John A. MORAN	Ireland	Founder and CEO, RHH International, a consultancy lobbying on behalf of internet giants and investment firms	May 2013
Konstantin J. ANDREOPOULOS	Greece	Honorary Director General, European Investment Bank	May 2013
Attila GYÖRGY	Romania	Secretary of State, Ministry of Public Finance	July 2016
Armands EBERHARDS	Latvia	Deputy State Secretary, Ministry of Finance	July 2014
Miglė TUSKIENĖ	Lithuania	Financial Counsellor, Permanent Representation of Lithuania to the EU	December 2010
Wolfgang NITSCHKE	Austria	Deputy Head of the Division, Ministry of Finance	June 2008
Kristina SARJO	Finland	Director of Unit for International Affairs, Ministry of Finance	May 2013
Mattias HECTOR	Sweden	Senior Advisor, Swedish Central Bank	September 2014
Marinela PETROVA	Bulgaria	Deputy Minister of Finance	NA
Petr PAVELEK	Czech Republic	Deputy Minister of Finance	May 2016
Vladimira IVANDIĆ	Croatia	Head of Sector for European Union Relations, Ministry of Finance	July 2013
Kyriacos KAKOURIS	Cyprus	Senior Economic Officer, Ministry of Finance	May 2004
Zoltán URBÁN	Hungary	CEO, Hungarian Export-Import Bank Plc.	September 2010
Stanley MIFSUD	Malta	Advisor to the Minister for Finance, Malta Investments Management Co Ltd	August 2016
Piotr NOWAK	Poland	Undersecretary of State, Ministry of Finance	March 2016
Anton ROP	Slovenia	Honorary Vice-President of the European Investment Bank	NA
Ivan LESAY	Slovakia	State Secretary responsible for the EU Slovak Presidency, Ministry of Finance	May 2016
Gerassimos THOMAS	European Commission	Deputy Director-General, DG ENER	December 2015

the overall policy of the Bank.¹⁶ Furthermore, individual Member States have the right to request the Bank not to disclose documents originating from them under the TP framework,¹⁷ a provision that was already softened following criticism from TI and other civil society organisation on the occasion of the stakeholder consultation.¹⁸

This does not mean that EIB staff have no legal protections against Member State influence. The EIB's Code of Conduct expressly stipulates that staff members shall not be influenced by, or receive instructions from, any government, person or entity outside the Bank. They may not accept external commissions, favourable buying or selling arrangements, gift, employment, or remuneration in connection with their service at the Bank.¹⁹

Other legal provisions impose further limits, in line with the principle that the EIB is mandated to support EU policy, with the EIB's actions constrained by the general framework of the Treaties.²⁰ For example, the Protocol on Economic, Social and Territorial Cohesion, annexed to the founding treaties of the EU, stipulates that the EIB has to devote "the majority of its resources to the promotion of economic, social and territorial cohesion".

The EIB Management Committee, a permanent collegiate executive body composed of nine members, carries out the Bank's day-to-day operations under the authority of the President and under the supervision of the BoD. The nine members are appointed by the BoG, on a proposal from the BoD, for a renewable period of six years. This body's independence is defended by the requirement that it is responsible solely to the Bank.

Figure: The Management Committee in 2016



Werner HOYER
President



Dario SCANNAPIECO
Vice-President



Pim van BALLEKOM
Vice-President



Jonathan TAYLOR
Vice-President



Román ESCOLANO
Vice-President



Ambroise FAYOLLE
Vice-President



Jan VAPAAVUORI
Vice-President



Andrew MCDOWELL
Vice-President



Vazil HUDÁK
Vice-President

Finally, the independence of the EIB is qualified by the role exercised by the European Commission in its decision-making process. The EIB consults the Commission, via the so-called Article 19 procedure (of the EIB Statute), with regard to each financing operation.²¹ Whenever the Commission delivers an unfavourable opinion on the proposed project, the financing may not be granted unless the BoD delivers a unanimous opinion, with the Director nominated by the Commission abstaining.

EFSI

While hosted within the EIB as a financial guarantee facility, EFSI is governed and run by its own Steering Board. The set-up of this board ensures more fine-tuned control by the European Commission over EFSI policies. This is because EFSI depends mainly on the Commission-administered EU budget, requiring greater EU-level accountability. The Steering Board comprises four members, three appointed by the Commission and one appointed by the EIB. Nevertheless, while the Steering Board sets out general policies for the functioning of EFSI, decisions on whether projects are eligible for the EFSI guarantee are down to the independent Investment Committee.²²

The EFSI Investment Committee is composed of “independent experts”, who are not affiliated with the EIB, but are chosen for their mostly private sector expertise (see box), and takes decisions on the use of the EU guarantee.²³ Projects are selected based on their “additionality” (i.e. that they would not be financed to the same extent without the backing of the EU guarantee), economic viability, reliability and credibility and their contribution to key growth-enhancing areas in line with EU policies.

STEERING BOARD MEMBERS

Gerassimos THOMAS
(Commission, DG ENER) – Chairperson

Ambroise FAYOLLE
(EIB Vice-President)

Irmfried SCHWIMANN
(Commission, DG GROW)

Benjamin ANGEL
(Commission, DG ECFIN)

ALTERNATE MEMBERS

Nicholas MARTYN
(Commission, DG REGIO)

Robert-Jan SMITS
(Commission, DG RTD)

Giorgio CHIARION CASONI
(Commission, DG ECFIN)

Source: EIB



INVESTMENT COMMITTEE MEMBERS

Gillian DAY (UK)

- Managing Director, the Royal Bank of Scotland
- Previously: JP Morgan, the Council on Foreign Relations

Thierry DEAU (French)

- Founder & CEO, Meridiam SAS (asset management with a focus on public infrastructure)
- Previously: CEO and other leadership positions at UK and French companies

Vicky D. KEFALAS (Greek/US)

- Head of Investment & Development Projects, Consolidated Contractors Company (multinational construction company with a focus on the Middle East), Athens
- Previously: various positions in Greek finance, British Petroleum, and management consulting

Dalia DUBOVSKA (Lithuanian)

- Manager in the National Museum of Lithuania, focus on infrastructure development projects and EU structural funds
- Previously: Project manager for Lithuanian energy companies, PPPs, as well as positions with public project promoters and various placements as Chief Financial Officer

Fabio PAMMOLLI (Italian)

- Economics Professor and senior adviser to the Italian Minister of Education and Research

- Previously: Various placements in academia and national ministries, pension and labour market reforms

Noel Gregor PATERSON-JONES (UK/South African)

- Investment Committee Mergence Asset Management (South Africa), UN Special Advisor
- Previously: Managing Director and other positions at the UK Green Investment Bank, Sterling Waterford Securities, Deloitte Consulting, General Guarantee and Trust Company

Nieves RODRIGUEZ VARELA (Spanish)

- Senior Adviser with the treasury, procurement and real estate department of the Madrid regional government
- Previously: Head of Investor Relations with the Madrid regional government, positions with the Inter-American Development Bank, World Bank, Spanish administration and private sector

Dominik RADZIWIŁŁ (Polish)

- Supervisory Board Member, GGE A.S. (Slovak energy utility company)
- Previously: Alternate Executive Director at the IMF, Undersecretary of State (Poland), CEO of a Polish mining and conventional power generation company, VP of an investment Bank, bank director, senior associate of a bankers' trust.

Source: EIB

The involvement of an independent Investment Committee and its prerogative to provide a project with a loss-absorbing EFSI guarantee (based on the fulfilment of the requirements of the EFSI regulation) are the critically new elements in what is largely an EIB-staffed operation. The independence of the Investment Committee is meant to be safeguarded by the fact that it is composed of eight independent experts. Nevertheless these experts are appointed by the Steering Board, a body which, as the table above shows, is dominated by representatives of the Commission.

✓ ***We suggest that future revisions of the EFSI regulation should consider a greater role for the Parliament and the Council in the appointment of the Steering Board.***

In this regard, the EIB could follow the example of the largest national development bank in Europe (Kreditanstalt für Wiederaufbau, KfW), whose Board of Supervisory Directors includes members of the Bundestag.²⁴

INDEPENDENCE (PRACTICE)

While the EIB can raise funds on financial markets autonomously on the basis of Member States subscribed capital, amounts are strictly regulated by the Statute, and any overall increase in loan volumes requires a capital increase by Member States. EIB governing bodies take decisions collegially or by majority vote, strengthening its independence. The fact that Member State appointed Vice-Presidents are put in charge of their own countries, however, poses a risk to the independence of the institution.

EUROPEAN INVESTMENT BANK

Overall, the EIB's independence relative to the Member States and other EU institutions is observed in practice. In addition to its legal bulwarks, the EIB has a financial one: although its paid-in capital is provided by the Member States as its shareholders, it has to raise the funds for its lending activities from the market. Scholars have described the EIB as an "autonomous project-financing body capable of financing most of its loans."²⁵

While the EIB's internal organization is that of a sophisticated international financial institution, with functionally separate and autonomous bodies, there remains room for further improvement. Specifically, we are concerned that members of the Management Committee are at risk of favouring well-connected national champions from their home countries in the same way as prior affiliation with particular companies or sectors may constitute a potential conflict of interests. This is the case because Management Committee members are typically in charge of projects in their "home countries" in the division of labour of the Management Committee, in addition to sectoral responsibilities. Additionally, larger Member States will more often be represented on the Management Committee, which only has nine members.

In the case of officials nominated and appointed to the Management Committee by the Member States, it is reasonable to assume that candidates for such high-level posts at the EIB will usually be deeply steeped in their home country's private sector and have excellent connections. The Advisory Appointment Committee (AAC) newly created on 1 September 2016²⁶ will likely agree that such prior experience is indeed of paramount importance to their ability to carry out the tasks of the Management Committee.

Even without evidence of wrong-doing, putting senior officials in charge of the economies they know best constitutes potential conflict of interests due to close links to national industry champions, for example. This risk stands even bearing in mind that the Management Committee takes decisions collegially (by consensus or majority vote). Given how easily this risk can be avoided, it is puzzling that Management Committee members are still in charge of their home countries.

√ ***Management Committee members should have sectoral responsibilities only. If members additionally need to sub-divide responsibility for proposed projects by country, then members should not be in charge of projects in their home country.***

EFSI

Too little time has passed since EFSI was established to deliver a detailed account of how the legal regime that governs its independence is observed in practice. EIB and EFSI staff are committed to strict eligibility criteria, and the EFSI regulation stipulates that there can be no country-specific or sector-specific quotas, given that any perception of public interference is thought to deter private sector investors. Investment guidelines and a scoreboard of indicators are the only benchmarks being used. However, it is difficult to assess in how far Investment Committee members are independent in their decisions as long as the scoreboard of indicators is not made public.

√ ***"Additionality" should be specified using more concrete metrics, going beyond the very broad definition contained in article 5 of the EFSI Regulation.***

TRANSPARENCY (LAW)

The EIB has to observe EU legislation on transparency and access to documents, which is done via its dedicated Transparency Policy. All EIB documents fall under a presumption of disclosure, though considerable exceptions exist. EIB governing bodies should be more transparent, and publish meeting minutes proactively. The Aarhus Convention furthermore commits the EIB to wide-ranging transparency on environmental and social topics, which is reflected in an array of documents published for each approved project. The EFSI regulation equally contains specific transparency provisions.

EUROPEAN INVESTMENT BANK

The legal regime governing EIB transparency is also constrained by specific EU law provisions, CJEU jurisprudence and European Ombudsman opinions. The applicable legal framework in which the EIB operates as an EU body with regard to the right of access to information are Regulations 1049/2001 and 1367/2006, as well as Article 15 (3) TFEU. At a more abstract level, this article enshrines the right of public access to information proclaimed by Article 42 of the Charter of Fundamental Rights of the European Union. Regulation 1049/2001 makes this right more concrete by specifying “the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission documents (...) in such a way as to ensure the widest possible access to documents.” The Regulation also “establishes rules ensuring the easiest possible exercise of this right, and to promote good administrative practice on access to documents.”²⁷

AARHUS CONVENTION

The right to information regarding the EIB is further bolstered in the case of environmental affairs by Regulation 1367/2006, which enshrined into EU law the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (or the so-called ‘Aarhus Convention’). Under this Regulation, the EIB is bound as much as any other EU body “to guarantee the right of public access to environmental information received or produced by the bank and held by it.” The EIB has to set out the basic terms and conditions of, and practical arrangements for, the exercise of that right, ensuring that “environmental information is progressively made available and disseminated to the public in order to achieve its

widest possible systematic availability and dissemination.” To make this right more easily used, the Regulation exhorts all EIB bodies to make use of electronic technology, provide for public participation concerning plans and programmes relating to the environment and granting access to justice in environmental matters.²⁸

The EIB transparency framework has a number of strong points. The bank is obliged to make publicly available on its website all information relating to its financing and investment operations, including the role of financial intermediaries. With regard to the transparency of the guiding principles on the choice of projects to be financed by the EIB, the Environmental and Social Handbook²⁹ outlines how environmental and social considerations are to be taken into account throughout the decision-making process and how compliance with these principles is to be evaluated.

The EIB also has a Public Register in line with Article 4 of the Aarhus Regulation, which discloses environmental and social risk information about each loan and social and environmental datasheets, including their carbon footprint. The EIB Public Register of environmental documents was launched in January 2014. Specifically, the following main categories of project-related documents are being published on the Public Register:

- EIB Environmental and Social Data Sheets (ESDS), which summarise the EIB’s environmental and social due diligence of individual projects. ESDS dating from 2012 onwards are available following project approval.
- EIB Environmental and Social Completion Sheets (ESCS), which summarise the Bank’s assessment of environmental and social issues at project completion stage.
- Non-Technical Summaries (NTS) of Environmental Impact Assessments (EIA) provided by the project promoters.
- The equivalent of the NTS (where available for projects outside the EU), provided by the project promoters.
- Environmental and Social Impact Assessment documents (ESIA) (for projects outside the EU), provided by the project promoters.

2016 saw the release of the first EIB Environmental and Social Completion Sheets (ESCS), which summarise the

Bank's assessment of environmental and social issues at project completion stage. The ESCSs are being published on the register when available after the completion of the related EIB investment and where an ESDS has been published. The Bank promises to continue to consider additional environmental and social documents that the public may find of interest.

TRANSPARENCY POLICY

Following an open consultation procedure, in 2015 the Board of Directors adopted a revised Transparency Policy (TP), with the requirement that the Bank issue an annual report on its implementation.³⁰ The TP constitutes the EIB's implementation of Regulation 1049/2001, a regulation which itself is in urgent need of updating.

Under the TP, all information and documents held by the Bank are explicitly subject to disclosure, but not proactively. For example, the EIB must publish a summary of the meetings of the BoD but not the minutes themselves. To obtain the minutes, interested parties have to jump through the additional hoop of filing a request for disclosure, which has to be resolved within 15 working days.

Based on the practice of OLAF there is an exception to the presumption of disclosure on investigative reports in order to protect cooperation with judicial and prosecutorial authorities. In practice, this exception leads, in the case of such information, to a presumption of non-disclosure, which means that the onus is then on the citizen to prove why the information should be disclosed. In all other cases, the onus is on the EIB to prove why it should not be disclosed.

The transparency regime also provides a comprehensive overview of the Bank's disclosure and publication strategy. It outlines modes of communication concerning particular information and types of documents, presumption of disclosure with substantive exceptions as well as detailed procedures relevant to handling of information requests³¹ The information subject to the transparency regime is comprehensive: institutional information, policies and strategies, project-related information (e.g. project summaries are published on the website three weeks before they are considered by the BoD), procurement information and tender notices, accountability and governance related information.³² Three weeks before any decision by the BoD, the project summaries are published on the EIB website.

Those who are dissatisfied with the EIB's implementation of the TTP have access to a Complaints Mechanism. Importantly, this unit represents the first appeal for rejected disclosure requests; an appeal to the European Ombudsman can be filed only after having exhausted the Complaints Mechanism stage.

The Transparency Policy should also be commended for including the obligation to engage in a relatively broad stakeholder consultation and release information throughout the decision-making process. Furthermore, it is renewed every five years, providing an opportunity to keep pace with the fast-evolving standards of open government, avoiding to become as outdated as the Access to Document Regulation from 2001.

Nonetheless, on the occasion of the last revision during 2014, pressure from civil society groups was instrumental in avoiding a backsliding in the transparency provisions.

In 2014 the EIB faced external criticism for its revised TP.³³ As Transparency International EU (TI EU), we found that "the proposed revisions to its current transparency policy which appear to usher in a much more restrictive information disclosure regime – represents a move away from the predictable and transparent handling of information requests and a policy of maximising public access."³⁴ For example, we criticized the lack of clarity on what EIB activities would indeed fall under the category of non-administrative tasks, for which article 15(3) TFEU would have allowed the EIB greater discretion over what can be considered administrative and non-administrative tasks, on a case-by-case basis, and therefore full discretion on whether to handle a request for access to information under existing disclosure obligations.³⁵ Following submissions by TI EU and other civil society organisations, the EIB dropped the differentiation between administrative and non-administrative acts. We commend the EIB for this swift reaction that safeguarded its transparency regime, and for its willingness to ask the European Ombudsman for help drafting language for the revised policy.

For all its strengths, the EIB's transparency regime has a number of weaknesses. In our view, the bulk of these weaknesses can be attributed to Regulation 1049/2001 and are therefore outside of the power of the Bank. Below we sketch the contours of the reforms and the reasons for them, recognising that these recommendations are only partly addressed to the Bank itself.



PROPOSED REFORMS

There are exceptions from the default disclosure requirement, in line with Regulation 1049/2001.³⁶ These exceptions are indicated by Article 5 of TP and include the protection of the public interest with regard to international relations (see Mopani case study), economic policy, and the protection of the privacy of the individual.³⁷ Further, exceptions to disclosure arise where the release of information or documents would undermine the protection of commercial interests, intellectual property or inspections, investigations and audit.³⁸

Following feedback from the Ombudsman³⁹ and in the interest of striking a balance on the issue of art 15.3 of TFEU, the TP provides ample room for determining how much transparency the EIB can allow. Specifically, it stipulates that the EIB may decide “in a way consistent with the principles of openness, good governance and participation, how the general principles and limits governing the right of public access should apply in relation to its specific functions as a bank.”⁴⁰ As per Art.1.3 of the TP, in case of conflict with specific transparency and disclosure rules included in other EIB Group policies, the TP’s provisions shall prevail.

✓ ***Based on this analysis and our case studies, we suggest that it should provide for a more specific set of circumstances under which disclosure is not provided.***

Articles 5(2) and (3) of the Aarhus Convention, and Article 4 of the Aarhus Regulation demand the proactive dissemination of environmental information through electronic registers only. Article 11 of Regulation 1049/2001 asks EU institutions to “provide public access to an electronic register of documents.”

The EIB has complied with these obligations by setting up a Public Register⁴¹ containing Environmental and Social Data Sheets (ESDS), Environmental and Social Completion Sheets (ESCS), detailed Non-Technical Summaries (NTS) of Environmental Impact Assessments (EIA) carried out by the project promoters. These documents are proactively published on the Register as early as the project appraisal phase and as soon as they are received by the EIB. On average, we found that these “summaries” can be 30-50 pages long.

In line with general open data principles, all documents should be made available in machine readable format, while some documents, in particular declarations of financial and other interests, were only made available as scanned PDF-documents.

EFSI

Relative to the EIB, EFSI has a more advanced transparency regime as enshrined in the EFSI Regulation, EFSI Agreement and Rules of Procedure, in particular as regards the transparency of the EFSI-specific governing bodies, showing how modern laws enacted by the European legislator will aim at a higher standard of transparency than that found in the normal operations of the Bank. In particular, the EFSI Regulation foresees that the (final version of the) minutes of the Steering Board meetings be published as soon as they have been approved.⁴² By law, they have to be readied for approval by the Steering Board within 15 working days of the meeting. In case of enduring disagreements on the minutes, any proposed amendment shall be annexed to the minutes.⁴³ Similarly, the Investment Committee is obliged by law to immediately disclose the summary of the decisions taken upon loan approval. The CVs and declarations of interests of each member of the Investment Committee are made public and continually updated on the website.⁴⁴

Furthermore, all documents requested by the Steering Board in the context of decision making or as support for discussions must be made available on the website by the EFSI Secretariat. The only exception regards documents that, in the view of the Steering Board, contain confidential and/or commercially sensitive information. Document not hosted on the website can only be released following an access to document request handled by the Secretariat.⁴⁵

In particular, the EIB shall make publicly available on its website information relating to all EFSI financing and investment. This should include information regarding financial intermediaries (financial institutions whose names are made publicly available by the EIB)⁴⁶ and information relating to the manner in which EFSI financing and investment decisions contribute to the general objectives set out in the Regulation.⁴⁷ Currently, the EIB publishes lists of intermediaries by country. Given that it is difficult to have a tight control over intermediaries (predominantly commercial banks), more transparency on this front would be most helpful. For example, existing research by the NGO Bankwatch asserts that in Eastern and Central Europe, “many intermediaries appear to be making very few allocations to SMEs despite the fact that they have often received the entire global loan amount and have had, in some instances, over two years to find SME beneficiaries.”⁴⁸

✓ ***The entry for each intermediary should contain information about on-lending by these institutions on an annual basis, compliance with EIB***

terms, including volumes, number and duration of loans.

The EFSI Regulation (Article 19) further demands that the EIB shall post on its website all information about EFSI financing and investment operations, including the role of financial intermediaries. The same requirement applies to its annual report to the European Parliament and to the Council of the EU on EIB financing and investment operations covered by the Regulation.⁴⁹

In making decisions on the orientation and implementation of EFSI objectives, the Board is under a legal obligation to engage in regular stakeholder consultations with interested citizens and civil society organizations.⁵⁰ In effect, the first such consultation was carried out based on an “invitation only” approach, without announcement on the website in due time. To remedy this situation, we draw on the example of the World Bank and urge EFSI to:

- ✓ ***Disseminate the relevant information on its website at least three weeks in advance, to enable adequate preparation.***
- ✓ ***Issue open consultation invitations on its website “with enough lead time, as short notice creates ill-will and promotes the impression of not taking [stakeholders] seriously”***
- ✓ ***Report in detail on stakeholders’ input and provide meaningful feedback to issues raised by them.***⁵¹

Finally, the EIB’s 2015-2017 Operational Plan⁵² also highlights transparency requirements with regard to EFSI and the equally recently introduced European Investment Advisory Hub (EIAH). The EIAH is a joint initiative by the European Commission and the EIB to offer advisory and technical assistance services regarding the opportunities for investment as part of the Investment Plan for Europe.

While encompassing, this transparency regime too has limits. The list of rejected projects and even the scoreboard of indicators for EFSI projects is not made public, presenting clear limits to accountability. The scoreboard in particular would help civil society watchdogs assess how the EU guarantee is being used e.g. for the greening of the economy. Information that has a confidential character or is commercially sensitive is exempt from this transparency regime, but can still be transmitted to the institutions to whom EFSI is accountable (in particular, to the European Court of Auditors), and to the EIB’s own governing bodies, auditors and advisors. Critically, the Commission can be required to disclose such confidential information to the European Parliament or to the Council, using the sensitive documents procedures agreed between these institutions for these purposes.⁵³

TRANSPARENCY (PRACTICE)

Interpretation of the EIB's Transparency Policy is not always straightforward, which can put some strain on the access to document procedure and its appeal mechanisms. Exceptions to the presumption of disclosure can be made more specific. The EIB can improve transparency on (i) entities benefiting from EIB loans intermediated by banks, (ii) beneficial ownership transparency of loan beneficiaries and of any bidders to EIB-financed procurement, and (iii) the implementation of EIB efforts to ensure complex multi-jurisdiction structures are not set up or used for the purpose of tax fraud or corruption.

EUROPEAN INVESTMENT BANK

Transparency anchors greater accountability into the EIB's operations and activities while safeguarding them from corruption and other harmful practices. Overall, the EIB's practice of transparency is an uneasy balance between continued commitment to good practices and hesitation to deal with enduring problems, particularly in the area of proactive transparency. The European Ombudsman noted that the EIB's statements "reflect the reality that proactive transparency is recognized [by the EIB] as one of the primary means of securing public trust in actions taken by major financial institutions."⁵⁴ The overall trend is one of improvement, with the EIB in 2013 joining the International Aid Transparency Initiative (a global campaign to create transparency in the records of how aid money is spent).

REPORTING

To enable adequate external policy evaluation, the EIB Group proactively publishes a wide range of statistical information regarding its activities, with the annual Statistical Report playing a key role in this respect.⁵⁵ Regarding the actual effects of EIB loans, several sources provide relevant information. The Annual Report on EIB operations inside the EU appraises projects funded within the EU according to the Bank's methodology (the three-pillar assessment framework)⁵⁶. Similarly, the report on the EIB's activities outside the EU presents the results of completed projects as well as the expected results of new lending. The 2015 report is the fourth since the introduction of the Results Measurement (ReM) framework which is used to keep track of and report on EIB projects results outside the EU.⁵⁷

The EIB also publishes detailed ex-post evaluations of priority EIB activities (innovation, SMEs, climate action,

sustainability), with document length reaching over 100 pages in some cases.⁵⁸

ACCESS TO DOCUMENTS

The EIB's info desk has a positive performance. In 2015, the info desk processed 4,876 requests (around 400 a month), with two thirds of them regarding financing and general questions about the EIB. The EIB managed to responded to 95-percent of them within the statutory 15 days' limit.

Number of access to documents requests	42
Full disclosure granted	43%
Denied disclosure	7%

Our interviews suggest that in practice too, EIB staff see themselves as subject to the presumption of disclosure, even if the information is not proactively posted on the website. Exceptions are investigation reports that are limited to a restricted set of stakeholders in the exercise of their duties such as OLAF, the European Court of Auditors, the Ombudsman or the CJEU.

The EIB's Complaints Mechanism (CM) is the first appeal body for the enforcement of the Transparency Policy. When the complainant is not content with the reply of the EIB or when the recommendations made by the EIB-CM are over-ruled by the Management Committee, s/he may lodge an appeal with the European Ombudsman. This is elaborated in greater detail under the Accountability (law) section referring to citizen and Ombudsman accountability. A supportive opinion from the Ombudsman can help nudge the Management Committee towards following the otherwise non-binding CM recommendations, as detailed in the Mopani case study.

The EIB handled 24 requests for disclosure of information in 2014 and 42 in 2015. Most requests focused on the disclosure of environmental and social impact assessments, emission evaluations, project evaluations and proposals made by the MC to the BoD. In terms of substance, the requests concerned projects in the area of energy, private sector development, transport and climate finance, often related to the financing activities under EFSI. However, to obtain access to the minutes of

the Board of Directors meetings, an access to document request is required. As the Ombudsman noted, it is not “reasonable to expect members of the public and interested parties to have to submit access to documents requests for such a key document.”⁵⁹

The available evidence suggests that when such a request was made, it took the EIB nearly a year to release an extensive version of the minutes. This certainly falls short of the “timely manner” standard applicable to requests for information demanded by the relevant EU law.⁶⁰ This procedure should be sped up.

Regarding requests for disclosure, in 2014 the EIB did not reject a single request. Nevertheless, the number of cases where only partial disclosure was granted is quite high and growing: from 25 % in 2014 to 50 % in 2015.

EIB GOVERNING BODIES

Regarding the transparency of its governing bodies, we noted that it is EIB practice to publish summaries of decisions taken by its Board of Directors (operational summaries), alongside an agenda of future meetings, and case-by-case declarations of conflicts of interest.

In our view, transparency practices should allow the adequate retracing of the thinking underpinning critical decisions made by public bodies. While we applaud the publication of conflicts of interest in the summaries, such declarations should not be made merely on an ad hoc basis. We also think that the BoD’s operational summaries fall short of modern standards of proactive transparency. The TI EU position remains unchanged: proactive, systematic and timely publication of meeting minutes.⁶¹ We stress that this should apply to all governing bodies, not only the Board of Directors, including, critically, the Management Committee, where the Bank’s daily operations are managed. Despite its importance, this body does not even release the summaries that the Board of Directors does.

The publication of the agendas before and the minutes after the MC meeting is of critical importance. To understand why, it must be noted that the Board of Directors consists of senior members of national ministries, who have to fly in to Luxembourg for each meeting. Although the BoD holds the formal responsibility for the EIB’s decisions, it only meets 10 times a year. Given the lengthy agenda for a typical one-day meeting, the meetings are unlikely to provide a close examination of trade-offs made in lending decisions. At the same time, the BoD also handles complex external and internal decisions. This overloaded agenda makes it clear that the Management Committee, as the only resident governing body of the EIB, is the institutional setting where the merits of project loans are duly analysed and crucial decisions are made. It can be argued that MC ‘decisions’

should not be made public as they are not final until signed off by the BoD. This issue can only be addressed by publishing MC meeting minutes after the BoD has signed off on those pre-decisions. Article 11(3) of the EIB statute, in conjunction with article 23 of the Rules of Procedure, separate MC roles into (i) preparation of BoD decisions and (ii) current business of the bank. The latter in particular should be subject to proactive disclosure of minutes.

Moreover, while the Board of Directors checks for conflicts of interest at each meeting, the other two governing bodies do not. We think that there are ample opportunities for such conflicts to exist. For example, it is not unconceivable that in some cases the Management Committee members’ decisions could be influenced by the agendas of the institutions in which their careers were formed before joining the EIB. Our formal suggestions are as follows.

- ✓ ***The Management Committee should proactively publish its agendas and meeting minutes in a systematic and timely manner, delaying the publication of investment recommendations until adopted by the Board of Directors.***
- ✓ ***The Board of Directors should proactively publish its meeting minutes in a timely manner.***
- ✓ ***The Management Committee should follow the practice of the Board of Directors in the transparent reporting of conflicts of interest of their members at the beginning of each investment meeting.***
- ✓ ***Conversely, members of the Board of Directors should publish declarations of interests beyond the current ad hoc practice.***



BENEFICIAL OWNERSHIP TRANSPARENCY

Transparency on the loans' beneficial owners is increasingly recognised as a key element in preventing corruption and money laundering. In its annual activity reports, the Office of the Chief Compliance Officer recalls that "transparency of the beneficial ownership remains a key requirement in the fight against illegal activities such as corruption and tax fraud" and that "the identification of the beneficial ownership is a fundamental requirement of the Bank's due diligence process", including as regards post-signature changes in the ownership structure of EIB counterparties. The EIB due diligence process performed on operations the EIB finances includes, inter alia, identification of beneficial owners, integrity assessments to identify any individuals or entities subject to sanctions, and the presence of Politically Exposed Persons and potential conflict of interests.

Following the proposal by the Commission to establish public centralised national beneficial ownership registers for companies and some trusts as part of the ongoing revision process of the 4th Anti-Money-Laundering (AML) Directive of May 2015,⁶² the EIB as an "obliged entity" will have access to this information as part of its due diligence process, to corroborate BO information provided by any loan applicants. Indeed, for operations guaranteed under EFSI, the EIB developed specific contractual provisions requiring the disclosure of BO information to the EIB (or to the intermediary in the case of indirect EIB lending). Further improvements are possible drawing from existing country practices: For example, in its implementation of said Directive, the UK went one decisive step further in providing open, free and public access to its national register of the beneficial ownership of UK companies.⁶³ A number of countries have made similar commitments at the May 2016 London Anti-Corruption Summit, including France.⁶⁴ In our view, there is nothing in the 2015 AML-Directive to keep the EIB from publishing BO information on the beneficiaries of its loans.

Corroborating this point with regard to lending via financial intermediaries (banks), the Council of the EU and the European Parliament, in their 2014 Decision on granting an EU guarantee to the EIB against losses in external lending,⁶⁵ call on the EIB to "*draw up, to the extent possible, in cooperation with the local financial intermediaries, a list of the final borrowers.*" To dispel residual concerns as to the legality of publishing BO data of loan beneficiaries, their consent could be made explicit in the standard contractual clauses signed as part of any loan agreement.

✓ ***In line with current trends, the EIB should make its loans contingent on beneficial ownership transparency, and publish BO information on all its loan beneficiaries, as part of its project data sheets.***

It is well established that one of the greatest risks of corruption remains in the field of procurement.⁶⁶ The OECD estimates that 20% of global public procurement expenditures, approximately 2 trillion USD, are stolen annually.⁶⁷ One way to mitigate this is to require that bidders for any procurement activities carried out with EIB funds must submit and agree to publish their BO information, both in private and public procurement. This keeps bidders from hiding behind complex legal and corporate structures. Such reforms should go hand in hand with an increase of resources for the monitoring of the correct implementation of EIB procurement guidelines.⁶⁸

Given that procurement activities already fall under the EIB guidelines for private sector projects, and are monitored by the bank's services as part of its due diligence process, these guidelines should be adapted to reflect best practices in combating common corruption risks.

✓ ***The EIB should require that legal entity bidders on Bank-funded procurements disclose their beneficial ownership information and that the Bank publish this information in an open data format as part of its wider efforts to foster transparency in its own contracting practices.***

COUNTRY-BY-COUNTRY REPORTING

For the European Commission⁶⁹ and specialised scholarship,⁷⁰ the issue of corporate tax avoidance requires greater transparency. Moreover, in our own view public country by country reporting will increase corporate accountability and transparency by providing citizens with adequate information to assess multinationals' economic activities, payments, structures and their whereabouts. This can help effectively reduce opportunities for tax fraud, alongside controversial tax practices. There is a broader momentum on tax issues that opens up interesting opportunities towards a paradigm shift for greater transparency globally and even more so in the EU policy arena. This is evident in the Commission's proposals to go beyond the G20-endorsed OECD Base

Erosion and Profit Shifting action plan in requiring public CBCR for large multinationals within the EU, subject to the approval of the co-legislators.

In this regard, in 2009 the EIB was a pioneer in adopting the landmark policy not to finance projects in “non-compliant jurisdictions” in terms of tax fraud, tax evasion and harmful tax practices. Since the creation of the Compliance function (OCCO) in 2005, the EIB has been relying in particular on the workings of the OECD Global Forum (on Transparency and Exchange of Information for Tax Purposes), Financial Action Task Force (FATF) and the European Commission as regards AML-CFT⁷¹ compliance.

In a January 2015 letter to the NGO Counter Balance,⁷² the EIB agreed with the principle that requiring country-by-country reporting (CBCR) and beneficial ownership (BO) transparency can be critical instruments for combating secrecy and harmful tax practices. At the same time, the EIB noted the very limited application of CBCR, pending the adoption of current legislative proposals, and that the timeframe for the implementation of centralised national BO registries was still unclear at the time. The EIB emphasises that as a general principle, it expects its counterparts to comply with all applicable legislation, and to inform the Bank of any material change in ownership, thus ensuring the transparency of the relevant counterparties on a continuing basis, as stipulated in the EIB contractual documentation.

The European Parliament has gone one step further in a resolution adopted on 28 April 2016, calling on the EIB to “make both direct funding and funding via intermediaries contingent upon disclosure of both country-by-country tax-relevant data along the lines of the CRD IV⁷³ provision for credit institutions, and beneficial ownership information”.⁷⁴

Following the presentation of the Anti-Tax Avoidance Package in January 2016, the EIB says it is continuing its dialogue with the Commission and seeking to take measures to enhance its tax due diligence. Based on this process, the EIB should stop cooperation with any banks and other financial institutions acting as EIB intermediaries that are based in secretive jurisdictions. Such jurisdictions hamper transparency and can therefore facilitate corruption. Article 140 (4) of the EU Financial Regulation prohibits EU funds from being invested in or channelled through intermediaries in countries that fall short of international tax transparency standards.

The January 2016 Commission Communication on an External Strategy for Effective Taxation even explicitly calls on the EIB Group to “transpose these good governance requirements in their contracts with all selected financial intermediaries”.⁷⁵ The Commission goes on to note that it has, in the past, blocked projects involving unjustifiably

complex tax arrangement through secrecy jurisdictions. The Office of the Chief Compliance Officer told us that the EIB is indeed going further: even irrespective of whether any “non-cooperative jurisdictions” are involved, operations with complex multi-jurisdictional structures are subject to additional, systematic enhanced due diligence and monitoring prior to the establishment of a business relationship. This includes specific tax disclosure requirements whereby prospective counterparties are required to disclose the economic rationale underpinning their complex structure, and disclosing how and where taxes are paid. The information provided, e.g. on an alleged need to avoid double taxation will also be verified. As many recent corporate scandals have shown, corrupt acts are often aided by the use of opaque company structures and secrecy jurisdictions. We call on the EIB to formalise this approach under a dedicated policy.

While the EIB emphasises that it is up to Member States to propose any remedial action (such as being excluded from EIB loans) on entities that do not report country-by-country and/or object to the disclosure of beneficial ownership information, the EFSI example shows that more can already be done under current legislation, without going beyond the mandate of the EIB, e.g. via specific contractual provisions. We agree with the Parliament’s assessment that the EU’s bank should use every margin of manoeuvre at its disposal to position itself as a leader in this field.

✓ ***We call on the EIB to support the Commission’s efforts to improve corporate accountability standards, including on tax transparency and combat secrecy and associated opportunities for tax fraud, within its possibilities.***

✓ ***Specifically, the EIB should exclude from its financing companies that are not transparent about their operations, structures and payments and based in secrecy jurisdictions.***

✓ ***Drawing on the practice of the OCCO, the EIB should develop a formal policy of requiring prospective counterparties to disclose the economic rationale underpinning complex structures even for operations not based in jurisdictions falling under the EIB’s NCJ-policy.***

EFSI

Overall, during its first year, EFSI has showed it followed the EFSI Regulation procedures on transparency. Its Steering Board dedicated a special meeting to the transparency regime applicable to EFSI in which it confirmed the statutory provisions discussed in this report's "transparency (law)" section on EFSI.⁷⁶

The CVs and the declarations of interests of Investment Committee members as well as the minutes of the Steering Board meetings with stakeholders are posted online. The Steering Board met a wide array of civil society groups, banking associations, national promotional banks' representatives and private sector associations etc.⁷⁷ However, on the occasion of the first EFSI stakeholder consultation, information on the consultation was not made public prior to the meeting, even while the online publication (on the EIB and Commission websites) was expressly demanded during the 14 March 2016 Steering Board meeting.⁷⁸ This oversight should be addressed in consultations planned for the future.

Most importantly, the EFSI Steering Board observes its obligation to proactively publish its minutes within 48 hours. It also proactively publishes key documents such as the "Strategic orientation of EFSI" and the "Operating policies and procedures necessary for the functioning of EFSI".⁷⁹ This assessment is shared by an otherwise highly critical report from Counter Balance, an EIB watchdog.⁸⁰

Each loan has a webpage with detailed and searchable (by country and sector) non-technical summaries concerning issues such as procurement, environmental and social impact. Each page makes available links to full documents in searchable PDFs for ease of use. However, not all are currently available in English.⁸¹

There are several areas where further improvements could be made in future reforms. We analyse each of them below:

1. The IC could emulate the high transparency standards of the Steering Committee regarding transparency on meeting minutes, with future revisions of the Regulation making this a legal obligation.
2. The Rules of Procedure for the Steering Board allow the Chairperson to invite experts on particular matters, on his or her own initiative or at the request of a Steering Board member. Extending this privilege to civil society organizations can boost EFSI transparency.

3. We assessed that of the operations already signed, approved and pre-approved under EFSI, most went to old EU Member States⁸³ with promotional banks. Indeed, France, Spain, Italy, Germany, but also Poland have national promotional banks whose key role in mobilizing EFSI funds was praised by the Commission.⁸⁴ A large number of EU countries, most of them from Eastern Europe, have not secured similar levels of EFSI funding.

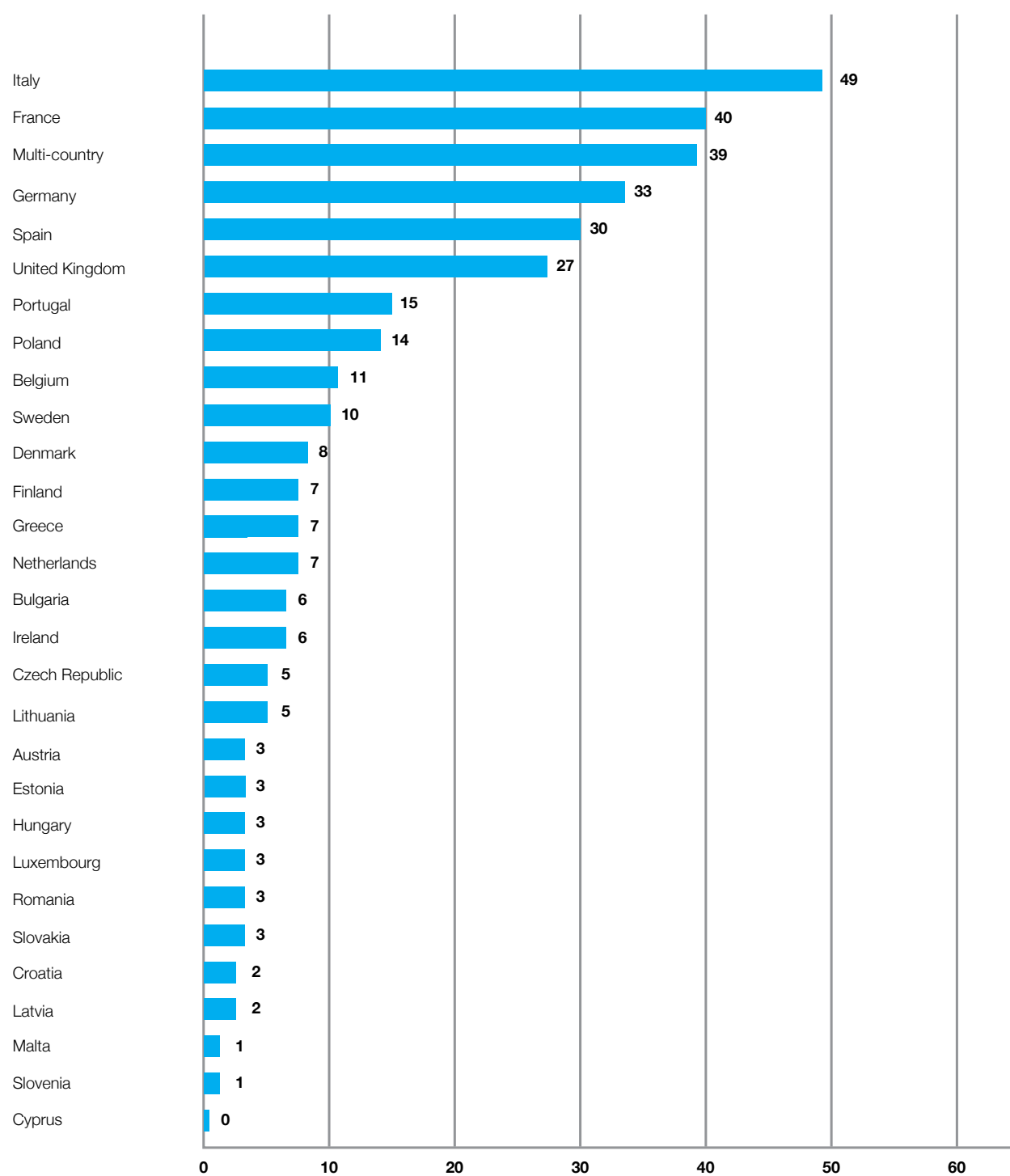
The EFSI Secretariat noted that the number of eligible investments is naturally higher in larger Member States and economies. In terms of EIB Group financing relative to GDP, the breakdown is said to favour smaller EU countries. In the case of EFSI, Estonia, Spain, Lithuania, Slovenia and Slovakia are expected to see the highest investments.

As of October 2016, EFSI funds administered by the EIB and the EIF amounted to 361 projects in 27 out of the 28 member states, with 44% of the 315 bn euros already used.⁸⁵ This can count as a success. However, if the European Investment Fund operations through the SME window are subtracted, a different picture emerges. Half of the EU's Member States have five or less EIB-administered projects each (loans, guarantees and equity type operations). A small number of Member States received a much larger number of funded projects. Although some of the winners are countries that struggle with an extreme dearth of investment (Italy, Spain, Portugal), or are generally larger economies with far more projects eligible for EFSI financing (Germany, France), it is nevertheless an issue that the new Member States are grouped towards the low end of the spectrum.

While this situation has complex causes, we think that it can be remedied not only through conventional, targeted and sustained efforts to ensure availability of information in these states but also through the provision of expertise for the establishment of national promotional banks. The EIB is the equivalent of a development bank at the EU level, while promotional banks are the equivalent of development banks at the domestic level. To the extent that the Commission currently favours the establishment of national promotional banks for the delivery of EFSI funds across the EU,⁸⁶ the EIB should ensure that its expertise and best practices are made available in the setting up of "sister" institutions to national authorities.⁸⁷

The EFSI has detailed guidelines on how to avoid geographical and sectoral concentration,⁸⁸ but nothing stands in the way of structurally well-positioned (and lower-risk) applicants from wealthier Member States to lodge successful applications.

Figure: Number of EIB projects under EFSI (loans, guarantees and equity operations)



Source: Authors' calculations (October 30, 2016)

CASE STUDY: DIESELGATE EMISSIONS SCANDAL

Slow disclosure, proactive crisis-management

The fallout from Dieselgate, the scandal in which carmakers have been accused of breaking EU law by using 'defeat device' software to artificially reduce their emissions results during laboratory testing, is far from over. The German car manufacturer Volkswagen has been at the centre of this scandal and has admitted using 'defeat devices'. But the case is also of relevance to the European Investment Bank (EIB), which has provided loans of over four billion euro to VW since 1990. Question marks remain over the EIB's reaction to the scandal.

The VW emissions scandal story began on 18 September 2015, when the US's Environmental Protection Agency (EPA) found that nearly 500,000 VW and Audi cars sold in the US were equipped with 'defeat device' software in diesel engines. Prior to that, VW had undertaken a large marketing campaign advertising its cars' low emissions to sell diesel cars in the US. The software can detect when the engines are being tested and adjust the fuel mix to circumvent EPA emissions standards for nitrogen oxides. On 3 September 2015, then President and CEO of the VW Group in the US admitted that the 'defeat device' had been used. Large numbers of vehicles in the EU have also been fitted with the software. The European Parliament set up a committee of inquiry in March 2016 to look into the emissions fixing scandal, which may affect diesel cars made by several car manufacturers.

In September 2015, Bankwatch reported that the EIB had provided VW with 19 loans worth over 4 billion euro between 2005 and 2015. Much of the money went to research into developing cleaner engines. In fact, five of the projects came under the EIB's 'climate action' strategy. The irony is clear given that some of the loan money may have been used to circumvent EU law on emissions standards.

In accordance with its Anti-Fraud Policy, the EIB has reacted by launching its own investigation into VW's use of EIB funds. According to Reuters, EIB President Werner Hoyer wondered aloud to the media whether the bank should not ask for its money back if it finds that the funds were used for purposes other than intended. In October 2015, according to the German newspaper Süddeutsche Zeitung, Mr Hoyer said "the EIB could have taken a hit [from the emissions scandal] because we have to fulfil certain climate targets with our loans". He added that the EIB would conduct "very thorough investigations" into what VW used the funds for.¹ In a press statement from October 2015, the EIB says that it is "in contact with VW to understand as rapidly as possible whether any of the



EIB loans were used in the development or deployment of illegal software in cars. Any decision about possible measures that the EIB might take will follow, and be based on, the findings of this review".

The European Anti-Fraud Office (OLAF) also deemed the case of the possible misuse of EIB loans of sufficient importance to open its own investigation on 16 December 2015, which is currently ongoing.

BANKWATCH INFORMATION REQUEST

In spite of the swift and proactive response, the EIB missed an opportunity to show diligence in terms of access to critical information about this high profile case. The loan transparency aspect to this story begins in late September 2015, when the environmental NGO Bankwatch entered the fray by requesting information from the EIB about its loans to VW.

Bankwatch's mission is to ensure that public money is

spent on climate-friendly development that is not driven by economic growth per se but benefits society and the environment. The watchdog contacted the EIB requesting information about a number of its loans to the VW Group, including twelve loans granted to help VW achieve better fuel efficiency and emissions reductions in their vehicles. A 400 million euro EIB loan to Volkswagen AG in 2009 to “support the development and market launch of greener and more fuel efficient drive train components for passenger cars and utility vehicles”² is at the heart of the issue.

“With this loan,” said Matthias Kollatz-Ahnen, the EIB Vice-President with responsibility for lending in Germany at the time of the signing, “we are pleased to be able to promote green technologies in Europe while actively helping the car industry in these difficult times”³. Like all EIB Vice-Presidents, Mr Kollatz-Ahlen was given responsibility for proposed projects from his home country, Germany. The German state of Niedersachsen owns 20 percent of the company.

In January 2016, EIB President Werner Hoyer told reporters that “we cannot exclude that there is a link” between the €400 million loan to the car maker and the cheating software. “In order to be on the safe side, we have decided to put on hold any new loan to Volkswagen,” he added.⁴ In Bankwatch’s opinion, the information released by the EIB was insufficient to determine if such a link existed.

INFORMATION REQUESTS: SLOW RESPONSE TIME IN HIGH PROFILE CASE

The hurdle was the EIB’s slow response to Bankwatch’s request for information. At the time, there was early but conclusive evidence showing that VW misrepresented the emission performance of its vehicles, increasing public interest in the EIB’s role in funding the relevant research. The EIB’s Transparency Policy requires it to respond to information requests from the public ‘without delay, and in any event no later than 15 working days following receipt’ and, even in complex cases, ‘the Bank shall [...] endeavour to provide a reply [...] no later than 30 working days following receipt’.

The bank first extended the deadline for disclosing information and then failed to meet this extended deadline. When it finally responded, two months after the request for information was lodged, the bank sent Bankwatch only the redacted contracts relating to two outstanding VW loans whose content, in the view of the watchdog, did not speak to the heart of the case.

EIB Transparency Policy (extracts)

5.22 Requests are normally processed by the EIB’s Infodesk and are replied to without delay, and in any event no later than 15 working days following receipt.

5.23 In exceptional cases, for example in the event of an application relating to a very long document or when the information is not readily available and complex to collate, the time-limit may be extended and the correspondent shall be informed accordingly no later than 15 working days following receipt.

5.24 The Bank shall, however, endeavour to provide a reply to such complex requests no later than 30 working days following receipt. (...)

5.31 In the event of a total or partial refusal following the initial application, the applicant may, within 15 working days of receiving the Bank’s reply, make a confirmatory application asking the Bank to reconsider its position. Alternatively, the applicant may lodge a complaint with the Complaints Mechanism within one year of the EIB’s response.

DEFENSIVE EIB REACTION: INFORMATION INITIALLY WITHHELD

In a letter dated November 2015, Bankwatch protested, accusing the EIB of “withholding most of the relevant information”⁵ and asking the Board of Directors to call on the Management Committee to disclose the requested contracts. Shortly afterwards, on 25 November, 2015, Bankwatch filed an application (known in the jargon as a ‘confirmatory application’) to appeal EIB’s limited disclosure as per Article 5.31 of the EIB’s Transparency Policy.

This time, the EIB reacted within the deadline set by its Transparency Policy. On December 16, 2015, the bank sent a reply and, critically, all the finance contracts between the EIB and VW. The bank also attached the redacted completion reports provided by VW to the EIB at the closure of each project.⁶ All the released contracts were redacted but, critically, the EIB insisted that none of the information that had been edited out was related to the environment.⁷ As such, the EIB did not see itself in violation of Article 5.7 of the Transparency Policy relating to overriding public interest.

While the EIB's Transparency Policy foresees circumstances where non-disclosure can be justified, "these exceptions apply unless there is an overriding interest in disclosure". The Transparency Policy singles out information and documents pertaining to "emissions into the environment" as a case where "an overriding public interest shall be deemed to exist".

However, the watchdog was not satisfied with this outcome. On 25 January 2016, Bankwatch invoked overriding interest and made a second confirmatory application indicating that two of the contracts had been released for the first time after their confirmatory application dated 24 November 2015.⁸ This time, the watchdog also challenged the EIB's redaction choices. Bankwatch complained that the EIB blackened out "information on [the] environment such as the type (or model) of engines and vehicle models for which the reported emissions' level were obtained" and argued that "releasing this information would not undermine the protection of the promoter's commercial interests or its intellectual property rights as providing such information publicly to consumers is anyway an obligation in the European Union".

It remains difficult to assess the merits of the case. However, the EIB does appear to have been slow in handling the VW emissions case. It is clear that they could have released, from the very beginning, all the requested contracts within the deadlines set by its own Transparency policy. They could also have provided fuller information when requested, especially in view of the fact that the EIB's own services were also investigating the matter.

The case is still far from over. We await the findings of the European Parliament's Committee of Inquiry and the OLAF investigation to determine whether EIB loans were indeed used for the development of 'defeat devices', whether the EIB could have known via an improved follow-up to the project documentation, and whether the information provided here is fully transparent and in line with the EIB's transparency policy.

ENDNOTES

1. <http://www.reuters.com/article/us-volkswagen-emissions-europe-loans-idUSKCN0S50YO20151011>
2. "Germany: EIB lends Volkswagen EUR 400 million to develop green technologies," Release date: 17 February 2009; reference: 2009-025-EN <http://www.eib.org/infocentre/press/releases/all/2009/2009-025-eib-unterstutzt-volkswagen-mit-400-mio-euro-darlehen-fur-umweltfreundliche-technologien>
3. Ibid.
4. <http://www.euractiv.com/section/transport/news/dieselgate-eib-freezes-new-loans-to-volkswagen/>
5. <http://bankwatch.org/sites/default/files/letter-EIB-VW-12Nov2015.pdf>
6. Bankwatch pooled all the contracts at <https://drive.google.com/drive/folders/0B5JQdo-K8mE5UFVIN1BNS09wWGM>
7. The letter was made public by Bankwatch at <http://bankwatch.org/documents/response-EIB-ConfirmatoryApplication-VW-18Dec2015.pdf>
8. The letter is online at <http://bankwatch.org/sites/default/files/confirmatoryapplication-EIB-VW-25Jan2016.pdf>



INTEGRITY (LAW)

The EIB's Code of Conduct is embedded in a wide net of guidelines, procedures and internal policies on everything from whistle-blowing to fraud prevention and investigations, aimed at ensuring the integrity of EIB staff and projects financed. These are backed-up by EIB bodies dedicated to their enforcement. Instances of wrong-doing and conflicts of interest have to be reported to these or external enforcement bodies. While the rules are encompassing and include external consultants, their temporal application should be expanded via stronger post-employment rules.

The EIB's Code of Conduct is the foundation of its legal framework on integrity. Its basic principle is that staff should not allow themselves to be influenced by personal considerations or relationships, refrain from conflicts of interest and declare them when they arise. As such, staff have the duty to report conflicts of interest, illegal activities, grave misconduct or violation of the EIB regulations, whether by staff or business partners.

Conflict of interest situations are clearly defined: "the private or personal interests of the members of the staff may influence or appear to influence the impartial or objective performance of their duties." These interests are defined as "actual or potential advantage for themselves, their families, their other relatives or their circle of friends and acquaintances," in particular "engagement in work regarding a loan, guarantee or any other of the Bank's operations" whenever the staff is "personally related directly or indirectly to or have any interest in a likely beneficiary of such operation."⁸⁹ A specific example given in the Code is staff taking a private loan from a bank with which the EIB does business.⁹⁰

Several specific protections are in place in this regard:

1. External professional activities can only take place after the Bank gave explicit and written permission;
2. Staff can only have unremunerated positions of responsibility for non-profit making organisations, so long as these positions remain compatible with their work for the Bank;⁹¹
3. Staff are prohibited from standing for public office unless they have been authorized to do so by the Secretary General;⁹²
4. Staff may not accept advantages in any Bank transaction in any form (compensation, commission, favourable buying or selling arrangements, gifts or

other advantage, direct or indirect, which is in any way connected with their employment at the Bank). Gifts cover "both tangibles as well as invitations of a non-professional nature, possibly extending to the staff's family. If gifts are above a token value (set around 50 euros), they must be immediately reported to the Group Chief Compliance Officer (CCO)."⁹³ If they are above significant value (set around 150 euros) they should be either refused or surrendered to the Bank. Even if a staff member receives no advantages but nevertheless feels beholden to a third party due to participation in events that may be deemed of benefit to the Bank, he or she must consult the CCO beforehand.⁹⁴

5. Staff may not use EIB facilities or services for private purposes, except on an occasional basis and within reasonable limits (e.g. using computers outside office hours).

The duty of confidentiality persists indefinitely even after ending service for the Bank. Former staff have a clear obligation to report conflicts of interest post-employment.

Rules on the jurisdiction over integrity issues are clear: the CCO is the main authority in charge of the administration and enforcement of the Code of Conduct. The CCO reports to HR, the President or VP on any material violations of the Code with recommendations and/or conclusions.⁹⁵ At times, the Code is ambiguous on whether integrity issues should be addressed by HR or the CCO (Article 4.1). If either of the two find that the Code is not clear enough, they may refer cases to the Integrity Committee composed of the CCO, the Secretary General, the Director of HR and the spokesman of the Staff Representatives.

For serious integrity issues ("Prohibited Conduct" in EIB parlance), reporting requirements and the level on which the cases are decided are escalated. Specifically, for instances of corruption, fraud, money laundering, financing of terrorism or any activities detrimental to the financial interest of the Union, staff members must inform the Inspector General, the Secretary General or, "if the member in question considers it useful, OLAF directly."⁹⁶ Each of these forms of prohibited conduct are clearly defined.

To deal with integrity issues in the Bank's governance, an Ethics and Compliance Committee (ECC) was established. The ECC is composed of the four longest-serving Directors and the Chairman of the Audit Committee. The Committee, chaired by the longest-serving Director, decides on any potential conflict of

interest of a member or former member of the Board of Directors or the Management Committee. It applies legal provisions concerning the compatibility with duties of the Board of Governors and informs both Boards of the decisions adopted. In addition, the ECC provides

non-binding opinions on ethical matters concerning members of the Board of Directors or of the Management Committee regulated in their respective Codes of Conduct or in related relevant provisions, during the period of their mandate.

Before matters are formally brought to the EEC, current and former BoD and MC members may, on a strictly confidential basis, informally consult the Chief Compliance Officer for potential conflicts of interest and activities not directly connected with the Bank's work. The CCO receives communication of all the documents provided to the ECC and participates in the meetings of the ECC without the right to vote.

Since 2004, the Inspectorate General (IG) and its dedicated Fraud Investigations Division (IN) has been in charge of handling the bulk of Prohibited Conduct cases. Two EIB committees (Audit and Evaluation) play a supportive role. The IG/IN's institutional independence from operational services is assured by a direct reporting line of the Inspector General to the EIB President, senior management, OLAF and the Audit Committee. Outside the EIB, OLAF has full authority over EIB staff.

The EIB's anti-fraud policy is available in all the of the EU's official languages, hinting at the requirement of national-level input and cooperation in the uncovering of fraud. Critically, the anti-fraud policy applies not just to EIB staff, but also to consultants, borrowers, project promoters, counterparties, contractors, sub-contractors, suppliers, beneficiaries and relevant persons or entities involved in EIB-financed activities or its procurement.⁹⁷

If such reporting constitutes a case of whistle-blowing (defined by the Code of Conduct as "making bona fide reports on alleged illegal activities, misconduct or violations"), the whistle-blower in question should benefit from the EIB's "assistance and protection in accordance with its duty of care."⁹⁸ In addition to these provisions in the Code of Conduct (CoC), the EIB also has a dedicated Whistleblowing Policy.⁹⁹ This policy is detailed and has an extensive scope, which includes all EIB staff, consultants and service providers. The policy provides for clear and distinct reporting channels, based on the type of allegation (e.g. fraud, ethics cases, harassment). Given the complexity of possible cases, awareness-raising and trainings are essential for a successful implementation. The Whistleblowing Policy is explicit about which EIB department is in charge of a broad range of offences (detailed in its section III), while allowing external reporting, via OLAF, as well as anonymous reporting. The policy

includes protective measures for whistle-blowers, and crucially, penalties for staff or managers taking retaliatory action on whistle-blowers. The key to any effective Whistleblowing Policy remains implementation,¹⁰⁰ elaborated in the next chapter on Integrity (practice).

There are clear sanctions for breaches whenever members of staff knowingly violate the duties and obligations contained in the Code. In such situations staff are liable to specific disciplinary measures stipulated in the Staff Regulations.¹⁰¹ If the person in breach is not a regular staff member, their contract with the Bank can be annulled. Moreover, the Bank can initiate additional legal proceedings under applicable national laws.

For all its strengths, the EIB's legal regime on integrity deserves an update that could provide useful synergies between integrity and transparency. This is particularly the case with the 10 years old Code of Conduct. We propose several reforms:

- 1.** Bearing in mind that project promotion should only take place via EIB staff, the Management Committee should meet only with such interest representatives that are duly registered on the EU Transparency Register. To this end, the EIB should join the inter-institutional agreement on the register.
- 2.** Drawing on the practice of the European Commission,¹⁰² Management Committee members should publish all meetings with outside actors online, without delay. The European Central Bank since October 2015 also published the meetings of Executive Board members.
- 3.** The revised CoC should explicitly determine whether "business partners" include external consultants and other providers, and to what extent these have to be covered by conflict of interest declarations. The benchmark in this regard should be the EIB's own Whistleblowing Policy, which covers staff and consultants alike.¹⁰³
- 4.** The recent appointment of a former President of the Commission José Manuel Barroso as Chairman of Goldman Sachs International shortly after the "cooling-off" period stipulated in the Commission's Code of Conduct raised the issue of whether technical adherence to existing rules on post-employment duties is sufficient to protect the public interest in the spirit of Article 245 TFEU. The Treaty commits Commissioners to behave with integrity, including after leaving office, with no reference to an end to this obligation. As the European Ombudsman aptly put it, "[t]he 'right to work' has to be balanced with the public's right to an ethical administration and particularly when it comes to those holding, or having held, very senior positions."¹⁰⁴

To this end, we want to highlight that World Bank cooling-off periods are applicable not only to the governance bodies, but to all staff, regardless of appointment type held, as well as to “entities where certain categories of relatives, including spouses, parents, full and half siblings, children, aunts, nieces, nephews and domestic partners are an owner, officer, partner or board member or companies where the relative has a financial interest”.¹⁰⁵

In light of this, we think the CoC should be revised to strengthen post-employment integrity obligations and put concrete sanctions in place for potential revolving door cases between the Bank’s top management and the private sector.

✓ ***The “cooling-off period” in which former members of the Board of Directors may not lobby EIB governance bodies and staff should be extended from the six months applicable today to at least 12 months (as is the case for the Management Committee).***

INTEGRITY (PRACTICE)

The Inspectorate General and the Compliance department are independent from EIB operational services. The internal mechanisms are backed-up by external bodies, such as the European Ombudsman for the Complaints Mechanism, OLAF for the Inspectorate General, and the European Court of Auditors for the Audit Committee. However, members of the Board of Directors do not publish declarations of interests, and those by the Management Committee lack detail. Entities debarred for past misconduct should be published on a dedicated list. The EIB could further join cross-debarment networks with other multilateral lenders.

The Office of the Chief Compliance Officer (OCCO) is in charge of breaches of the Code of Conduct. Cases concerning Prohibited Conduct are addressed by OCCO in cooperation with the Inspectorate General (IG) and its dedicated Fraud Investigations Division (IN). Two EIB bodies (Audit Committee and Operations Evaluation) play a supportive role. The OCCO and IG/IN's institutional independence from the bank's operational services is assured by a direct reporting line of both the CCO and the Inspector General to the EIB President, and the Audit Committee. Outside the EIB, OLAF has full authority over EIB staff.

The Office of the Chief Compliance Officer (OCCO) is tasked with the early detection, monitoring and discouragement of any breaches in the EIB's internal rules on ethics and integrity. The specific activities within its remit are vast and include ethics (as institutionalised in the Code of Conduct), Compliance Policy and institutional matters, anti-money laundering and combating the financing of terrorism, due diligence of EIB counterparties and operations, training (jointly with Personnel) and clearance of the Bank's own procurement processes. In 2014, OCCO also hosted the first Compliance Summit for other IFIs such as the World Bank or the EBRD, with a focus on the fight against money laundering, financing of terrorism and tax evasion.

Although the Chief Compliance Officer has no veto regarding operations, its investigations findings have real consequences. In 2014, 12 transaction parties were rejected either by OCCO's Operations Directorate (and not presented to the Management Committee for approval) or by the Management Committee itself.

OCCO and IG/IN deserve praise for their efforts to raise awareness among new and existing staff, refreshing their

knowledge of policies on ethics and integrity via regular trainings. Attendance is mandatory, tests are administered to check learning outcomes and failure may damage one's professional evaluations. These sessions are carried out face to face or via an e-learning course.

The Inspectorate General and its Fraud Investigations Division equally play crucial roles in ensuring the integrity of the bank, alongside OCCO. We commend both services for their "proactive integrity reviews" designed to catch warning signs of fraud and/or corruption. The number of compliance and integrity reviews carried out by OCCO has more than doubled since 2010, suggesting the increase in EIB lending following two increases in shareholder capital and the establishment of EFSI has not come at the expense of thorough compliance checks.

Year	Compliance reviews	Yearly increase
2015	898	11.28%
2014	807	11.93%
2013	721	26.71%
2012	569	1.25%
2011	562	49.47%
2010	376	

Source: EIB

Coordination with OLAF on opened cases is well-established. This is reflected in regular contacts between the Inspectorate General and OLAF senior management multiple times a year. Similarly, the practice of Proactive Media Reviews which have been carried out by IG/IN since 2010 is a useful instrument for identifying irregularities with EIB-funded projects that have not previously been signalled to the EIB by other parties. We further commend the IG for applying anti-fraud policy evenly to both staff and externals (such as consultants) as well as for providing access to EIB anti-fraud investigators in situations where integrity issues arise vis-a-vis contractors and beneficiaries.

The IG workload has increased from 95 new allegations in 2011 to 116 in 2014, most of them originating from outside the EIB. At the same time, the number of cases closed grew from 74 in 2012 to 132 in 2014. Only a small number of allegations were proven (between 16 and 24 percent a year).¹⁰⁶ Of these, only two cases concerned staff misconduct.



Below are several areas where there is room for further improvements:

1. EIB rules demand systematic conflict of interest checks in its Board of Directors meetings and the results are noted in the summary of the minutes of the meeting, which are published on the website. However, despite the importance of the Management Committee for the daily activities of the bank, the same rules do not apply to this governance body. MC members should post declarations of financial interest in open, searchable formats, alongside notifications of updates and historical versions of those declarations. The European Court of Auditors or an EIB-internal service such as IG/IN should check the veracity of the information given.

2. In order to map out “red flags” of fraud and corruption, the OCCO and IG/IN have conducted proactive integrity reviews since 2010. However, their number remains extremely low (5 in 2012) relative to the much greater size of investments the EIB has mobilized in the past three years and is currently co-managing under EFSI. This should entail an increase in resources for IG/IN.

3. The European Parliament asked the EIB for “strict and transparent criteria for public-private partnerships receiving funding, in order to ensure that not only the investment part of the projects are fairly shared by both public and private partners but also the risks involved in the investments so as to safeguard public interest.”¹⁰⁷ This point is of particular importance for parts of the EU where administrative capacity is known to be weak, or where corruption risks as measured by the TI Global Corruption Barometer and Corruption Perception Index are known to be high.

4. Article 1.1.15 of the Code of Conduct stipulates that if “in some cases refusal [of gifts above a token value] might prove embarrassing to the donor, given differences in business culture or particular circumstances (...) the member of the Management Committee may accept the gift in the name of the Bank subject to the final decision by the CCO.” However, while CCO may decide to ask the MC member “to surrender the gift to the Bank for inventory as Bank’s property in accordance with the relevant rules and regulations,” the list of such gifts is not yet made public. Members of the Management Committee should publish the list of gifts received.

5. The European Ombudsman noted that it was not clear how potential conflicts of interests are assessed for the Management Committee: “At first sight, these documents do not seem to contain an adequate level of detail to perform an effective conflict of interest assessment.”¹⁰⁸ Unlike their peers in the world of international financial institutions, the members of the Board of Directors are not obliged to file a declaration of interests or a financial interest disclosure, and

instead declare conflicts of interests relevant to the specific companies and sectors under review at BoD meetings. While the EIB-BoD is a non-resident non-executive board, it nonetheless relieves the Management Committee of the responsibility for final investment decisions, necessitating full interest disclosures.

✓ ***We endorse the Ombudsman’s call for more detail regarding declarations of interests of Management Committee members. Additionally, BoD members should also file a declaration of interests and a financial interest disclosure.***

WHISTLE-BLOWING

A key pillar of integrity is whistleblowing or “the disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action.” Without whistle blowing, corruption goes understudied and under-prosecuted. Therefore, robust and clear internal reporting channels in addition to protections against dismissal, harassment and humiliation are essential. These reporting channels and protections must have a strong track record in protecting previous whistle-blowers from adverse consequences.¹⁰⁹ There are some concerns that whistle blowers are not always adequately protected in practice by EU institutions. With cases such as the De Nicola case from the early 1990s still being adjudicated in various courts as of 2015,¹¹⁰ a visible commitment to the cause of whistle-blowers is needed to empower prospective informants to come forward and create a culture that encourages the reporting of wrongdoing.

In our interviews, OCCO and IG/IN were keen to emphasise their serious implementation of the EIB’s official Whistleblowing Policy and acknowledged the difficult position whistle-blowers find themselves in. In parallel to “blowing the whistle” within the EIB, staff have the possibility to use other reporting avenues such as OLAF. In training sessions, they are also reminded of the protections under the EIB’s whistle-blowing policy as long as allegations are made in good faith, including the assurance that their identity will not be revealed without the consent of the whistle-blower.¹¹¹

In its implementation, more can be done to disseminate information on the range of reporting channels available, including mechanisms to report information to the regional offices present in most EU Member States but also as far as China and Australia, as well as on the protections and guarantees available to whistle-blowers. Clear procedural guidelines, with corresponding timelines, need to be in place to ensure that the WB is informed throughout the process of all key developments on their reporting, from the decision to open an investigation to the reasoning behind any outcome (as detailed in Article 6 of Ombudsman's rules for good practice).¹¹² Such guidelines should be included in the Whistleblowing Policy to make sure prospective informants are aware of these assurances.

- ✓ ***Clarify timelines within which a complaint will be treated, including the possibility to appeal a final outcome.***
- ✓ ***Make the whistle-blower a part of the complaint by providing updates on and follow-up of the outcomes of the disclosure.***
- ✓ ***A dedicated digital reporting form could be a tool to facilitate reporting (including anonymously) encouraging a culture that promotes whistle-blowing, and offering prospective whistle-blowers guidance throughout the process.***

DEBARMENT

Although the EIB has detailed Exclusion Procedures regarding the conditions under which the Management Committee can exclude entities and individuals from EIB-financed projects or other EIB-related operations if they were found to have engaged in prohibited conduct, it is not entirely clear through which mechanisms the exclusion decisions can be enforced across EIB projects and activities.

According to the updated EIB Anti-Fraud Policy, the Bank will seek to exclude any individual or entity engaging in Prohibited Conduct (as defined by the Bank) or who is subject to a registration in the Central Exclusion Database operated by the European Commission, which was abolished in 2015 and replaced by the EU Early Detection and Exclusion System (EDES).¹¹³ However, we did not find a list of debarred entities and individuals. The European Bank for Reconstruction and Development

(EBRD) on the other hand lists four debarred entities and individuals based on its own assessments and dozens more based on mutual enforcement with institutions such as the World Bank or the Asian Development Bank.

Although the EIB in 2009 joined an international discussion on cross-debarment with other development banks, it did not ultimately join the ensuing agreement. In the view of a study published in the World Bank Legal Review, the inclusion of the EIB in the multilateral development banks' cross-debarment regime was premature because "its sanctions system is still in the development stage and, when the EIB does impose sanctions, its debarment decisions will be subject to review by courts and institutional bodies within the EU." In short, the EIB assessed its legal framework as not conducive to international cross-debarment initiatives that, in the light of the EBRD experience, could lead to the debarment of a large number of entities and individuals.

To ensure the highest standards of integrity, EIB peer institutions such as the EBRD¹¹⁴ declared some firms ineligible to become a bank counterparty and made the lists of the ineligible (or "debarred") entities public. While the EIB has in the past published settlements on its website in the past with firms that violated the EIB Anti-Fraud Policy,¹¹⁵ the EIB website does not provide a dedicated space where debarred entities are listed. As of October 2016, only three entities were debarred, following a settlement reached with the EIB. All three entities pertained to the same case. The debarment was published on the EIB website as a news item focusing on the fact that a settlement had been reached with these entities – excluding them from EIB financing for a period of three years. Past debarments were also published on the EIB website in this *ad hoc* fashion.

- ✓ ***In order to ensure a deterrent effect, the EIB website should contain a dedicated and visible space where debarred entities are listed publically.***
- ✓ ***The EIB should join cross-debarment networks with other multilateral lenders.***
- ✓ ***The EIB should urgently adapt its Anti-Fraud Policy and associated procedures to the Commission's Early Detection and Exclusion System.***

ACCOUNTABILITY (LAW)

The EIB is mainly accountable to its shareholders, the Member States, which clear its accounts via the Board of Governors but are at the same time responsible for loan approvals, via its Board of Directors; both are staffed by Member State representatives. It is also accountable to the Commission, which has to deliver opinions on each project before approval. The EIB falls under CJEU jurisdiction and also answers to the Ombudsman, the European Court of Auditors, and the European Data Protection Supervisor. As the EFSI is based on the EU budget, it also brings formal accountability to the European Parliament, including additional reporting requirements.

EUROPEAN INVESTMENT BANK

The EIB as an institution predates many of the supranational developments that the EU has taken. In its legal framework, it is set up as an intergovernmental organisation, which is ultimately accountable to its shareholders, the Member States. However, the EIB is also the EU's bank, and has over time taken up ever more direct roles and responsibilities on behalf of the Union, which therefore entail accountability to a broader array of EU bodies, from the Commission to the Ombudsman. This trend has been evident before the introduction of the EFSI oversight framework, with previous EU financial instruments administered by the EIB, such as Project Bonds, the Connecting Europe Facility and Horizon 2020 research funds.

THE EUROPEAN COMMISSION

The EIB is essentially tasked with helping the EC implement its evolving policy objectives. As such, the EIB has a multi-layered accountability framework towards the Commission. First, the EC has a representative in the 29-member BoD and co-nominates the BoD members which are in turn appointed by the BoG. Second, European Commission has a key role in vetting the decisions of the BoD as it has to be consulted on every operation before it reaches the Board of Directors. Should the Commission give a negative opinion, the BoD has to deliver a unanimous vote to override the Commission.

THE MEMBER STATES

The members of the Board of Directors and the Board of Governors are direct representatives of the Member States, constituting an avenue of direct control over the bank.

There are several channels through which this accountability is exercised. The EU Member States are shareholders in the Bank by providing the bank's subscribed capital (EUR 243bn in 2013). France, Germany, Italy, the United Kingdom and Spain cover two thirds of the EIB's capital. Under its Statute, the Bank is authorised to have maximum outstanding loans equivalent to 2.5 times its capital.

The EIB's Board of Governors is composed of the 28 Finance Ministers. This is an important "high-level policy" governance institution, as it lays down credit guidelines, approves the annual report and financial statements and gives formal authorisation to the EIB's work outside the EU. Critically, it decides on capital increases and appoints BoD members. On a proposal from the Board of Directors, the Board of Governors also appoints the nine members of the Management Committee, who run the daily operations of the Bank. The BoG meets whenever its Chairman so decides or when a BoD member requests it.

Member States are also directly represented in the BoD, usually through state secretaries or heads of national agencies in charge of international cooperation and development. This body controls the Management Committee and approves every decision to grant EIB loans or guarantees as well as the EIB's borrowing programme. A "double majority" requirement in decision making ensures that the opinions of smaller Member States are duly considered.

However, when acting as members of the BoD, the national representatives are legally responsible solely to the Bank. After they no longer serve in their domestic functions, they automatically resign from the BoD.

The Member State in which an approved EIB financed project is located may veto the Bank's financing. Furthermore, the citizens can hold the EIB to account via domestic parliamentary challenges to their country's national representative in the BoG and BoD.

The EIB's accountability vis-à-vis Member States is also apparent in the Council of the EU. The EIB's Governors are generally the same ministers represented on the Economic and Financial Affairs Council (ECOFIN). The EIB President is invited to attend ECOFIN meetings, and the EIB is also represented in meetings of its preparatory bodies, such as the Economic and Financial Committee, contributing its expertise. The Council may directly request the EIB to implement new initiatives.

THE EUROPEAN PARLIAMENT

In terms of its broader democratic accountability, the EIB's legal framework does not provide for any direct EIB accountability to the European Parliament. As indicated in the following section, the EP nonetheless annually expresses its opinion on the EIB's annual reports through plenary resolutions.¹¹⁶

In our view the EIB should submit to more comprehensive parliamentary oversight along the lines of the EFSI Regulation. While some changes can be swiftly incorporated into an inter-institutional agreement between the EIB and the Parliament currently under negotiation, others may have implications for future changes in the treaties. Although in practice the EIB President has been forthcoming in the relations of his office with the Parliament (see the section on practice below), legal provisions should be in place beyond the current practice of replying to parliamentary questions under the Transparency Policy adopted by the EIB. Specifically, we propose the following reforms:

- ✓ ***The inter-institutional agreement under negotiation with the European Parliament should include a section on parliamentary accountability legally underpinning the EIB President's current practice of appearing in Parliament upon request and addressing questions by MEPs within a set time period.***
- ✓ ***The annual EIB reports should indicate how the EIB integrated the recommendations made in European Parliament resolutions, a practice of accountability that should be formalised as part of the above-mentioned agreement.***

COURT OF JUSTICE OF THE EUROPEAN UNION

Judicial accountability is comprehensively covered in the treaties. As a rule, disputes between the EIB and its creditors and debtors are to be settled in national courts, apart from cases where jurisdiction has been conferred on the Court of Justice of the European Union (CJEU).¹¹⁷ However, the CJEU is competent for all cases relating to the correct application of the EIB Statute in the procedures for loan approval.

In terms of judicial review, the TFEU makes specific provisions for the CJEU review of measures adopted

by the EIB Board of Governors.¹¹⁸ Challenges against decisions by the Board of Directors can be brought only in so far as they concern procedures for the approval of investments. Only the Member States and the Commission may initiate these procedures and no specific provisions are made for individuals.¹¹⁹ However, the CJEU has held that where decisions of the EIB's internal bodies, including those made by the Management Committee, are final and produce effects vis-à-vis third parties (including individuals), they are subject to judicial review.¹²⁰ Or, to use the court's own words, the fact that an action for the annulment of a measure adopted by the Board of Directors of the European Investment Bank may be instituted only by Member States or by the Commission "does not have the effect of depriving that category of persons of effective judicial redress."

COMPLAINTS MECHANISM AND THE EUROPEAN OMBUDSMAN

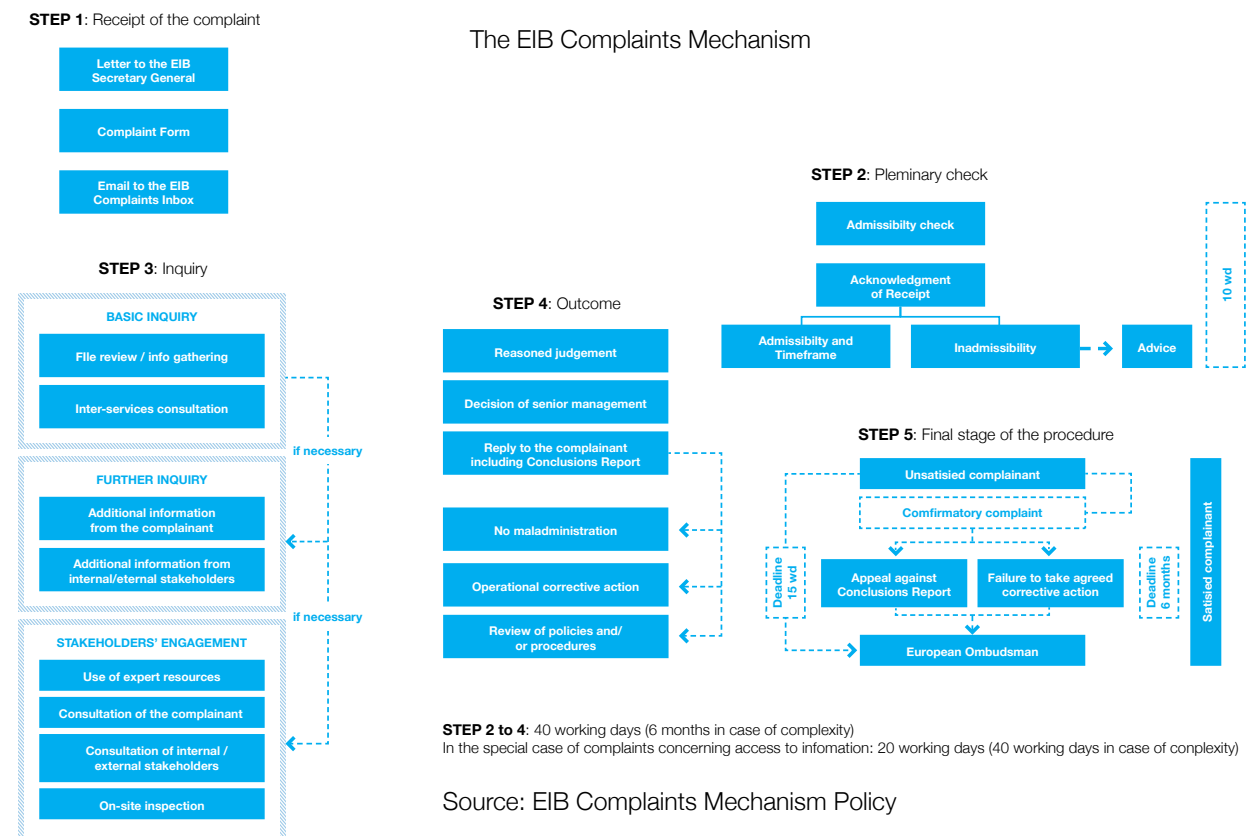
Beyond the accountability to EU bodies and Member States, the EIB has a specific interface for citizen-driven accountability: the Complaints Mechanism (CM). It is designed to hold the EIB to account over its implementation of the EU's treaties, law, Charter of Fundamental Rights, social and environmental policies (including the EIB Statement on Environmental and Social Principles, EIB Environmental and Social Handbook) and international treaties subscribed to by the EU such as the Aarhus Convention. The CM gives all EIB stakeholders the right to appeal EIB decisions.

The EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (the CM Policy) have been subject to a process of review including consultation with the concerned services of the EIB and of the European Ombudsman and underwent public consultation prior to approval by the EIB Board of Directors. The CM treats complaints of alleged maladministration lodged against the EIB Group, except those that concern its investment mandate, credit policy guidelines or participation in financing operations that manifestly fall outside the scope of the CM.

The CM is hosted within the independent Inspectorate General and offers a direct channel of accountability to EU citizens. With lesser legal force, it also assures non-EU citizens residing outside the EU but affected by EIB-financed projects that it will consider their submissions as well.¹²¹ The CM's independence in terms of sole responsibility for admissibility, methodology of the inquiry, findings and conclusions can make it an effective tool to hold the EIB Group to account, as detailed in the Mopani case study. Beyond the opportunities to use the CM to challenge decisions on access to documents as highlighted in the section on Transparency, it can also be used to challenge investment decisions, environmental

and social impact assessments, and other bank activities. The CM also provides advice and recommendations to the EIB management regarding broader and systemic policies, procedures, resources, reports and follows up on corrective actions meant to improve the functioning of the Bank.

The most important function of the CM is compliance review. This means that the CM is in charge of complaints regarding maladministration (“poor or failed administration”) at the EIB. Examples of maladministration include “administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, unnecessary delay.”¹²² Beyond this compliance review, the CM has a mediation function aiming at alternative and pre-emptive resolution of complainants via conciliation and dialogue facilitation, involving all relevant parties such as EIB bodies, project promoters, and the involved national authorities. The CM will also consult other EU bodies (Commission, Ombudsman, OLAF) and international organisations (Aarhus Convention Compliance Committee) “where appropriate”, e.g. to seek clarification over transparency requirements.



As regards escalation of a complaint beyond the EIB, the CM Policy establishes a two-tiered redress process. The internal tier is managed by the Complaints Mechanism Division, independent from the operational services of the Group. The external tier is managed by the European Ombudsman, where complainants may lodge a complaint of alleged maladministration against the EIB should they not be satisfied with the CM's reply.¹²³ Maladministration cases include failure to comply with human rights, applicable laws and the EIB's own policies, or with the principles of good administration.¹²⁴ Similarly to the internal IG/IN fraud investigations and external OLAF fraud investigations, this duality may serve to strengthen the hand of the operationally independent CM and may increase the likelihood that CM recommendations addressed to EIB bodies such as the Management Committee are followed. The option to escalate a case to the Ombudsman strengthens the hand of complainants.

The detailed modalities of cooperation between the Ombudsman and the EIB are outlined in the Memorandum of Understanding, a non-binding document concluded in its most recent version on 9 July 2008.¹²⁵ By virtue of this MoU, should a complaint be inadmissible on the sole basis of the applicants' citizenship or residency status, the European Ombudsman uses its own-initiative power to handle complaints lodged by non-EU complainants. The Complaints Mechanism Division is obliged to inform complainants of the possibility to lodge a complaint of maladministration against the EIB with the European Ombudsman.¹²⁶ Though the Ombudsperson has proven an effective and consistent advocate for greater openness and accountability, its recommendations too are non-binding. Nonetheless, EU bodies will typically go to great length to avoid being formally charged as engaging in “maladministration”.

The Complaints Mechanism is concerned with any of the EIB Group's activities, except cases of fraud or corruption, which fall within the mandate of the Inspectorate General's Fraud Investigations Division.

AUDITING OF ACCOUNTS AND PRUDENTIAL SUPERVISION

Given that the EIB as a hybrid between bank and EU body is not subject to any prudential supervision, auditors play a crucial role in holding the bank to account on its financial accounts, alongside the EIB's need to refinance itself implying accountability to financial markets.

Pursuant to its Statute (Article 12), the EIB "endeavours to conform to best banking practice under the supervision of its Audit Committee," "applies best banking practices" and "aims to comply in substance with relevant EU bank directives and with best practice as recommended by the banking supervisors of EU Member States and by the Basel Committee on Banking Supervision." It is not in practice subject to prudential supervision under these regulations, laying a heavier burden on the Audit Committee.¹²⁷

The EIB's Audit Committee is composed of six members, rotating between the Member States. The auditors are appointed by the BoG, by unanimity, to ensure relevant expertise. The Audit Committee hires private external auditors (usually from "the Big Four" accounting firms) to review the EIB's financial reports, and provides its opinion and recommendations to the BoG which clears the EIB's accounts.¹²⁸

In addition to the procedures of its own Audit Committee, the EIB's accounts are also reviewed by the European Court of Auditors (ECA).

Article 287(3) TFEU has specific provisions for this review. The detailed modalities of access to the EIB information by the ECA are outlined in a tripartite agreement between the two institutions and the European Commission, which was renewed in September 2016¹²⁹ Similarly, the Memorandum of Understanding between the EIB and the ECA stipulates that the latter can conduct both documentary and on the spot audits.

EUROPEAN DATA PROTECTION SUPERVISOR

Regarding the protection of personal data processed by EU bodies, the EIB is accountable to the European Data Protection Supervisor (EDPS), the EU's independent supervisory authority in this field. This accountability relationship is based on Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

In 2009, the Management Committee of the EIB adopted specific rules concerning the Bank's Data Protection Officer (DPO), the specialised body tasked with enforcing the Regulation, the role of data controllers and the rights of data subjects. According to a key provision of these rules, the DPO's independence is safeguarded by the fact that this body will act "in cooperation with the EDPS and may not receive any instructions from the President of the Bank or from elsewhere regarding the internal application of the provisions of Regulation (EC) No 45/2001 or regarding the DPO's cooperation with the EDPS."

Importantly, the EDPS has several prerogatives over the EIB's application of data protection. First, the DPO may not be dismissed without the consent of the EDPS. Second, the DPO must respond to requests from the EDPS and cooperate with it at the latter's requests (or on his or her own initiative). Finally, the DPO must notify the EDPS of processing operations likely to present specific risks and submit to the EDPS an annual report on the DPO's activities. Similar obligations exist for the EIB controllers.

AARHUS CONVENTION COMPLIANCE COMMITTEE

Another form of accountability of the EIB concerns the application of the Aarhus Regulation According to the Transparency Policy (point 6.5), "any member of the public has the right to submit communications to the Aarhus Convention Compliance Committee (ACCC) against the European Union concerning the alleged non-compliance of the EIB with the Convention."

This right was exercised against the EIB. For example, in 2007 an Albanian NGO filed a complaint against the EIB by alleging that a power plant it financed in the Bay of Vlora was built without ensuring proper public participation as required by the Aarhus Convention. In what can be interpreted as an instance of accountability to the ACCC, the Bank moved to solve the matter before recourse to any review procedures were taken, by providing the requested information in full. The ACCC held that the fact that the delay did not constitute non-compliance.¹³⁰

EFSI is not only being promoted as a successful initiative to incentivise investment in a depressed economic climate. It also has a higher standard in terms of transparency and accountability to EU institutions. In view of EFSI's size, the Commission and the co-legislators have given its accountability mechanisms more thought than they have in the design of previous EU financial instruments administered by the EIB, or indeed the EIB itself. While the limitations of the EIB Transparency Policy also apply to the case of EFSI, the proactive transparency of the EFSI governing bodies and formal accountability to the co-legislators and notably the Parliament are certainly something that other EIB bodies can regard as best practice.

Article 20 of the Regulation formally submits EFSI to audit by the European Court of Auditors, while Article 21 describes the anti-fraud measures, including OLAF's competence. OLAF may carry out investigations, on-the-spot checks and inspections in accordance with relevant national legal frameworks. Financing agreements shall include, if necessary, appropriate recovery measures in cases of fraud, corruption or other illegal activity.¹³¹ The EFSI Regulation imposes specific notification obligations on the EIB with regard to possible instances of fraud, corruption, money laundering or any other illegal activity that may affect the financial interests of the Union.

The main reason for higher standard of accountability to the EU institutions is EFSI's use of the EU budget. Given strong prior Member State and Commission involvement, the novelty is a key role for the European Parliament. The contours of EFSI accountability are as follows:

First, there are comprehensive reporting requirements on EFSI prepared by the European Commission, the EIB and external actors.¹³² Reporting obligations provide for the evaluation of operations financed by EFSI with a view to assessing their relevance, performance and impact, including their "additionality" and added value, as well as to identify aspects that could improve future activities.¹³³ The report, including an assessment of compliance with the requirements on the use of the EU guarantee and containing key performance indicators as provided for in the regulation, is to be submitted to the European Commission every six months.¹³⁴ Substantive requirements are in place regarding the format, publication and type of assessment of the report.

Second, unlike in the case of the EIB, the European Parliament has proper oversight competences within the EFSI accountability framework. Article 17 of the EFSI Regulation institutes the compulsory nature of oral hearings, written responses to questions and an agreement concerning the exchange of information, including for the selection of the EFSI Managing Director.

Beyond the need to make investment decisions taken by the Investment Committee public and accessible, the EIB is further required to submit twice a year to the European Parliament, the Council and the Commission a list of all decisions of the Investment Committee rejecting the use of the EU guarantee, subject to strict confidentiality requirements. Moreover, the EP can at any time hold hearings with the EFSI Managing Director on the performance of the latter. The Managing Director is legally bound to reply swiftly – orally or in writing – to questions addressed to him by MEPs. However, the Commission unilaterally appoints three out of four members of the Steering Board, thus removing this critical part of governance from parliamentary oversight.

↓ ***Parliamentary oversight of the EFSI can be further bolstered by granting the Parliament a stronger say over the composition of the EFSI Steering Board, to add a measure of scrutiny over the Commission's appointments.***

Finally, there are few but specific requirements related to broader accountability to stakeholders, i.e. citizens, prospective investors and civil society watchdogs. While stakeholder consultation is foreseen by the EFSI regulation, it is difficult for stakeholders – investors, civil society groups, but even the Parliament – to effectively hold EFSI accountable without knowing the details of the scoreboard of indicators used. This point is of particular importance should EFSI be used as a blueprint for further investment vehicles, such as EU's newly-announced External Investment Plan, which is set to use a similar leveraged structure to guarantee investment projects outside the Union.

↓ ***Make the EFSI scoreboard of indicators publically available.***

The EFSI Regulation provides that prior to creating the transparent "pipeline" of current and future projects (European Investment Project Portal or EIPP), it falls to the Commission, with the participation of the EIB, to carry out appropriate consultations with Member States, experts and stakeholders.



ACCOUNTABILITY (PRACTICE)

The multitude of institutions the EIB is accountable to sets it apart from other multilateral lenders such as the World Bank. In practice, the EIB is not only accountable to the Commission and the Member States, but equally answers to the European Parliament, attending hearing and addressing questions. This arrangement should be formalised, including an EIB commitment to react to parliamentary recommendations. The EFSI regulation brings stronger EU-level accountability than previous financial instruments the EIB administers on behalf of the EU. EFSI accountability can be further strengthened by diversifying its Steering Board and publishing its scoreboard of indicators.

EUROPEAN INVESTMENT BANK

The previous section showed that the EIB is embedded in a specific European legal framework requiring higher democratic standards than in the case of most multilateral (as opposed to national) development banks. In practice, accountability to EU institutions is managed mainly through the EIB Brussels office which is attached to the EIB's General Secretariat (a liaison body) and through its Luxembourg-based Policy Support Department.

The EIB already interacts regularly with the European Parliament. Although not legally obliged, the President appears at least once a year before the Parliament, to deliver a stylized narrative of the annual report and hear the suggestions made by MEPs. In 2015, for example, the EP asked the President to better target EIB funds to projects that had long-term effects and stood to maximize employment creation and sustainable development.¹³⁵ The Parliament publishes transcripts of MEPs' questions and the President's answers.

The President also appears before various EP committees and exchanges of views take place regularly throughout the year. For example, in 2014 and 2015 the EP committees on trade, on budgets, on economic and monetary affairs and on regional development together made an average of twenty suggestions to the EIB based on the bank's general and activity-specific annual reports.¹³⁶ The suggestions covered a broad range of topics, from economic policy to the bank's governance, transparency and control frameworks. Moreover, staff at the EIB representation in Brussels have regular interactions with EP services.

As of 2016 there were ongoing internal discussions – rather than an explicit pledge – to strengthen this practice, specifically on whether the EIB President should emulate the ECB President's quarterly hearings before the EP and take up a formal obligation to address written questions within a fixed time frame.

In line with the longstanding efforts of the European Parliament's Committee on Budgetary Control, parliamentary oversight should apply to previous financial instruments in which the EIB manages funds derived from the EU budget, including but not limited to the External Lending Mandate, the Connecting Europe Facility, and Project Bonds Initiative. Formalising an EIB accountability for these programmes could be accomplished in the same inter-institutional EIB-EP agreement.

Finally, while formal accountability to the European Parliament is lacking, in practice the EIB is responsive to oral and written questions. However, EP reports on the EIB contain repeated calls that this arrangement to be formalised, alongside more specific recommendations. We join the MEPs in stating that comprehensive parliamentary oversight, including at the European level, is a basic standard of accountability and, therefore, of the democratic legitimacy of the EU. This principle should be reflected in a revamped EP-EIB relationship along the lines suggested in the previous section. Pending the entry into force of such an agreement, the EIB should unilaterally start the practice of addressing the status of implementation (or reasons why this may not be feasible or desirable) of each recommendation made to the EIB in the Parliament's resolutions. This will not only increase the EIB accountability to the Parliament, but also help address possible misconceptions as to the feasibility of individual recommendations.

The Ombudsman reports show high level of compliance with recommendations made. In line with the EIB Complaints Mechanism Policy, the EO has regular exchanges with the Complaints Mechanism Division, which is responsible for liaising with the Ombudsman on complaints against the EIB Group. The Ombudsman meets with the EIB Inspector General and senior staff of the EIB Complaints Mechanism at least once a year. Close relationship between the respective Secretaries General of the EO and EIB has been established as well as via specialised operations including the update/review of EIB internal policies.¹³⁷

Regarding the European Anti-Fraud Office (OLAF), we found that it does indeed play the role of a second layer to the EIB's own integrity mechanisms, with the Inspectorate General of the EIB and its Fraud Investigations Division acting as the first instance, as set out in Article 10 of the EIB Investigation Procedures.¹³⁸ In 2003, the CJEU held that notwithstanding the existence of control mechanisms specific to the EIB, OLAF can investigate alleged wrongdoing at the Bank. The EIB's Anti-Fraud Policy characterises the cooperation as a "close partnership" and does not distinguish between the access to information, documents etc. between OLAF and the EIB's IG/IN.

Beyond the importance of having an in-house investigations capability, IG/IN acts as a first filter, while promptly notifying OLAF of any opened investigations and submitting quarterly confidential status reports with an overview of all matters under consideration, enabling OLAF to itself determine whether cases should be opened. The measure of outside scrutiny can strengthen the standing and independence of IG/IN within the bank, if case this were necessary, and explicitly enables whistleblowers and other complainants to choose whether to address the EIB or rather an external authority. In practice, there is a regular pipeline of cases between IG/IN and OLAF, and regular contacts are underpinned by an Administrative Cooperation Arrangement between the Bank and OLAF, including joint 'on the ground' fact-finding missions, though both EIB and OLAF rely on cooperation with and responsiveness of national judicial authorities, which interviews showed can be inconsistent across Member States.

Regarding the Commission, accountability is organized on several levels. First, the EU bank is tasked to help the Commission fulfil its objectives and coordinate with it in order to ensure the coherence between its investment decisions and the EU's policy objectives. In practice, DG ECFIN is the Commission body most prominently represented on the EIB's governing bodies, but exceptions exist and Commission policy is mainstreamed across Directorates-General through regular inter-service consultations.

As regards the Complaints Mechanism, between 2012 and 2014, 47 complaints were registered annually on average. From the total backlog, around 100 complaints were dealt with each year, with complaints regarding governance, procurement and environmental/social impact representing the largest share. During the past few years, a large percentage of complains received "no grounds for allegations" responses (30-40%). In 2014, the last year for which we have the CM activity report, the CM notes that 16 % of complaints could be concluded with a friendly solution following successful mediation efforts. The CM can side with the complainant against the Bank in a nontrivial number of cases. In 2014,

20% of complaints resulted in recommendations for improvement, up from 9 % in 2012.¹³⁹ At the same time, in five cases complaints were escalated to the European Ombudsman, or just over 10 % of the number of new cases filed with the CM in 2014.

An instructive case of the functioning, in practice, of the Complaints Mechanism and its dynamic with the European Ombudsman as regards appealing a negative EIB decision on access to documents can be found in the Mopani case study.

In our view, the evolving accountability standards and the new role that the EIB plays under EFSI and other financial instruments in increasing the impact of the EU's budget open up new opportunities for improvement in the EIB's accountability framework, and it should be considered if the resources at the disposal of the EIB Complaints Mechanism, Office of the Chief Compliance Officer and the Inspectorate General should be increased.

EFSI

EFSI is accountable to the Ombudsman, OLAF and the European Court of Auditors to the same extent that the EIB is. Regarding the European Parliament, we found that the EFSI Steering Board reported to the MEPs in detail regarding its compliance with the objectives set out in the Regulation. These reports are to be issued on an annual basis and the first one (from 2015) was made publicly available pursuant to the existing legal framework.

Since it was founded, the EFSI Steering Board organized meetings with watchdogs and other citizen groups defined as "relevant stakeholders." However, even though the Steering Board minutes clearly call for such an announcement and open invitation, the consultation hearing had no announcement on the website and the guidelines given by the Board were not fully observed. The EFSI Secretariat took the view that existing EIB and EC stakeholder lists were contacted. This fits the description of an invitation-only consultation and certainly did not include a number of stakeholders commonly represented at other civil society engagement events, which the EIB organises throughout the year. With a view to broadening stakeholder engagement, such information should generally be made available online and disseminated via other channels, regardless of specific Steering Board instructions to this effect. In our view, the first consultation was therefore not inclusive and falls well short of the European Commission's minimum standards on public consultations.¹⁴⁰ Even more so since the Commission's Better Regulation Agenda puts even more emphasis on orderly and thorough stakeholder consultation.

METHODOLOGY

Our methodology is based on the adaptation of Transparency International's National Integrity System (NIS) assessments, taking into account the characteristics of an international financial institution such as the EIB. The NIS is the methodological hallmark of TI and is based on a holistic approach to integrity. Its original main aim was to evaluate the strengths and weaknesses of the formal integrity framework of different institutions and then assess its use in practice with a view to making recommendations for improvement. Used in over 70 countries since 2001, the NIS framework looks at thirteen key functions in a state's governance structure: the legislative; executive; judiciary; public sector; electoral management body; ombudsman; law enforcement agencies; supreme audit institution; anti-corruption agencies; political parties; media; civil society; and business.

In 2015 TI-EU published the first such study applying the NIS approach to the supranational level by looking at the structure of the EU's governance. In practice this meant an assessment of individual EU institutions and actors rather than evaluating specific governance functions.¹⁴¹ This TI report on the EU integrity system provided us with a useful template to create a bespoke analytical framework to examine the EIB.

Regarding independence, we examined the extent to which the EIB can act without interference from other actors and determine its leadership and policies. Regarding transparency, our analysis dwelt on the ability of the general public to scrutinize the decision-making and actions of the EIB, in particular those aspects where there are potential corruption risks. Our work on transparency enabled us to check how well the public can examine the integrity and accountability of the EIB itself as well as of the functioning of inter-institutional oversight functions. Concerning the assessment of the EIB's integrity safeguards in law and in practice, we looked at the extent to which the behaviours and actions of the EIB staff are consistent with the Bank's own external and internal legal frameworks, in particular with a view to risks of fraud and corruption.

Finally, we looked at accountability, or the extent to which the EIB can be held responsible by EU institutions, Member States and the broader public for executing its mandate adequately. We attempted to reveal the nature of the relationships between the EIB and other EU institutions with regard to safeguarding integrity via the interplay of independence and accountability indicators. Throughout each of these sections, we took a close look at the scope of the involvement of the EIB in supporting

the overall integrity of the EU governance via cooperation with other institutions such as the OLAF, the Ombudsman or the European Court of Auditors.

Our research unfurled from May 2016 until October 2016 and was carried out in four phases 1) Desk research consisting of gathering relevant legal and policy texts, institutional reports, and secondary sources. 2) Structured interviews with EIB staff. The interviews used a bespoke questionnaire based on the preliminary findings of our desk research. Their main function was to validate the findings from the desk research phase and gather knowledge on actual institutional practices. The cooperation with the EIB was excellent and we were able to organize interviews with high and mid-level staff without difficulty. 3) Follow-up correspondence with EIB staff. An EIB representative answered thirty questions by email following the interviews and the completion of the main part of the desk research. 4) Incorporation of extensive feedback from the TI-EU Advisory Group and stakeholders, including the opportunity for the EIB itself to comment on the draft report. We are grateful for their help in weeding out factual mistakes.

CASE STUDY: MOPANI

Three shades of Transparency Policy

Allegations about tax irregularities at the firm Mopani Copper Mines in Zambia highlight just how important a clear interpretation of the Transparency Policy and a flawless handling of requests for disclosure are critical for the European Investment Bank (EIB).

The case emerged at a time when the European Union is trying to find ways to put a stop to the practice of tax arbitrage, whereby companies and individuals restructure their transactions in the most advantageous way in order to pay the least amount of tax. The case shows how important it is to have commonly agreed interpretations of an organisation's transparency policy, and how internal and external pressure had to be applied to achieve the disclosure of crucial information.

Mopani Copper Mines is a Zambia-based subsidiary of the Swiss-based Glencore International AG and Canadian mining company First Quantum Minerals. The case gained international attention on 9 February 2011 with the leak of the draft version of an audit report commissioned by the Zambian Revenue Authorities into Mopani's tax affairs. According to the EIB, the report highlighted "alleged irregularities concerning Mopani's operational costs, revenues, transfer pricing, employee expenses and overheads."¹ A coalition of NGOs² detailed "financial and accounting manipulations" for tax evasion purposes and highlighted the fact that Mopani's ownership chains included two jurisdictions commonly identified as tax havens, Bermuda and the British Virgin Islands.



The EIB also had to look into the allegations, as it had approved a loan for the company in 2005. In response to the leak, the EIB acted swiftly and proactively: in March 2011, the Bank initiated a formal investigation by its independent Inspectorate General, and sent a mission to Zambia where investigators met with the Zambian Revenue Authority and Mopani officials. In line with its Anti-Fraud Policy, the EIB informed the EU's anti-fraud office OLAF about the allegations from the report as soon as it started its investigations.

The Bank's review, which ran from 1 August until 17 August, 2011, looked into "irregularities with operational costs, revenues, transfer pricing and other costs"³ and may, if proven, have triggered early repayment of the EIB loan. The Bank's then President, Philippe Maystadt, further sought to assuage public concern by assuring the European Parliament that EIB services had been instructed not to consider Glencore funding applications any longer,⁴ though this determination was made on the basis of other cases and is no longer valid: Glencore does not appear among the three entities debarred by the EIB as of October 2016.

After their fieldwork in Zambia was completed, the EIB's investigators submitted their conclusions to the Management Committee in November 2011. One year later, UK-based NGO Christian Aid requested access to the Inspectorate General's investigation report.

EIB REFUSAL TO RELEASE INVESTIGATION REPORT

Unfortunately for the complainant, the EIB's Management Committee decided to adopt a very narrow interpretation of its Transparency Policy and EIB officials informed the complainant that the EIB chose not to release the investigation report. They simply stated that the EIB "does not publish its reports regarding specific investigations carried out by the Bank's Inspectorate General".⁵ Indeed, in so doing, the EIB "has not explained to the requester why the restriction was necessary to protect the purpose of this investigation".⁶

Christian Aid filed a complaint to the EIB's Complaints Mechanism to contest the bank's decision, whose June 2014 report recommended that the EIB release the investigation report.

Additionally, the complainant turned to the Ombudsman in February 2014, who asked the EIB either to release the report or to explain, with reference to the exceptions in the EIB's Transparency Policy, why making the report public "would specifically and effectively undermine the protection of an interest relied upon".⁷

On 25 July 2014, the Management Committee replied to the Complaint Mechanism's report on the matter and maintained its refusal to release the investigation report. This time the EIB also provided an update, indicating that the loan had been repaid by the borrower to the EIB in 2012, at the borrower's request, and that OLAF, which had opened its own investigation, had also closed the file because no EU budget funds were involved and the EIB no longer had any contractual relations with Mopani/Glencore. The case, therefore, was closed as far as the EIB was concerned.

OMBUDSMAN SEES EVIDENCE OF MALADMINISTRATION

In its December 2014 draft recommendation, the Ombudsman expressed dissatisfaction with this reaction and noted that the EIB had been wrong to refuse to grant access to its investigation report into allegations of tax evasion. As such, it gave the EIB two choices: release a redacted version of the report or, if this was deemed problematic, provide a meaningful summary and explain why "releasing the report would specifically and effectively undermine the protection of an interest relied upon". A summary of this kind would be in keeping with the exceptions in point A.5.2 of the EIB's 2010 Transparency Policy. If not, the EIB's initial refusal would be deemed an act of maladministration, given the lack of sufficient reasoning provided for the decision.

Specifically, the Ombudsman noted that the EIB relied on a general presumption of non-disclosure of documents and information relating to its anti-fraud investigations (Article 5.2.3 of Part A of the 2010 Transparency Policy). The Ombudsman deemed this to be an erroneous interpretation of the Transparency Policy because such a presumption of non-disclosure should only be invoked as long as the investigation was still ongoing. Given that the investigation had been closed in November 2011 and the request for the release of the report was filed a year later, this non-disclosure presumption could not be used as valid argument.

Moreover, the Ombudsman added that, in accordance with Article 5.2.3 of part A of the 2010 Transparency Policy, the consideration of a request for the release of information had to factor in whether there was "an overriding public interest" in disclosure. In practice, this would have meant that "the general public should be able to know, once the investigation is closed, and to the extent that disclosing the information in question does not undermine the protection of commercial interests, the outcome and at least the essential findings of such an investigation, in particular when considerable amounts of public money, as is the case with most of the EIB's lending operations, are involved". Finally, the Ombudsman considered that the update "contained no

meaningful information concerning the findings of the investigation”.⁸

EIB COMPLAINT MECHANISM BACKS THE OMBUDSMAN

It is interesting to note the opposition to non-disclosure within the EIB. The Complaints Mechanism did confront the Management Committee with a different view than the one that informed the previous two ‘no release’ decisions by the Bank’s services. The Complaints Mechanism stated its preference to disclose a redacted version of the investigation report “following a review of the parts of this document which fall within the policy-based exceptions, in consultation with the stakeholders concerned”. When giving their reasons for this position, the Complaints Mechanism made many of the same critiques later taken up by the Ombudsman,⁹ and stated that, if the Bank could not disclose the report, it could at least provide the complainant with a summary of the investigation and its outcome.

Faced with this dual pressure from the Ombudsman and the Complaints Mechanism, the EIB’s Management Committee agreed to provide a summary of the report. The summary released by the EIB contained additional information concerning the investigation, mainly an account of the difficulties encountered by the EIB’s Inspectorate-General investigating in Zambia due to what appeared to be obstruction by local entities.

The summary of the report was posted on the EIB website in December 2014, i.e. nearly a year after the complainant involved the Ombudsman in the case.

In contrast to its initial terse refusal, the EIB now took the time to explain why the release of the report was not a feasible option: (1) risks regarding the protection of privacy and integrity of a number of individuals who were

identified/identifiable in the report, (2) risks regarding the protection of legitimate commercial interests as they related to Mopani’s contractual relationship with the EIB, (3) investigative risks deriving from revealing the investigation methods of the Inspectorate General of the EIB, (4) and even political risks regarding the relations between the Zambian state and the EIB.

OMBUDSMAN SEES EIB AS FAILING TO PRODUCE A ‘MEANINGFUL SUMMARY’

While this reaction met the more loosely formulated second recommendation of the Complaints Mechanism, it fell short of the Ombudsman’s suggestion of a “meaningful” summary.¹⁰

The Ombudsman’s March 2015 Decision stated that the EIB had to consider whether there was “an overriding public interest” in the disclosure of its investigation report within its duties to observe the protection of commercial interests. The EIB response was inadequate in that it merely asserted that disclosure would damage legitimate interests rather than providing some reasoning to support this.

According to the Ombudsman, the EIB has not adequately justified its reliance on the exception in its own Transparency Policy which protects international relations. The Ombudsman argues in its opinion that the “EIB must nevertheless justify its conclusion that disclosure of the report, or any portions of it, would undermine the public interest as regards international relations”.¹¹

Furthermore, the summary was not meaningful in that the EIB did not reveal the nature of the information that investigators had sought in Zambia, and the nature of the documents that they were able to assess.

In short, the dual actions of the Ombudsman and Complaints Mechanism exerted enough pressure to move the Management Committee to release a summary of the investigation, while the external pressure from the Ombudsman appears to have mattered the most.



Critically, the Ombudsman challenged not only the decision to release a redacted version of the investigations, but also the nature of the summary. The main reason concerned the issue of how the report had dealt with the allegations of tax evasion. Having read the investigation report, the Ombudsman found that “it was not possible to comprehensively prove or disprove the allegations raised in the Leaked Draft Report”.

By contrast with the Ombudsman’s enduring criticism, the EIB’s Complaints Mechanism was satisfied with the summary provided by the Management Committee

THREE MAIN CONCLUSIONS CAN BE DRAWN FROM THE MOPANI CASE

The interpretation of the EIB’s Transparency Policy is not straightforward. The EIB Management Committee, the EIB Complaints Mechanism and the European Ombudsman acted based on three distinct interpretations as to when the EIB could legitimately reveal information requested by third parties.

The Management Committee will reverse its decisions if pressure is applied simultaneously by coalitions of internal and external critics.

The differences in interpretation of the EIB’s Transparency Policy indicates that the EIB is not a unitary actor with a homogeneous legal culture regarding transparency. It also attests to the Complaints Mechanism’s effective independence, while the final decision remains with the Management Committee.

TIMELINE

- 2005 EIB approves loan for Mopani Copper Mines
- 9 February 2011: A draft version of a pilot audit report commissioned by the Zambian Revenue Authorities into Mopani’s tax affairs is leaked.
- April 2011: A coalition of NGOs file a complaint against Mopani with the OECD.
- May 2011: EIB launches its own independent investigation into the allegations of tax irregularities.
- 23 May 2011: EIB President asks the EIB services to stop accepting demands for financing from Glencore (one of the owners of Mopani Copper Mines).
- 17 August 2011: EIB finishes its investigation.
- November 2011: EIB investigators submit their conclusions to the Management Committee.
- November 2012: A UK-based NGO (Christian Aid) requests access to the EIB Inspectorate General’s investigation report.

- June 2013: After the EIB’s refusal to disclose the report, Christian Aid files a complaint to the EIB’s Complaints Mechanism.
- February 2014: Christian Aid complains to the Ombudsman due to the lack of a positive response from the Complaints Mechanism.
- 25 July 2014: The Management Committee replies to the complaint of 24 June 2013.
- December 2014: The Ombudsman issues its Recommendation.
- January 2015: A summary of the report is posted on the EIB website in January 2015.
- March 2015: The Ombudsman issues its Decision.

ENDNOTES

1 EIB, “Mopani Copper Project. Summary of the investigation of the Inspectorate General Fraud Investigation (IG/IN)”, January 29, 2015, http://www.eib.org/attachments/press/mopani_copper_mines_summary_of_the_main_findings_en.pdf

2 According to The Guardian (August 20, 2014), “many organisations, including Christian Aid, Counter Balance, Tax Justice Network Africa, Oxfam International and Eurodad have urged the bank to publish its investigation into the tax allegations in Zambia.” <https://www.theguardian.com/global-development/poverty-matters/2014/aug/20/glencore-report-european-investment-bank-secrets>

3 EIB Complaints Mechanism Report, Complaint SGA/2013/01, p.5 at <http://www.eib.org/attachments/complaints/2014-07-25-letter-from-eib-sg-to-r-baird-final-reply-annex-1-conclusions-report.pdf>

4 EIB Complaints Mechanism Conclusion Report, Complaint SG/A/2013/01 June 2014, p. 12, <http://www.eib.org/attachments/complaints/2014-07-25-letter-from-eib-sg-to-r-baird-final-reply-annex-1-conclusions-report.pdf>

5 Citation by the Complaints Mechanism Conclusion Report, p. 13

6 Citation by the Complaints Mechanism Conclusion Report, p. 5

7 Decision of the European Ombudsman closing the inquiry into complaint 349/2014/OV against the European Investment Bank (EIB), March 17, 2015, paragraph 6, <http://www.ombudsman.europa.eu/cases/decision.faces/en/59317/html.bookmark>

8 As summarized by the Ombudsman decision

9 Complaints Mechanism Conclusion Report, June 2014

10 European Ombudsman, “Decision of the European Ombudsman closing the inquiry into complaint 349/2014/OV against the European Investment Bank (EIB),” March 17, 2015

11 Ombudsman decision, paragraph 30

ENDNOTES

1. Article 309 TFEU lays down the task of the EIB to contribute to the balanced and steady development of the internal market in the interest of the Union. Additionally, the EIB is expected to contribute to the social, economic and territorial cohesion of the European Union.
2. For a detailed analysis of the EIB mandate as a financier of European policies see Field, Brian, Eugenia Kazamaki Ottersten, and Maria K. Sioliou. "Funding integrated territorial development: The role of the European Investment Bank in supporting European policies." *Journal of Urban Regeneration & Renewal* 9.3 (2016): 221-234.
3. For a historical overview see Griffith-Jones, Stephany, and Judith Tyson. *The European Investment Bank: Lessons for Developing Countries*. United Nations University, World Institute for Development Economics Research, 2013.
4. See Griffith Jones et al.
5. Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments
6. Myant, Martin, Juncker's investment plan: What results can we expect?, *Swedish Institute for International Policy Studies*, 31 (2015): page 2.
7. According to the EFSI Regulation (para 31), The funds did not depend extensively on the EU budget, however. It had only EUR 16 bn guarantee from the EU budget and a EUR 5 bn contribution from the European Investment Bank (EIB). These allocations were to serve as leverage to raise the rest of the money from Member States and on capital markets. Together, this is expected to generate EUR 60bn in additional EIB investments which, in turn, is expected to further generate a total of EUR 315 bn in investment within three years.
8. Article 2(6) of the EFSI Regulation defines mid-cap companies as having less than 3,000 employees
9. Commission Communication: Europe investing again, COM(2016) 359 final.
10. http://europa.eu/rapid/press-release_MEMO-16-2983_en.htm?locale=en
11. Para. 14, case 110/75 Mills v EIB [1976] ECR 955
12. Hachez/Wouters, 2012, p.50
13. C85/86 Commission v Board of Governors, [1988] ECR 1281, para 28
14. Article 4 and 5 of EIB Statute
15. Article 7 of EIB Statute
16. Article 7(2) Statute
17. Article 5, paragraph 10 of the 2015 Transparency Policy
18. http://www.transparencyinternational.eu/wp-content/uploads/2014/10/2014-09-26_TI-EU_contribution_EIB_trans_policy_consult.pdf
19. EIB Code of Conduct, Article 3.4.1
20. Articles 1 and 309 of the EIB Statute.
21. Article 19 EIB Statute
22. The EC-EIB agreement governing the management of EFSI is available online http://www.eib.org/attachments/strategies/agreement_on_the_management_of_the_european_fund_for_strategic_investments_and_on_the_granting_of_the_eu_guarantee.pdf
23. Article 7(9) EFSI Regulation
24. <https://www.kfw.de/KfW-Group/About-KfW/Vorstand-und-Gremien/Verwaltungsrat-und-seine-Aussch%C3%BCsse/>
25. Griffith-Jones et al., Stephany and Judith Tyson. *The European Investment Bank: Lessons for Developing Countries*. United Nations University, World Institute for Development Economics Research, 2013
26. Pursuant to Article 23.a (2) of the EIB Rules of Procedure, of 1 September 2016
27. Article 1 of Regulation (EC) N° 1049/2001.
28. Article 1, Regulation 1367/2006.
29. EIB Environmental and Social handbook at <http://www.eib.org/infocentre/publications/all/environmental-and-social-practices-handbook.htm>
30. This was done in accordance with Article 18(1) indent 9 of Rules of Procedure, which concerns access to documents. For the consultation process see <http://www.eib.org/about/partners/cso/consultations/item/public-consultation-on-eibs-transparency-policy-2014.htm>
31. Article 5.16-5.34
32. Para. 4.1. TP
33. <http://itcointergroup.eu/file/2014/11/Press-statement-on-the-EIB%C2%B4s-new-transparency-policy.pdf>

34. <http://www.transparencyinternational.eu/2014/10/eib-transparency-must-move-forward-not-back/>
35. <http://www.transparencyinternational.eu/2014/10/eib-transparency-must-move-forward-not-back/>
36. The draft version of Transparency Policy included a distinction between administrative and non-administrative information pursuant to the wording of the Treaty Article 15 TFEU. Following intervention by the Transparency International EU, letter of 26 September 2014, this wording has been removed.
37. Data protection under Regulation (EC) N° 45/2001. I
38. See para. 5.5.
39. <http://www.ombudsman.europa.eu/resources/otherdocument.faces/e,/60106/html.bookmark>
40. Para. 3.8 Transparency Policy
41. <http://www.eib.org/infocentre/registers/index.htm>
42. EFSI Regulation (Article 7(3), second sub-paragraph); EFSI Agreement (Article 4.10); Rules of Procedure (Article 13.2)
43. EFSI Rules of Procedure, Article 10.
44. EFSI Regulation, Article 7.10.
45. EFSI Regulation (Article 19), the EFSI Agreement (Article 29) and the Steering Board Rules of Procedure (Article 13.1).
46. The list is organized by country and is available at <http://www.eib.org/products/lending/intermediated/list/index.htm>
47. Article 19 EFSI Regulation
48. Bankwatch, Missing in Action, November 2010, <http://bankwatch.org/sites/default/files/missinginactionEIB.pdf>
49. EFSI Regulation, Article 16 (2).
50. Article 7(3) EFSI Regulation
51. http://siteresources.worldbank.org/CSO/Resources/ConsultationsSourcebook_Feb2007.pdf
52. EIB, “Operational Plan 2015-2017”, http://www.eib.org/attachments/strategies/cop2015_en.pdf
53. EFSI Agreement, Article 29.
54. Letter of the European Ombudsman to the EIB, February 22, 2016.
55. (<http://www.eib.org/infocentre/publications/all/2015-statistical-report.htm>)
56. <http://www.eib.org/infocentre/publications/all/3pa-report-2015.htm>
57. http://www.eib.org/attachments/country/eib_rem_annual_report_2015_en.pdf
58. <http://www.eib.org/infocentre/publications/all/ex-post-evaluations/index.htm>; http://www.eib.org/attachments/general/reports/sustainability_report_2015_en.pdf
59. <http://www.ombudsman.europa.eu/resources/otherdocument.faces/en/64158/html.bookmark>
60. Letter from the Ombudsman to EIB, February 22, 2016
61. <http://www.transparencyinternational.eu/2014/10/eib-transparency-must-move-forward-not-back/>
62. Directive 2015/849
63. <https://www.gov.uk/government/news/public-register-to-boost-company-transparency>
64. <https://www.wiltonpark.org.uk/wp-content/uploads/WP1502-Comments-on-beneficial-ownership-transparency-and-open-contracting-and-public-procurement-at-Anti-Corruption-Summit.pdf>
65. DECISION No 466/2014/ of 16 April 2014 on granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the Union
66. For more detailed information on curbing corruption in public procurement, refer to TI’s compilation of best practices under http://www.transparency.org/whatwedo/publication/curbing_corruption_in_public_procurement_a_practical_guide
67. See, Implementing the OECD Principles for Integrity in Public Procurement, p. 22, OECD, http://www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement/why-clean-public-procurement-matters_9789264201385-3-en;jsessionid=951fbj6h46u4a.x-oecd-live-01
68. http://www.eib.org/attachments/thematic/procurement_en.pdf
69. http://europa.eu/rapid/press-release_IP-16-1349_en.htm
70. Palan, Ronen, and Duncan Wigan. “Herding cats and taming tax havens: The US strategy of ‘not in my backyard’.” Global Policy 5.3 (2014): 334-343; Seabrooke, Leonard, and Duncan Wigan. “Powering ideas through expertise: professionals in global tax battles.” Journal of European Public Policy 23.3 (2016): 357-374.
71. Anti-Money Laundering and Combating the Financing of Terrorism
72. Letter from EIB to Counter Balance, January 2015, pasted on the final pages of that NGO’s report: <http://www.counter-balance.org/wp-content/uploads/2015/04/towards-responsible-taxationWEB.pdf>
73. The fourth Capital Requirement Directive
74. Paragraph 67, European Parliament resolution P8_TA(2016)0200 of 28 April 2016 on the European Investment Bank (EIB) – Annual Report 2014
75. Commission Communication on an External Strategy for Effective Taxation, COM(2016) 24 final
76. Steering Board, Document 05-2016, January 28, 2016.

77. EIB Steering Board minutes, at <http://www.eib.org/efsi/governance/efsi-steering-board/minutes.htm>
78. http://www.eib.org/attachments/strategies/efsi_steering_board_stakeholders_consultation_orientation_implementation_of_efsi_investment_policy_en.pdf
79. Letter of the European Ombudsman to the EIB, February 22, 2016.
80. Counter Balance, “What’s New?” July 2016, <http://www.counter-balance.org/wp-content/uploads/2016/07/What%E2%80%99s-new-in-the-Investment-Plan-for-Europe.pdf>
81. e.g. <http://www.eib.org/infocentre/register/all/64601742.pdf>
82. EFSI Steering Board Rules of Procedure, Article 7.
83. Reuters: Exclusive: EU’s richest countries getting lion’s share of bloc’s investment plan, <http://www.reuters.com/article/us-eu-investment-report-exclusive-idUSKCN1241PZ>, October 2016
84. COM(2015) 361 final, “Working together for jobs and growth: The role of National Promotional Banks (NPBs) in supporting the Investment Plan for Europe”, July 22, 2015, at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52015DC0361>
85. <http://www.eib.org/efsi/index.htm>
86. Commission Communication on The role of National Promotional Banks (NPBs) in supporting the Investment Plan for Europe, COM(2015) 361 final, July 2015
87. For a more in-depth argument on this point see Cornel Ban and Jazmin Sierra, “Bringing the State Back into Finance: National Promotional Banks in the European Union,” policy paper for the Boston University’s Center for Global Economic Governance Initiative (November 2016).
88. http://www.eib.org/attachments/strategies/efsi_steering_board_efsi_strategic_orientation_en.pdf
89. Code of Conduct, Article 2.4.2.
90. Code of Conduct, Article 2.4.7.
91. Code of Conduct, Article 2.2.1.
92. Code of Conduct, Article 2.2.3.
93. Code of Conduct, Article 2.4.3.
94. Code of Conduct, Article 2.4.4.
95. Code of Conduct, Article 1.5
96. Code of Conduct, Article 1.5.1.
97. Anti-Fraud Policy, Article 9.
98. Code of Conduct, Article 1.5.2.
99. <http://www.eib.org/infocentre/publications/all/eib-s-whistleblowing-policy.htm>
100. Transparency International, International Principles for Whistleblowing Legislation, 2013, http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation
101. <http://www.eib.org/infocentre/publications/all/staff-regulations.htm>
102. http://europa.eu/rapid/press-release_IP-14-2131_en.htm
103. <http://www.eib.org/about/procurement/index.htm>
104. <http://www.ombudsman.europa.eu/en/press/release.faces/en/69172/html.bookmark>
105. <http://siteresources.worldbank.org/EXTCORPPROUREMENT/Resources/VendorFAQs.pdf>
106. http://www.eib.org/attachments/general/reports/inspectorate_general_fraud_investigations_annual_report_2012_en.pdf
107. <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0200&language=EN>
108. Letter from the Ombudsman to the President of the EIB on conflict of interest issues - Follow-up to her letter on proactive transparency, July 22, 2016.
109. Lavena, Cecilia Florencia. “Whistle-blowing individual and organizational determinants of the decision to report wrongdoing in the federal government.” *The American Review of Public Administration* 46.1 (2016): 113-136.
110. Panichi, James. “EU agencies faulted for not protecting whistleblowers”, December 2015, Politico
111. See section V of the EIB Whistleblowing Policy for details
112. <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/59102/html.bookmark>
113. http://ec.europa.eu/budget/explained/management/protecting/protect_en.cfm
114. <http://www.ebrd.com/ineligible-entities.html>
115. <http://www.eib.org/infocentre/press/news/all/eib-and-fir-advisors-s-l-and-squatina-business-inc-settlement-agreement.htm>
116. European Parliament Resolution, 28 April 2016 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0200+0+DOC+PDF+V0//EN>
117. Article 27 EIB Statute
118. Article 271 and especially Article 271(1)(b) TFEU.
119. See Case T-460/93, Etienne Tête and Others v. European Investment Bank.
120. Case T-461/08, Evropaïki Dynamiki v. EIB, judgment of 20 Sept. 2011, see also N. Hachez and J. Wouters, ‘A

Responsible Lender? The European Investment Bank's Environmental, Social and Human Rights Accountability', (2012) 49 Common Market Law Review, 47-96.

121. Pursuant to the Memorandum of Understanding with the European Ombudsman, the latter will open own-initiative inquiries to assist non-EU citizens wishing to escalate their complaint beyond the Complaints Mechanism.

122. CM Principles, Terms of Reference and Rules of Procedure, p.5.

123. Article 6, Complaints Mechanism Policy. Complainants may decline to make use of the "confirmatory complaint stage" to invoke the European Ombudsman, http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf

124. Article 2.II of Memorandum of Understanding between the EO and EIB of

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

126. EIB Complaints Mechanism, Principles, terms of Reference and Rules of Procedure, 2010.

127. EIB, Corporate Governance Report, 2014, p. 18.

128. European Court of Auditors: Gaps, overlaps and challenges: a landscape review of EU accountability and public audit arrangements, 2014

129. The agreement was done on 27 October 2003, with subsequent renewals for period of four years, last one being on 26 September 2016, <http://www.eib.org/infocentre/publications/all/tripartite-agreement.htm>

130. ACCC, European Community ACCC/C/2007/21; ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009

131. Article 21 EFSI Regulation

132. Article 16 and 18 EFSI Regulation

133. Recital 47 EFSI Regulation

134. Article 16(1) EFSI Regulation

135. The summary of the EP debates leading up to the vote on the EIB Annual Report presented by the Parliament is available here: <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1435280&t=e&l=en>

136. <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2016-0050&language=EN>

137. European Ombudsman, "Putting it Right? - How the EU institutions responded to the Ombudsman in 2014", December 2015, at <http://www.ombudsman.europa.eu/en/cases/followup.faces/en/61644/html.bookmark>

138. http://www.eib.org/attachments/strategies/anti_fraud_procedures_20130703_en.pdf

139. Based on EIB Complaints Mechanism Activity Report (2014), October 2015

140. <http://fra.europa.eu/en/european-commission-minimum-standards-public-consultations>

141. <http://www.transparencyinternational.eu/european-union-integrity-system-study/the-euis-report-latest-news/>

GLOSSARY

Aarhus Convention	16-19, 39, 41
Access to Documents	16, 19, 21, 39
Audit Committee	9, 32, 34, 41
Beneficial ownership transparency (BOT)	22, 25
Board of Directors (BoD)	10-12, 17, 22, 32, 36, 38
Board of Governors (BoG)	10-11, 32, 38, 41
Code of Conduct	11, 33, 32-33
Complaints Mechanism	34, 39-41, 44-45, 48-50
Cooling-off periods	31, 32, 33
Country-by-country reporting (CBCR)	24-25
Court of Justice of the EU	10, 16, 21, 39, 45
Debarment	37
EFSI Investment Committee	14-15, 19, 26, 42
EFSI Steering Board	12-14, 19, 26, 42, 45
European Commission	12, 20, 24, 33, 38, 42, 45
European Data Protection Supervisor	41
European Ombudsman	16, 19, 21, 36, 39, 44, 48
European Parliament	16, 20, 24, 36, 39, 42, 44
Fraud Investigations Division (IN)	32, 34, 36, 41, 45,
Inspectorate General (IG)	32, 34, 36, 39, 41, 45, 48
Management Committee	12, 15, 21, 32, 36, 39, 41
Transparency Policy	16, 21, 29, 39, 41, 47
Office of the Chief Compliance Officer (CCO)	24, 32, 34, 45
Whistle-blowing	31-32, 36-37

TRANSPARENCY INTERNATIONAL EU
Rue de l'Industrie 10, 1000 Brussels, Belgium
Phone: +32 2 893 24 55
Email: brussels@transparency.org
Website: www.transparency.eu
Facebook: www.facebook.com/TransparencyEU
Twitter: @TI_EU