

Civil Society joint paper

Submission to the EIB's Complaints Mechanism Review public consultation

29 September 2017

The 25 below-signed organizations appreciate the opportunity to provide comments on the draft Policy and Procedures for the Complaints Mechanism (CM) of the European Investment Bank (EIB). The revision of the CM is a crucial opportunity to strengthen the accountability of the EIB towards European institutions and citizens. Therefore, we take this opportunity to formulate the following key recommendations:

- 1. The proposed draft CM Policy and Procedures are unacceptable and, if adopted, would lead to a serious setback for the independence and effectiveness of the CM, making it almost unusable for potential complainants.**
- 2. Fundamental reforms to the existing CM Policy and Procedures are necessary in order to address the serious procedural and structural flaws of the CM.**
- 3. For those changes to take place, a more equitable and meaningful public consultation is needed: this should include a second round of consultation on a substantially revised draft that merges the Policy and Procedures.**

For a decade, civil society has been increasingly monitoring the operations of the EIB. In this regard, civil society organisations (CSOs) have demanded that the bank steps up its accountability to citizens affected by its activities inside and outside the European Union, as well as towards European taxpayers and decision-makers.

In recent years, a set of reports has assessed the functioning of the EIB's current accountability mechanism, coming to a critical conclusion: the CM is struggling to hold the EIB accountable, prevent harms and deliver remedy to project-affected communities because of procedural and structural weaknesses. More specifically, the CM's independence is jeopardized, its recommendations are not binding and it is marginalised within the EIB. While promising on paper, CSOs have acknowledged that, in practice, the CM has to be reformed to overcome the above-mentioned obstacles and fully play its role of ensuring accountability and preventing and remedying harm.

Such expectation is also the concluding observation of the report of the External Quality Review initiated by the EIB in 2015: *"To maintain and further improve the credibility and current standing of the CM among internal and external stakeholders, concerted efforts must be made by the EIB Management, its staff, and the EIB-CM staff to maintain and improve its actual and perceived independence, the transparency of its procedures and its ability to discharge its functions on a timely and effective manner. We hope that this review and the upcoming consultations will contribute to these important objectives"*. The European Parliament also sent similar signals to the EIB in resolutions adopted in 2015 (2014/2156(INI)), 2016 (2015/2127(INI)) and 2017 (2016/2098(INI)). Finally, in February 2017, the European Ombudsman (EO) sent her [comments](#) on the CM policy, highlighting the need to ensure operational independence, transparency, accessibility, timeliness, and adequate resources.

This joint civil society submission provides an analysis and distils main recommendations about the draft policy under consultation. This submission is divided in three separate papers:

- Annex A (“*Context*”) summarising the main problems with the current set-up of the CM and previous stakeholders’ positions on the matter.
- Annex B (“*Recommendations and best practices*”) is a proposal for a “model” CM policy, compiling the best practices from other independent accountability mechanisms (IAMs). It formulates recommendations to ensure that the CM is in line with its peers.
- Annex C is a proposal to revisit the Memorandum of Understanding between the EIB and the EO, that allows for an appeals process, in order to ensure heightened and pro-active scrutiny of EIB operations.

Key recommendations and areas for improvement:

1/ Strengthening the independence of the Complaints Mechanism

There is no IAM whose system has codified to such a degree the undue influence by the very actors whose actions and decisions are under review. The draft CM Procedures provide that the Inspector General will decide on admissibility of complaints when EIB Services has objected to the decision by the head of the CM.¹ Perhaps more egregiously, the CM cannot proceed to undertake a compliance review unless EIB Services or the Management Committee - the entity that is ultimately responsible for the actions under review - agrees.²

We would like to recall the following conclusion of the External Quality Review: “*We strongly urge avoiding giving responsibility for handling complaints to those against whose decisions or actions a complaint has been lodged. Doing so would be a step backwards and contradict best practice in other institutions*”.

As detailed in Annex B, the draft Policy also introduces new requirements for the CM to consult with the bank’s Services and the Management Committee in the process of investigating a complaint without similar requirements to consult with complainants. This not only undermines the fairness of the process, but it also compromises the independence of the CM in making its findings by formally establishing a process for bank management to control the contents of CM reports at each stage before sharing with the complainant.

It is not possible to label the CM as “independent” when it does not even have the authority to decide on the **admissibility of complaints or whether to undertake an investigation**. These provisions should be removed from the draft Policy and Procedures to ensure the independence of the CM and integrity of the process.

2/ Improving the governance of the CM

Reforms should include ensuring Board oversight of the CM. It is urgent for the Board of Directors to increase its engagement and scrutiny on complaints lodged to the bank, especially at a time when the EIB is ramping up its operations inside and outside of Europe. The Policy should establish a systematic flow of information, including reports and recommendations on individual cases, directly between the CM and the Board.

¹ Art. 1.1.3 “*in exceptional and duly justified cases, where disagreement exists, the Inspector General may decide on the admissibility of the complaint*”.

² Procedures 2.3.2.

The democratic legitimacy of the CM should be strengthened by creating a **nomination committee including external stakeholders for the hiring process of the head of the CM**.

3/ Countering the restrictions on the accessibility of the CM

The draft Policy limits accessibility of the EIB through restricting admissibility of certain types of complaints without providing any reasonable justification.³

The draft Policy removes **project procurement** complaints from the jurisdiction of the CM. Instead, these complaints would fall within the mandate of a new, as yet to be established, EIB Project Procurement Complaints System. In the absence of such a system, and given the experience of the CM in dealing with procurement, the proposal does not have reasonable grounds. The Ombudsman provided extensive comments on that issue, expressing doubts if the new system would at all constitute a genuinely independent review.

The draft Policy puts further **restrictions on complaints related to the investment mandate of the EIB Group**. The consequence of those proposed changes will be to prevent complaints challenging, for example, the compliance of the Board's decisions with sectoral policies, the EIB's statute or mandates given to the EIB.

A third restriction concerns **complaints challenging the legality of EIB Policies** decided by the EIB Governing Bodies. The aim of this provision, like the previous one, is to prevent the CM from dealing with complaints regarding decisions of the EIB governing bodies.

4/ Ensuring the security and protection of complainants

The draft Policy makes a substantial change compared to the current policy: a switch from a presumption of confidentiality for the complainant to a presumption of disclosure. This requires striking a balance between, on the one hand, the security and protection of complainants (for which the risk of retaliation may be a barrier to access the mechanism) and on the other hand the importance of transparency of the CM and, consequently, the public interest in the accountability of the EIB. In order to ensure security and protection of complainants, the presumption of disclosure shall be guided by a do-no-harm principle. It is key for the EIB and the CM to introduce pro-active tools throughout the project cycle to ensure protection of complainants.

5/ Consulting on a revised, consolidated and improved draft Policy

Given the nature and amplitude of changes to the draft Policy that are required to ensure a functioning, effective and credible CM, we strongly urge that a second round of consultation should be opened for all stakeholders, including former complainants.

The consultation should be on one, consolidated Policy, which contains all the relevant provisions to understand the mandate, structure and process of the CM. As explained in a letter to the EIB President in June 2017, signed by 19 CSOs, dividing the process between two documents – the Policy and Procedures – makes it nearly impossible for potential complainants to understand how their complaints will be handled. Many of the provisions that seriously undermine the independence of the mechanism are found in the draft Procedures. Excluding them from the consultation is unjustified and inappropriate.

³ Arts. 4.3.6; 4.3.7, 4.3.8.

Conclusion

The signatories of this position paper hope their recommendations will be taken into consideration and reflected in a revised draft of the CM Policy and Procedures. It should be in the interest of all stakeholders involved in this process (the EIB itself, civil society and the European institutions) that the financial arm of the European Union is equipped with a strong independent accountability mechanism, also enabling the bank to learn lessons and improve the quality of its operations. Having a two-tier system, via the role of the European Ombudsman, should not be an argument for the first tier – the CM – not to be independent and functional.

At times when the democratic gap between the European Union and its citizens seems – for a wide set of reasons – to be widening, we consider it crucial that citizens affected by EIB operations have their voices heard and their concerns adequately addressed. A step backwards in this regard would be a disturbing signal sent to citizens in and outside the EU. We are confident that the EIB will therefore seriously address the matters raised in this paper.

We hope to have a fruitful and beneficial collaboration with you and your services in this process and look forward to hearing from you on the points raised in this submission.

Signatories

Accountability Counsel



Bank Information Center Europe



Both ENDS



Center for International Environmental Law



CEE Bankwatch Network



Collectif Camerounais des Organisations des Droits de l'Homme et de la Démocratie



Community Empowerment and Social Justice Foundation (Nepal)



Counter Balance

Eurodad



Focus Association for Sustainable Development



Friends with Environment in Development (Uganda)

International Accountability Project



Jamaa Resource Initiatives (Kenya)



Lumiere Synergie pour le Developpement (Senegal)

Minority Rights Groups



National Association of Professional Environmentalists (Uganda)



NGO Forum on ADB



Oxfam International



OXFAM

Platform London



Polish Green Network



Re:Common



RE:COMMON

SOMO



Transparency International EU



Urgewald

urgewald



WWF European Policy Office



ANNEX A: CONTEXT

WHY STEPPING UP THE ACCOUNTABILITY OF THE EUROPEAN INVESTMENT BANK IS NEEDED – BACKGROUND AND CONCERNS ON THE REVISION PROCESS

For a decade, civil society has been increasingly monitoring the operations of the European Investment Bank (EIB). In this regard, a central pillar of CSO demands has been to improve the accountability of this bank towards citizens affected by its activities inside and outside the European Union, as well as towards European taxpayers and decision-makers.

Until recently, people and communities impacted by the EIB's activities had nowhere to go to lodge a complaint. While upward accountability – vis-à-vis the EU Member States and EU institutions – was arranged more or less at the time of the legal foundation of the EIB, downward accountability – towards taxpayers and citizens affected by their activities – was entirely lacking until the establishment of the EIB's CM. What makes the EIB mechanism unique is that, if not satisfied with the conclusions of the CM, citizens (even outside of the EU) can turn towards the European Ombudsman for issues related to 'maladministration'.

In recent years, a set of reports has analysed and critically assessed the functioning of this current accountability mechanism: the May 2014 Counter Balance report "*Holding the EIB to account, a never ending story*"⁴ and its follow-up in June 2015 "*Towards a reinforced accountability architecture for the European Investment Bank*"⁵ or the September 2015 Eurodad report "*An assessment of transparency and accountability mechanisms at the EIB and the IFC*"⁶. It is also worth mentioning the collective analysis comparing the EIB CM to relevant accountability mechanisms of other financial institutions – led by a group of CSOs and resulting in the January 2016 report "*Glass Half Full? The state of accountability in development finance*".⁷

The rising macroeconomic role of the EIB – for instance through its role in the newly created European Fund for Strategic Investments (EFSI) under the Investment Plan for Europe or the increase of the guarantees underpinning its operations outside of Europe – has only increased the necessity to democratise the "EU Bank" and make it a more accountable institution, both downwards towards citizens, and also upwards towards EU Member States and EU institutions – for instance by granting more power to the European Parliament to scrutinise its activities and outline its priorities.

The growing complexity of EIB operations, via the multiplication of financial instruments and intermediated activities or the extension of its countries of operations, also call for particular attention on internal control mechanisms at the bank's level. The increased lending capacity of the bank means that there will be more and more controversial projects to deal with, like large infrastructure projects with important environmental, debt and social impacts. The EIB Complaints Mechanism has been dealing with an increasing number of complaints in the last two years – 78 complaints were registered in 2016 and 62 by the end of July 2017. In

⁴ "Holding the EIB to account, a never ending story", Counter Balance, May 2014, <http://www.counter-balance.org/holding-the-eib-to-account-a-never-ending-story/> .

⁵ "Towards a reinforced accountability architecture for the European Investment Bank", Counter Balance, June 2015, http://www.counter-balance.org/wp-content/uploads/2015/07/CB_Towards-accountability_print_web_hyperlinks.pdf .

⁶ "An assessment of transparency and accountability mechanisms at the EIB and the IFC", Eurodad, September 2015, <http://eurodad.org/Entries/view/1546480/2015/09/30/An-assessment-of-transparency-and-accountability-mechanisms-at-the-European-Investment-Bank-and-the-International-Finance-Corporation> .

⁷ <https://www.grievancemechanisms.org/resources/brochures/glass-half-full> .

addition, new trends in finance, including the use of financial intermediaries to reach out to small- and medium-sized enterprises (SMEs) and the creation of new financial instruments (blending facilities, investment platforms or risk-sharing mechanisms), pose challenges to the effectiveness of accountability mechanisms. Hence, there is a strong political argument in exerting more scrutiny on the EIB operations and improving the quality of the bank's activities.

In the words of the CM itself, *“On-going social and cultural changes are raising people’s expectations with regard to participation, self-determination, and the fulfilment of their human rights. Moreover, the capability and desire of communities to assert their own vision of what constitutes progress will put extra pressure on IFIs’ accountability”*.⁸

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

In this regard, the revision of the Complaints Mechanism is a crucial opportunity to strengthen the accountability of the European Investment Bank towards European institutions and citizens. It is important to note that CSOs have been advocating for the creation of the CM and have been using extensively the two-tier accountability mechanism of the EIB (the internal CM and the European Ombudsman). According to the CM Activity Report for 2015⁹, there were 49 new cases registered in 2015 and 20% of those were lodged by CSOs.

CSOs already expressed in 2015 – in a joint letter¹⁰ signed by 9 organisations – expectations for the review, which was at the time anticipated to take place shortly. The letter called for two rounds of public consultation open to all stakeholders, a civil society discussion on the topic with the EIB Board of Directors and a review of the Memorandum of Understanding between the EIB and the European Ombudsman.

It is also worth noting that several CSOs (SOMO, CEE Bankwatch Network, Client Earth and Counter Balance) were part of the stakeholders consulted by a group of experts as part of an External Quality Review initiated by the EIB. The concluding observation of the review's report is quite telling about the task ahead of the bank with the review of the CM set-up: *“To maintain and further improve the credibility and current standing of the CM among internal and external stakeholders, concerted efforts must be made by the EIB Management, its staff, and the EIB-CM staff to maintain and improve its actual and perceived independence, the transparency of its procedures and its ability to discharge its functions on a timely and effective manner. We hope that this review and the upcoming consultations will contribute to these important objectives”*.

The need for the revision process to lead to genuine and necessary improvements was then further highlighted in a joint letter¹¹ to the EIB Board of Directors in January 2016 outlining principles of effectiveness for the CM. In January 2017, with the CM review set to start in the following months, we sent another joint letter to the Board, renewing our expectations for the

⁸ <http://www.eib.org/infocentre/publications/all/complaints-mechanism-annual-report-2009-2012.htm> .

⁹ http://www.eib.org/attachments/general/reports/complaints_mechanism_annual_report_2015_en.pdf

¹⁰ http://www.accountabilitycounsel.org/wp-content/uploads/2017/07/7.1.15-Sign-on-Letter-to-EIB-on-CMO-revision_July-2015.pdf .

¹¹ http://www.accountabilitycounsel.org/wp-content/uploads/2017/07/2016-Briefing-for-the-EIB-Board_Principles-for-Complaints-Mechanism.pdf .

consultation process.¹² Finally, in February 2017, we sent a joint letter¹³ to the EIB President expressing our concern that the selection of a new head of the CM was occurring prior to the revision of the operating procedures and without any external consultation.

The European Parliament sent similar signals to the EIB, for instance via a resolution adopted on 30 April 2015¹⁴ which “*urges the EIB to improve the independence and effectiveness of its Complaint Mechanism Office; calls on the EIB Management Committee to take on board the recommendations of that office; calls on the EIB to act on the opinions of the European Ombudsman and to practice greater cooperation in order to avoid situations like the inquiry into complaint 178/2014/AN against the European Investment Bank*”.

A year later, the Parliament reiterated its call¹⁵: “*...expect[ing] that the ongoing revision of the CM will improve and enhance its independence and effectiveness and will contribute as well to the greater effectiveness and efficiency of the CMO; calls on the EIB Management Committee to take on board the recommendations of that office and to act on the opinions of the European Ombudsman; calls for a steady flow of information between the CMO and the EIB Board of Directors; believes that there is a need to update the Memorandum of Understanding between the EIB and the European Ombudsman in order for the Ombudsman to exercise external scrutiny over the EIB more actively and to improve monitoring procedures and further accountability of the EIB*”.

Finally, the latest resolution adopted by the Parliament in April 2017¹⁶ made the following statement: “*Welcomes the review of the rules of the CMO, and the renewal of the Memorandum of Understanding between the European Ombudsman and the EIB; requests clarification from the EIB on the delay to the launch of a public consultation on the revision of the policies and procedures of its complaints mechanism; notes that such a revision process offers the opportunity to further improve the independence and efficiency of the complaints mechanism, with a view to also establishing a mechanism for a systematic flow of information directly between the CM Office and the directors; stresses that the EIB management should report annually to the Ombudsman and Parliament on how the recommendations of its complaints mechanisms have been reflected in the policies and practices of the bank; stresses, in addition, that the head of the CM Office should present its activity report and its assessment of how the bank is fulfilling the CM Office recommendations to Parliament once a year*”.

In February 2017, the European Ombudsman sent her comments to the CM policy pointing to the need to ensure CM operational independence, transparency, accessibility, timeliness and adequate resources.

It is in this context, and following a two-year delay, that the EIB officially launched in June 2017 its public consultation on the draft Complaints Mechanism Policy.¹⁷

¹² http://www.accountabilitycounsel.org/wp-content/uploads/2017/07/CSO-Briefing-for-the-EIB-Board-Complaints-Mechanism_24.01.2017.pdf .

¹³ <http://www.accountabilitycounsel.org/wp-content/uploads/2017/07/CSO-ltr-to-EIB-on-CMO-selection-Feb-2017.pdf> .

¹⁴ European Parliament resolution of 30 April 2015 on the European Investment Bank - Annual Report 2013 (2014/2156(INI)):

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0183>

¹⁵ European Parliament resolution of 28 April 2016 on the European Investment Bank (EIB) – Annual Report 2014 (2015/2127(INI)).

¹⁶ Annual report on the control of the financial activities of the EIB for 2015 (2016/2098(INI)).

¹⁷ EIB Group Complaints Mechanism Policy, Draft for Consultation, http://www.eib.org/attachments/consultations/public_consultation_complaints_mechanism_policy_draft_en.pdf .

ANNEX B: RECOMMENDATIONS AND BEST PRACTICES

Last year, 11 organizations published “*Glass Half Full? The State of Accountability in Development Finance*”, which evaluated the complaint processes of the Independent Accountability Mechanisms (IAMs) at 11 International finance institutions (IFIs) against the effectiveness criteria of the UN Guidelines for Business and Human Rights. The report included a series of recommendations for both the DFIs and IAMs to ensure that remedy is provided to complainants who have been harmed by DFI-financed activities. Subsequently, we identified existing IAM policy language that embodies the report’s recommendations. The resulting 55 current best practice recommendations are organized in sections normally found in an IAM policy: mandate, functions, structure, information disclosure and outreach, complaint process, compliance review, dispute resolution and advisory. These recommendations will be included in a forthcoming publication.

We have assessed the EIB’s draft CM Policy and Procedures against these 55 best practice recommendations and found that they have met only nine fully. If adopted, the resulting mechanism would lack all the hallmarks of independence, putting its credibility in serious jeopardy. It is not sufficient to simply assert that the CM “shall be independent” or that the CM “shall be free from internal and external interference”. The structure, staffing and complaints process foreseen in the draft Policy and Procedures belie those assertions.

The utter lack of independence of the CM is perhaps best demonstrated through the compliance review process. The EIB itself – either represented by EIB Services, Directors General or the Management Committee – is judge, jury and defendant simultaneously. The CM cannot proceed to undertake a compliance review unless the Management Committee – the entity that is ultimately responsible for the actions under review – agrees. Then EIB management has multiple opportunities to object to the CM’s findings and recommendations. Finally, if the CM persists in keeping a recommendation in its final Conclusions Report to which EIB management objects, EIB management can decide to disregard it and even prevent the complainants from seeing the final EIB response.

There is no IAM whose system has codified to such a degree the undue influence by the very actors whose actions and decisions are under review. The availability of the European Ombudsman can provide no justification for a system as lacking in independence and fairness as the EIB’s. If the draft Policy and Procedures are not significantly revised to re-conceptualize the CM’s structure and process, the CM cannot be considered a credible IAM.

MANDATE

Neither the draft CM Policy nor its Procedures articulate(s) the objective of the CM. They state what the CM does – handles complaints regarding alleged maladministration¹⁸ – and the principles that will guide it in doing so.¹⁹ It does not, however, identify what the EIB and the CM hope to achieve for the institution and the complainant through the complaint process. The closest the draft Policy comes to articulating a goal, in defining a complaint, is “restoring compliance and good administrative behavior”.²⁰ That does not address the need to redress any harm that complainants may have suffered or to learn lessons from the complaints in order for EIB Services to improve environmental and social outcomes in future projects.

¹⁸ Draft Policy art. 1.1.

¹⁹ Draft Policy art. 2.

²⁰ Draft Policy art. 4.1.1.

It is clear from the language used in the draft Policy and Procedures that the EIB and the CM do not consider complainants to be the primary beneficiary of the mechanism, despite the Inspector General's assertion during the 29 June 2017 public consultation that he, in effect, reports to complainants. For example, the draft Policy states that, "the procedures and outcomes must (i) be timely in relation to *market needs...*" instead of timely in relation to the needs and actual or anticipated impacts to complainants.²¹ The Procedures commit the CM to "substantial information flows and consultations with the EIB Group's relevant services, in order to ensure constructive collaboration", but there is no similar provision for complainants.²² That deference to EIB services is manifest throughout the draft Policy and Procedures.²³

The EIB and the CM must demonstrate their commitment to serving the complainants, remedying any harm done to them and preventing future harm from occurring. The overarching mandate of the EIB's CM should be two-fold: first and foremost, to prevent harms and provide effective remedy to project-affected people; and second, to ensure institutional compliance with the EU legal framework, accountability and continuous improvement vis-à-vis social and environmental risks and impacts of EIB-supported projects. The draft Policy should be revised to include language similar to the IFC's Compliance Advisor Ombudsman (CAO) Operational Guidelines:

"CAO's mandate is to:

- *Address complaints from people affected by IFC/MIGA[Multilateral Investment Guarantee Agency] projects (or projects in which those organizations play a role) in a manner that is fair, objective, and equitable; and*
- *Enhance the environmental and social outcomes of IFC/MIGA projects (or projects in which those organizations play a role).*

In executing this mandate, the CAO process provides communities and individuals with access to a grievance mechanism that offers redress for negative environmental and/or social impacts associated with IFC/MIGA projects. This includes impacts related to business and human rights in the context of the IFC Policy and Performance Standards on Environmental and Social Sustainability."

In addition, the CM should express its commitment to working directly with communities affected by EIB-funded projects, with heightened attention to marginalised communities, which are referred to in EIB's Environmental and Social Policy Handbook. The draft Policy should therefore include a paragraph that expresses such a commitment. The language from the CAO Operational Guidelines provides a starting point for such a provision: "CAO recognizes that local communities, minorities, and vulnerable groups often have much to gain or lose from a project. CAO also recognizes that it is these groups of people who typically live with the impacts and benefits of the project, and therefore will have an ongoing relationship with the client. As such, CAO seeks to work directly with the project-affected community".

FUNCTIONS/ROLES

The draft Policy explicitly identifies four functions for the CM: Complaints Investigation (Compliance Review), Mediation (Dispute Resolution), Advisory and Monitoring. It is unclear why the draft Policy prioritizes compliance, stating that "the EIB-CM is predominantly compliance focused."²⁴ The Policy should further clarify the applicability of problem solving

²¹ Draft Policy art. 6.2.3 (emphasis added).

²² Draft Procedures art. 1.4.2.

²³ Draft Policy art. 6.2.6 and Draft Procedures arts. 1.1.3, 1.4.4, 1.10.1, 2.2.7, 4.2, 1.6.1, 1.6.2, 1.7.3, 2.5.6.

²⁴ Draft Policy art. 5.3.3.

and/or mediation as it currently suggests in point 5.3.4 that mediation is only applicable when compliance review can be excluded. The function(s) employed in a particular case – compliance, dispute resolution or both – should depend on the preference and needs of the complainants. The mechanism should not prioritize one function over the other, nor should one foreclose the possibility of the other. Regardless of the function(s) chosen by the complainants, the aim of the CM should be to fulfill the mandate articulated above: redress for complainants and continuous improvement for the EIB.

Furthermore, it is not possible to undertake compliance review or dispute resolution effectively without monitoring. It is only in the monitoring that an IAM can ensure that complainants have, in reality, received redress for any harm that occurred and that the EIB has changed its policies or practices to prevent that harm from occurring in future cases. For that reason, we do not view monitoring as a separate function but as a necessary element of compliance review and dispute resolution.

The point 5.1.3 of the draft Policy imposes conflicting roles for the CM making it also responsible for dealing with complaints against the EIB Group with any other non-judicial complaint lodged with international institutions. The role of the CM should not be to defend the EIB at other institutions but to objectively deal with complaints lodged at the mechanism. The EIB services are fully competent to deal with complaints and defend the bank.

- **Compliance Review (CR):** The compliance review function should be an impartial fact-finding body that investigates claims of maladministration, social and environmental harm or potential harm, linked to non-compliance with Bank policies and standards by the EIB and its clients, or that result from weaknesses and gaps in EIB policies. The draft Procedures describe the outcome of an investigation as a determination of “indications of compliance or non-compliance...”²⁵ The CM should either find compliance or non-compliance, not indications thereof. The United Nations Development Programme’s Social and Environmental Compliance Unit (UNDP’s SECU) (para. 2), for example:

“provides UNDP, and those affected by UNDP projects, with an effective system of independently and objectively investigating alleged violations of UNDP’s social and environmental commitments. SECU seeks to protect locally-affected communities and, in particular, disadvantaged and vulnerable groups, and to ensure participation of local stakeholders.”

- **Dispute Resolution (DR):** The dispute resolution function should be empowered and equipped to use a range of tools and approaches to assist parties in reaching resolutions to address or remediate adverse social and environmental risks and impacts and other conflicts related to EIB’s financed operations. The mechanism should remain impartial and independent in this process, while also seeking to address the power imbalances between the parties. We welcome the explicit reference to EIB Group services in the definition of the mediation function.²⁶ Their involvement in dispute resolution processes, when it is appropriate, can help ensure that the EIB contributes to solutions for the complainants as well as draws lessons for improving environmental and social outcomes in future cases. However, the draft Policy misunderstands dispute resolution when it gives the CM the responsibility to “find and propose appropriate solutions whilst taking into account the interest of all stakeholders”.²⁷ Although there may be some instances when it could be helpful for an experienced mediator to facilitate the dispute resolution process by identifying and suggesting solutions based on the circumstances and interests of all stakeholders, it should ultimately be a decision of the parties to pursue these or other solutions under consideration. Instead, Article 5.3.4 of the draft Policy should be re-written to reflect the language that describes the problem-solving function of the African Development Bank’s Independent Review Mechanism (AfDB’s IRM):

²⁵ Procedures 2.4.1.

²⁶ Draft Policy art. 5.3.1.

²⁷ Draft Policy art. 5.3.4.

“restor[ing] an effective dialogue between the requestors and any interested persons with a view to resolving the issue(s) underlying a request, without seeking to attribute blame or fault to any such party.”

- **Advisory:** The advisory function should derive thematic and systemic lessons from trends in the CM’s caseload, both compliance and dispute resolution, in order to provide guidance to EIB leadership on improving the institution’s social and environmental performance. The advisory function helps to embed an institutional culture of continuous learning and improvement of policy and practices. While it is positive that the CM draft Policy includes an advisory function in order to draw lessons learned from the complaints it receives, the draft Policy suggests that the advice is for internal purposes only.²⁸ In order to ensure that the EIB is accountable for addressing and incorporating the lessons learned from complaints, the CM’s advice and the EIB’s response to it should be public. The complaints upon which the advice is based are public; the advice should be too. Beyond this reference to the advisory function, neither the draft Policy nor the procedures provide any further description.

The definition of the advisory function found in Article 5.3.1 of the draft Policy should be revised to reflect the language found in the Operational Guidelines of the IFC’s CAO (para 1.2):

“CAO is a source of independent advice to the President and the senior management of IFC and MIGA. Advice is based on insights gathered from CAO’s dispute resolution and compliance interventions and is focused on broader environmental and social policies, guidelines, procedures, strategic issues, trends, and systemic issues based on the experiences gained through its case work, with the goal of fostering systemic improvements in IFC/MIGA.”

STRUCTURE

The mechanism must be structured in a manner that maximizes its independence, impartiality and legitimacy. For the mechanism to function effectively, it must be trusted by all stakeholders, including local communities, EIB management, EIB clients and interested CSOs. Project-affected people must have confidence that the mechanism is empowered to address their problems and concerns. As it is currently drafted, the CM lacks all the hallmarks of independence, putting its credibility in serious jeopardy.

Despite its valuable efforts, the CM seems to be hindered from completing its tasks in an independent and efficient manner that is meaningful for the complainants. For instance, in the Bujagali case²⁹ the significant delay of the issuance of the report by the Complaints Mechanism was the result of EIB’s internal dynamics and non-cooperation of the EIB staff with the CM. A letter³⁰ in May 2013 from the EIB President to all staff of the bank requiring full cooperation with the CM, affirming that “good cooperation and support from the Bank’s services is essential” and that “prompt response and exchange of necessary information with the EIB-CM will help respect the required deadlines”, illustrates the difficult position of the CM within the bank. The External Quality Review also mentions that recently “*there has been a sharpening of conflict over some cases*” and that those controversies are mainly linked to disagreements with the conclusions reached by the CM and its interpretation of the CM

²⁸ Draft Policy art. 5.3.1 (the CM advises the EIB Management and/or the EIF CE/DCE *internally* on broader and systemic issues related to policies, standards, procedures, guidelines, resources, and systems, on the basis of lessons learned from complaints...) (emphasis added).

²⁹ See Decision of the European Ombudsman closing his inquiry into complaint 2288/2011/MMN against the European Investment Bank.

<http://www.ombudsman.europa.eu/cases/decision.faces/en/51867/html.bookmark>.

³⁰ <http://www.counter-balance.org/wp-content/uploads/2015/04/independenceCMO.pdf> .

Policy and Procedures, as well as the “*non-acceptance of the EIB-CM mandate by some of the Services*”.

Instead of resolving the issues about the CM’s independence and mandate, the draft Policy further exacerbates them. It is not sufficient to simply assert, as the draft Policy does, that the CM “shall be independent”³¹ or that the CM “shall be free from internal and external interference”.³² The structure, staffing and complaints process foreseen in the draft Policy and Procedures belie those assertions.

The CM is necessary for the Board to discharge its statutory functions, including approving investments, supervising the execution of its functions delegated to Management Committee and ensuring the bank is managed in accordance with the provisions of the Treaties and of its Statute. But the CM cannot serve that role if its findings are filtered through Management to the Board. The CM must report directly to the Board. With the exception of the EBRD’s Project Complaints Mechanism (PCM),³³ the CM is the only IAM that is housed within management without a direct reporting line to the Board or President. The excuse for the lack of Board’s competence over the CM cannot be the non-resident character of the Board. There are other independent units at the EIB that report to the Board, such as the Operations Evaluation Division. Moreover, the Board’s statutory functions justify and demand such a reporting line be established to ensure accountability of the EIB in relation to acts of maladministration.

The complaint process, as envisioned under the draft Procedures, further demonstrates the CM’s lack of independence. The CM cannot make any decisions on its own if those decisions conflict with the opinion of EIB Services.³⁴ If EIB Services disagree with the CM’s decision, that decision is elevated to the Inspector General (IG), the Directors General, the Management Committee or a combination thereof. Such practices are not observed in the policy of the Operations Evaluation Division, which conducts ex-post evaluations of EIB’s operations and sends the evaluation reports for comments to all Directorates concerned (and other relevant parties if appropriate). Any unresolved differences of view regarding these evaluations are separately recorded in the final report that is sent to the Board of Directors. Not only can the Management Committee influence the decisions of the CM, it also has the discretion to decide whether or not it will adopt the CM’s recommendations and even whether it will publicly disclose EIB Services’ response to the CM’s compliance report. Under the draft Policy and Procedures, not only will complainants not be guaranteed that the EIB will do something if non-compliance is found, they do not even get the benefit of an explanation for the lack of action.³⁵

In addition to all of the ways in which EIB Services can formally influence the decision of the CM through the Procedures, the structure allows for informal ways to influence the CM through budget decisions, performance evaluations, salary increases, etc., that are presumably decided by the IG.

The excuse for the CM’s lack of independence cannot be the availability of the EO as an appeals body. Complainants must have confidence in the CM itself in order to file a complaint in the first instance. The EIB and the CM should ensure a fair process and satisfying outcome for the complainants such that there is no need to appeal to the EO.

Taken together, the current draft Policy and Procedures are insufficient to ensure the CM’s independence and need to be radically revised. In order to foster confidence in the CM and ensure its credibility, **the mechanism must be structured in a way that reinforces its independence from EIB management.** This requires the following:

³¹ Draft Policy art. 2.2.

³² Draft Policy art. 5.1.11.

³³ Indeed, this is a topic of debate at the EBRD that will be taken up during the next scheduled review of the PCM. Please see CSO letters to the EBRD from [January 2017](#) and [March 2017](#).

³⁴ Draft Procedures arts. 1.1.3, 1.6.2, 1.7.3, 1.8.2, 1.8.3, 2.2.7, 2.3.2.

³⁵ Draft Procedures arts. 1.8.2, 1.8.3.

- **The CM should report directly to the Board of Directors of the EIB.** There is no formal relationship between the EIB Board of Directors and the CM. The 2015 External Quality Review highlights “*the need [...] to achieve a greater ownership of the Mechanism by the EIB Board of Directors*”. Currently, the findings of the CM reports on cases are mostly discussed with the staff and agreed by the Management Committee of the EIB. Although the Board of Directors is responsible for ensuring that the Bank is properly run and supervises its executive body – the Management Committee, the Board receives, for information only, an annual report that includes short summaries of cases handled. And even then, the draft Policy would require that the Management Committee first approve the CM’s annual report before it is sent to the Board.³⁶ The Management Committee, who is responsible for the actions under investigation, is solely responsible for deciding whether to apply the corrective actions proposed. Such a system prevents accountability of the EIB Management. Independence from management is key to the mechanism’s legitimacy. Project-affected communities and CSOs will not use the mechanism unless they are assured that it is not beholden to or unduly influenced by EIB management.

As such, the CM should report to the Board of Directors rather than to IG. **We propose that the Board creates a Board Committee on Complaints which would be the main interlocutor for the CM.** The Committee should coordinate the work and steer discussions on the systemic issues raised by the CM, including its recommendations to the Bank. This Committee shall also cover relations with the European Ombudsman. The Board Committee would review and approve the CM’s Corrective Actions, Quarterly Reports, Annual Report, the Work Programme, the CM budget and the recommendation from the Nomination Committee for the Head of the CM. Proposed solutions are similar or identical to those already applied to the Operations Evaluation Division.

The relevant provisions of Articles 5.1 and 5.4 of the draft Policy should be revised to reflect the same reporting structure as the World Bank Inspection Panel (para. 6), the first IAM, as well as many of the IAMs that followed:

“[t]he Panel reports to the Board. The Board’s Committee on Development Effectiveness (CODE) is designated as the main interlocutor for the Panel.”

- **The CM should be run by a director, who oversees dispute resolution and compliance function managers and a permanent staff.** While we agree with the need to have a clear separation between the mediation function and the compliance review function (and, we would add, the advisory function), the draft Policy seems to suggest that the mediation function be a distinct office from the CM: “The clear separation of the Mediation Function from the Investigation Function, with separate staffing, ensures it will be managed as an independent and impartial *office* with the necessary expertise and resources in terms of problem solving.”³⁷ To ensure that all functions are complementary and working together to fulfill the CM’s mandate, they should be housed in one office under the leadership of a director. If this is not what was intended, the text should be revised to refer to “function” rather than “office. Both the Inter-American Development Bank’s Independent Consultation and Investigation Mechanism (IDB’s MICI) and the IFC’s CAO are headed by a Director/Vice President, who oversees the compliance and dispute resolution functions.

“The MICI is headed by a director, who is assisted by phase coordinators and the operations and administrative staff necessary to perform the Mechanism’s work efficiently and effectively. All MICI staff including consultants will report to the Director.”

- **External stakeholders should participate in the hiring process for the mechanism’s director and function managers.** Concerns about the independence of the mechanism

³⁶ Draft Policy art. 5.4.3.

³⁷ Draft Policy art. 5.3.5 (emphasis added).

are also compounded by the lack of transparency in hiring processes. This has been demonstrated most recently in the current selection process for a new head of CM, which the EIB has undertaken without the involvement of external stakeholders.

External stakeholders and members of the EIB Board of Directors on the selection committee help to legitimize the hiring process and build trust in the independence and integrity of the individuals selected. Additionally, the selection committees for mechanism principals should not include members of EIB management. In response to a [letter](#) dated 16 February 2017 from CSOs suggesting that external stakeholders be included in the nomination committee for the selection of the next Head of the CM, the EIB responded by rejecting the recommendation and asserting that the two-tier system, with the ability to appeal to the European Ombudsman, “guarantees a high level of independence.” Again, the availability of the EO should not be used as an excuse for a CM that lacks independence. The CM itself must have procedures in place to ensure its own independence. One critical element is the inclusion of external stakeholders in the selection process of the Head of the CM.

As detailed in the CSO letter, many IAMs include external stakeholders in the selection process. The best example is the selection of the IFC Vice President/Compliance Advisor Ombudsman, who is appointed by the World Bank Group President following an independent selection process led by civil society, industry and academia.

- **CM staff should be selected by the Head of the CM.** The mechanism should be responsible for hiring its own staff. The draft Policy and Procedures do not specify who has the authority to hire CM staff. Article 5.1 of the draft Policy should include text similar to the one found in the CAO Operational Guidelines (para. 1.3):

“CAO staff are recruited by the CAO Vice President.”

- **The function managers should be empowered to hire outside consultants with technical expertise relevant to the complaint.** Complaints often raise technical issues on which the mechanism staff does not have sufficient expertise or that may require a skillset that the staff does not possess. Thus, the mechanism must be able to hire outside consultants to help it fulfill its mandate. We welcome the provisions in the draft Policy and Procedures that allow the CM to hire external experts for the compliance review³⁸ and mediation.³⁹ However, the CM should not use internal experts, as provided for in the draft Procedures.⁴⁰ There would always be a real or perceived conflict of interest for an expert from EIB Services to provide advice on a complaint. Given that the complaint is associated with activities of EIB Services, having EIB Services’ staff provide technical assistance to the Bank’s independent accountability mechanism would not only be inappropriate, it would also undermine the complainants’ confidence in the process. The draft Procedures should be revised to explicitly exclude that possibility. The draft Procedures also mention that experts shall be selected on the basis of “international recognition”⁴¹ among other criteria. The CM should ensure that this does not unnecessarily foreclose local experts, who may be particularly well versed in the cultural context and other relevant circumstances of the project area. The IDB’s MICI Policy provides (para. 56):

“The MICI Director is authorized to contract any external expert necessary, in strict compliance with the Bank’s policies and procedures. In consultation with the Human Resources Department, the MICI Director will also prepare and maintain a list of independent expert consultants with specialized knowledge in areas such as mediation, dispute resolution, compliance, auditing, resettlement, indigenous peoples, environmental and social safeguard policies, and other required areas of expertise. These experts will

³⁸ Draft Policy art. 6.2.2.

³⁹ Draft Procedures art. 2.5.5.

⁴⁰ Draft Procedures art. 2.4.4.

⁴¹ Draft Procedures arts. 2.4.4, 2.5.5.

not come from Management.”

- **There should be a pre-employment cooling off period of at least five years.** To ensure the mechanism's impartiality and independence from the Bank's operations departments and management, there should not be a revolving door between the EIB and the mechanism.

Pre-employment bans or cooling off periods for mechanism principals and staff are best practice at IAMs. The draft Policy and Procedures do not include such provisions. Article 5 should include a provision similar to that found at the Asian Development Bank's Accountability Mechanism (ADB's AM) (paras. 109, 113):

“The SPF must not have worked in any ADB operations departments for at least 5 years before the appointment” and “[d]irectors, alternate directors, directors’ advisors, Management, staff, and consultants will be ineligible to serve on the CRP [Compliance Review Panel] until at least 3 years have elapsed from their time of employment with ADB.”

The AfDB goes further and does not allow former Bank staff to serve on the IRM's Roster of Experts (para. 85):

“Executive Directors, Alternate Executive Directors, Senior Advisers and Advisers to Executive Directors, any Officer or Staff member of the Bank or persons holding consultant appointments shall not serve on the Roster of Experts at the end of their service with the Bank.”

- **There should be a post-employment ban for the principals of the mechanism and a cooling off period for staff.** The possibility of subsequent employment at the EIB could compromise impartiality, or the perception of neutrality, of the CM head and key staff. Whether consciously or not, mechanism staff could inappropriately consider his or her relationship – and future relationship – with EIB management while handling a complaint. The draft Policy and Procedures do not provide for a post-employment ban for key staff. Article 5 of the draft Policy should be revised to include a provision similar to that found in the CAO Operational Guidelines (para. 1.3):

“Contracts for CAO staff restrict specialists and staff above that level from obtaining employment with IFC or MIGA for a period of two years after they end their engagement with CAO. The CAO Vice President is restricted for life from obtaining employment with the World Bank Group.”

- **Person(s) with a conflict of interest must recuse themselves from the complaint process.** In the event that a member of the mechanism or a consultant has a conflict of interest in regards to a particular complaint, he or she should disclose that conflict of interest and recuse him or herself from the complaint process. The draft Policy and Procedures do not include any provisions requiring CM staff or consultants to disclose conflicts of interest and recuse themselves from the handling of a particular complaint. That text could be included in the rules of conduct, included as Article 6 of the Procedures. The CAO Operational Guidelines (para. 1.3) provide best practice in this regard:

“If a CAO staff or consultant has a conflict of interest in relation to a particular case, that person will withdraw from involvement in that case. In exceptional circumstances, contractual arrangements for CAO consultants may impose time-bound restrictions on their future involvement with IFC or MIGA.”

In addition, we believe the following innovations would help strengthen the structure of the mechanism:

- **Stepping up the role of the European Parliament in relation to complaints about the EIB.** The Petitions Committee (PETI) – which is in charge of relations with the European Parliament – should be constantly informed about EIB-related cases being handled by the EO. On an annual basis, after the Head of the CM presents its annual report to the European Parliament, a specific discussion about EIB complaints should take place together with the Ombudsman in the PETI Committee. This is all the more relevant in the context of the European Fund for Strategic Investments and the External Mandate in which the EIB is operating under a guarantee emanating from the EU budget. In this context, the EIB Management Committee should report annually to the Ombudsman and the European Parliament on how the CM recommendations have been reflected in the policies and practices of the Bank.

INFORMATION DISCLOSURE AND OUTREACH

Many individuals who experience harm as a result of DFI-supported projects are neither aware that a complaints mechanism exists nor understand the mechanism's process for reviewing and resolving concerns. For the EIB, this is confirmed by the External Quality Review which, in its recommendation 17, mentions that *“EIB-CM needs to enhance its internal and external information about its role, procedures, complaints received and ongoing cases via the Internet. The information about role and procedures should be posted in all EU languages and progressively in other languages relevant to the EIB Group's work.”*

Accessibility, which requires informing project stakeholders about the EIB's financing role and the existence of its grievance mechanism, is currently a challenge for the CM. Although noticeable efforts have been undertaken by the CM to improve the accessibility of the mechanism – such as a flyer available in 24 languages or outreach events with civil society organizations – the existence of the mechanism remains in most cases unknown to those directly affected by EIB financing. In a report published in 2015⁴² on the Investment Facility managed by the EIB, the European Court of Auditors found that those directly affected by EIB activities were often unaware of the Bank's role in financing. A lack of knowledge of EIB financing in turn affects knowledge of the availability of the CM.

Recently the CM improved its database of cases and clarified that additional case documents and information would be added, subject to confidentiality and disclosure of information requirements. This is a welcome step forward, and in our opinion the CM should be equipped with the necessary capacity and resources to improve further its transparency performance. Nevertheless, the CM must do a better a job of proactively disclosing information.

In order to improve project-affected communities' awareness and understanding, EIB and CM policies should: commit to transparency and disclosure of information about the mechanism's procedures, operations and cases; empower the CM to conduct public outreach in the EIB's countries of operation; and promote engagement by the CM with external stakeholders. Specifically:

- **The EIB should require clients and sub-clients to disclose the existence of the mechanism to project-affected communities.** Clients and sub-clients are often the primary source of information about a project for affected communities. The draft Policy references “briefings to external stakeholders during project consultation processes” as an example of how information regarding the CM could be disseminated.⁴³ It is unclear, however, if EIB requires its clients to do so through contract provisions or otherwise. Bank staff should also be required to work with clients to ensure disclosure of information for all types of financing, including indirect lending through financial intermediaries, and should be equipped with monitoring mechanisms to ensure that their clients and sub-

⁴² http://www.eca.europa.eu/Lists/ECADocuments/SR15_14/SR_INVESTMENTS_EN.pdf

⁴³ Draft Policy art. 8.3.

clients follow through. Article 8.3 of the draft Policy should be revised to include language similar to ADB's AM Policy, (para. 211):

“Staff, working with the borrower, will disseminate information early in the project cycle about the Accountability Mechanism and its availability as a recourse in case other mechanisms for dealing with harmful project effects are not successful. The intensity and format of this activity will vary with the nature of the project. Operations departments will focus on projects with a high degree of safeguard risks, such as projects with heavy resettlement. Pamphlets in national or official languages, community notice boards, audiovisual materials, or other appropriate and effective means will be used to inform people.”

- **Information about the mechanism should be included in relevant EIB publications and feature prominently on its website.** This recommendation is largely met with Articles 8.2 and 8.4 of the draft Policy. We welcome the link to the CM on the EIB's homepage and the commitment expressed in the draft Policy to raise awareness about the CM “in all areas of its activity.” However we recommend that the link to the CM be featured more prominently and revised to read: “File a Complaint.”

Increasing the visibility of the CM on EIB's website, as well as ensuring that relevant information on the CM is available in languages of relevance for affected communities, are also necessary. Recommendation 19 of the External Quality Review formulates similar demands.

For reference, IDB's MICI Policy states (para. 60):

“[t]he MICI Director will coordinate with other Bank offices and units to ensure that information about the Mechanism is integrated into Bank activities and publications designed to promote information about the institution. Management will support the MICI's efforts to publicize the Mechanism.”

- **Information about the CM, including a model complaint letter, should be produced in multiple languages and accessible formats.** Currently, the CM's Operating Procedures and Terms of Reference are available only in English, even though the current Procedures require them to be available in all EU languages.⁴⁴ While we appreciate that the draft Policy reiterates this commitment in Article 8.1, we recommend that the CM be provided sufficient budget and capacity to implement this provision and to consider producing translated and user-friendly documents in languages of the countries where EIB operations are taking place. We also commend the CM for making a digital complaint form available in 24 languages.

For reference, the CAO Guidelines (para. 1.6) commit to publishing:

“CAO Operational Guidelines, CAO's Terms of Reference, information brochures, and other materials in the official languages of the World Bank Group [Arabic, Chinese (Mandarin), English, French, Russian, Spanish, and Portuguese], and additional languages where deemed necessary, and mak[es] these documents available in hard copy, online, and by other culturally appropriate means.”

- **The CM should develop a public outreach strategy, including accessible events in the EIB's countries of operation, with adequate budget to support participation by potentially affected communities.** This outreach strategy should include an obligation for the EIB client to appoint a focal point for community contacts and complaints. Article 8.4 of the draft Policy satisfies this recommendation.

For reference, the IDB's MICI Policy states (para. 60):

⁴⁴ Current Policy art. 6.1.

The MICI office has a mandate to conduct public outreach throughout Latin America and the Caribbean. The MICI Director will develop and implement an outreach strategy to inform civil society.”

- **The CM should publish a complete and updated complaint registry.** The registry should include pending, completed and closed cases, including ineligible complaints, with links to complaint letters (redacted if complainants request confidentiality), decisions on complaint eligibility, assessment reports, dispute resolution reports and agreements, terms of references for compliance review investigations, investigation reports, management responses and proposed remedial actions, monitoring reports, conclusion reports and other relevant documentation. While the current Procedures require that the CM maintain a complaint registry, it has not always been maintained with up-to-date information. It also lacks an advanced search function that would make it more user-friendly. While the draft Policy maintains a requirement for a registry,⁴⁵ we urge the CM to dedicate the necessary budget and staff to ensure that the registry is complete.

For reference, MICI rules of procedure include the best practice text on this element (para. 62):

“The Mechanism will maintain a virtual Public Registry that will provide up-to-date information on Requests submitted to the Mechanism and their processing, and will include the publication of the public documents provided for under this Policy.”

- **The CM should establish an external stakeholder advisory group to regularly provide strategic guidance, advice and feedback.** The advisors should include representatives from CSOs and technical experts in fields such as accountability, sustainable development and conflict resolution. The draft Policy and Procedures do not provide for the creation of an advisory group. Language similar to that below from the CAO’s website should be included in Article 5.1 of the Policy:

“CAO meets with a Strategic Advisors Group comprised of professionals from civil society, private industry, academia, and the field of mediation and conflict resolution.”

- **The CM should comply with the principles of the IAM Network.** The IAM Network is a forum for information exchange and learning for mechanisms of public IFIs. The Network is guided by principles of independence, impartiality, transparency, integrity, professionalism, accessibility and responsiveness. According to the IAM Network criteria, for the CM to participate it must be, inter alia, a “citizen-driven complaint and response mechanism” and be “operationally independent.” While we appreciate the commitment made in Article 7.2 to participate in the IAMs Network, we would note that if the draft Policy and Procedures are adopted without significant revisions, the CM would no longer qualify as “operationally independent.” As a result, its membership could be in doubt.
- **The CM should regularly review its policy and guidelines through a public process.** In order to ensure that the mechanism continually improves and remains responsive to project-affected communities, it should conduct public reviews at regular intervals. The review should include a public consultation process, soliciting input from project-affected communities, complainants and other stakeholders. While the draft Policy does provide for reviews of the CM, it does not specify the frequency.⁴⁶ Arguably, it also allows for revisions of the Procedures without public comment. As this review makes clear, the Procedures include provisions that significantly affect the functioning and effectiveness of the mechanism. The CM should be governed by one document that is subject to review every five years or as needed, similar to the language in the rules of procedure for the EBRD’s PCM (para. 72):

⁴⁵ Draft Policy art. 8.7.

⁴⁶ Draft Policy art. 9.1.

“The PCM will be reviewed by the Board every five (5) years or as needed.”

We would note, though, that the EIB and the CM could do much more to encourage the participation of stakeholders and complainants in the review process by, for example, organizing regional consultation meetings or videoconferences at multiple points throughout the review process. The consultation meeting held in Brussels on 29 June 2017 as part of this process did not provide sufficient time to discuss all of the significant concerns related to the draft and may have prevented some stakeholders from participating because of travel and logistical difficulties. Similarly, it is surprising that there is no reference to the current review on the CM’s website.⁴⁷

We welcome the commitment to develop a methodology for soliciting feedback from complainants and other external stakeholders.⁴⁸ That information will be a valuable input for future reviews.

COMPLAINT PROCESS

In order to deliver real results for affected communities, the CM’s jurisdiction and eligibility rules should be designed to **minimize barriers to access** to the mechanism and allow complaints to proceed in a **predictable, independent, transparent and effective manner**. The draft Policy and Procedures are convoluted and difficult to understand, resulting in a process that is neither predictable nor transparent for potential complainants. Merging the Policy and Procedures into one comprehensive document would go a long way to make the process more understandable. As it currently stands, complainants must go back and forth between the Policy and Procedures to understand what to expect from the CM and EIB Services. This may be particularly difficult for complainants with low literacy, particularly in EU languages. The complexity is further exacerbated by the excessive typology for complaints (8 types) and procedures (4 procedures). At a minimum, we recommend that there only be one procedure for E and F complaints, regardless of when they are filed.

Moreover, some of the procedures, particularly the Prevention⁴⁹ and Simplified⁵⁰ Procedures, restrict complainants’ access to a fully independent evaluation by the CM. The CM’s framework should include, at minimum, the following provisions for the complaint process to ensure its accessibility:

- **The CM should accept complaints across all EIB operations and activities, and all stages of operations, including activities co-financed with other DFIs.** The risk of harm to communities and the environment is not limited to certain lending instruments but can result from all types of activities financed or co-financed by the EIB. The current Procedures of the CM, together with the CAO’s Operational Guidelines (para. 4.1) exemplify best practice, ensure the jurisdiction of the mechanism extends to all Bank-supported operations and activities:

“all IFC’s business activities including the real sector, financial markets, and advisory services.” The CM Operating Procedures currently state (para. 4.3) *“A complaint is considered admissible if the allegations relate to a decision, action or omission by the EIB.”*

The equivalent provision in the draft Policy removes “decisions” from scope of the mechanism and explicitly excludes complaints regarding the legality of the EIB’s

⁴⁷ Rather it is accessible through the consultations section of the EIB’s website:

<http://www.eib.org/about/partners/cso/consultations/item/public-consultation-on-eib-group-complaints-mechanism.htm>.

⁴⁸ Draft Policy art. 5.4.5.

⁴⁹ Draft Procedures art. 3.

⁵⁰ Draft Procedures art. 4.

policies,⁵¹ representing a narrowing of the current jurisdiction of the CM. We recommend keeping the current Policy language and scope.

Then, the definition of a “project’s area of influence” in the Policy is unclear and therefore creates a great deal of ambiguity in understanding and applying article 2.1.4 in the Procedures. The phrases “cumulative impacts” and “other project-related developments that can realistically be expected at the time due diligence is undertaken” in the definition of a “project’s area of influence” appear to limit the application of the term. The meaning of “temporal influence” is also unclear. Since the definition of a “project’s area of influence” bears upon whether a complaint concerning a human rights impact could be heard under the mechanism, it would be helpful if the CM could clarify what is intended by this term.

The draft Policy limits accessibility to the CM also by restricting the admissibility of certain type of complaints. Articles 4.3.6, 4.3.7 and 4.3.8, which impose new restrictions on the CM’s jurisdiction without any reasonable justification, should be removed.

The draft Policy would exclude procurement complaints from the jurisdiction of the CM. Instead, these would fall within the mandate of the as yet created EIB Project Procurement Complaints System. In the absence of such a system, and given the experience of CM in dealing with procurement, the proposal does not have reasonable grounds. The European Ombudsman provided extensive comments on that issue, expressing doubts if the new system would at all constitute a genuinely independent review. Restricting the mandate of the CM in regards to procurement complaints seems to be rather a direct consequence of the Pizzaroti case in which the CM had found the complaint of the Italian company grounded, yet EIB management chose to ignore the ruling of its own policy-enforcing body.

The draft policy puts further restriction on complaints concerning the investment mandate of the EIB Group, its financing or investment decisions per se, its credit policy or other related, purely commercial or banking discretionary decisions. As noted by the European Ombudsman such restriction does not apply to complaints to the Ombudsman.

The EIB’s rationale behind preventing such complaints is unknown, but the result will be that complaints challenging decisions to provide finance to certain operations (e.g. challenging the compliance of the Boards’ decisions with sectoral policies, EIB’s statute, mandates given to EIB, such as the external and development or high level EU policies) will be foreclosed. In general, this provision prevents complaints challenging decisions undertaken by the Board of Governors or a Board of Directors from being dealt with by the CM.

A third restriction concerns complaints challenging the legality of EIB/EIF Policies decided by the EIB/EIF Governing Bodies. Again this provision has no reasonable justification as such complaints would be anyway admissible for the European Ombudsman. The EIB is subject to the rule of law and its internal policies must comply with EU law. EIB Group activities can be understood as activities that are performed on the basis of decisions from its Governing Bodies. One of the functions of the Board of Directors, according to Article 9 of the Statute, is to “ensure that the Bank is managed in accordance with the provisions of the Treaties and of this Statute and with the general directives laid down by the Board of Governors.” While performing this function, the Board of Directors undertakes decisions to approve and apply the policies and procedures. These decisions constitute an “activity” of the EIB performed by its Governing Body within the scope of the Board’s administrative functions and as such would be subject to maladministration check.

Since the draft policy proposes that such complaints will be addressed by the Secretary General of the EIB, we would like to recall the following conclusion of the External Quality

⁵¹ Draft Policy arts. 4.3.1, 4.3.7.

Review: *“we strongly urge avoiding giving responsibility for handling complaints to those against whose decisions or actions a complaint has been lodged. Doing so would be a step backwards and contradict best practice in other institutions.”*

- **The eligibility requirements should be simple.** Complainants often lack the resources and information necessary to file detailed claims of their grievances and policy non-compliance. Complainants to the CM should simply be required to outline how the alleged harm or potential harm affecting them is tied to EIB-supported activities. While it is positive that the draft Policy explicitly provides that complainants do not have to reference the specific policy or procedure that was allegedly violated,⁵² it would be difficult to allege maladministration, as required by article 4.3.1 of the draft Policy, without doing so because maladministration is defined as occurring “when the EIB Group fails to act in accordance with a rule or principle that is binding upon it, including in the case of the EIB Group, its own policies, standards and procedures.”⁵³

The replacement of the term “concerns” by the more legal-sounding term “allegations” throughout the Policy could be interpreted as requiring specific and clear articulation of the alleged violation(s), which may hamper the admissibility of complaints by persons or groups who are inexperienced in formulating complaints as well as marginalized persons. Therefore, the term “concerns” should be retained. The European Ombudsman also highlighted this issue in her letter of February 2017 to the EIB.

While the objective of the CM in undertaking a compliance review should be to determine if maladministration occurred, a project-related complaint should be deemed eligible if it meets simple requirements, like those found in the CAO Operational Guidelines (para. 2.2.1):

“1. ...pertains to a project that IFC/MIGA is participating in, or is actively considering. 2. The issues raised in the complaint pertain to CAO’s mandate to address environmental and social impacts of IFC/MIGA projects. (...)

The determination of admissibility must be the sole responsibility of the Head of the CM. The draft Procedures allow the Inspector General to make that determination if EIB Services disagree with the CM’s decision⁵⁴ and states that *“in exceptional and duly justified cases, where disagreement exists, the Inspector General may decide on the admissibility of the complaint.”*

There is no justification and no precedent for allowing EIB Services or anyone else to determine eligibility under any circumstances. While it is necessary for the CM to consult with EIB Services during the admissibility phase, that consultation should be limited to soliciting information regarding the project, not their opinion on whether the admissibility requirements have been met. If EIB Services have diverging views with the CM, they will have the chance to express those views during the Complaints handling process. There is no need for an extra step to even prevent those complaints from seeing the light.

It would not be possible to label the CM as “independent” when it does not even have the possibility to decide on admissibility of cases it deals with. The whole purpose of the CM Policy should be to clarify what is admissible or not. Then, it is the CM’s duty to act according to the Policy. The question here is not to discuss the alleged “independence” of the Inspector General, but rather to point out that the CM is the only body that should be responsible for judging upon the admissibility of complaints.

Unless Article 1.1.3 of the Procedures is removed, the CM’s independence and credibility will be seriously jeopardized.

⁵² Draft Policy art. 1.4.

⁵³ Draft Policy art. 3.1.

⁵⁴ Draft Procedures art. 1.1.3.

- **Complaints should be admissible prior to project approval.** In order to prevent or mitigate potential adverse impacts, complainants should be able to bring complaints to the mechanism before the project is approved by the EIB's Board. The relevant provisions of the draft Policy and Procedures regarding complaints filed prior to project approval are internally inconsistent, illogical and prevent the CM from fulfilling its mandate. While the draft Policy asserts that E and F complaints are admissible as long as the EIB is "actively considering financing the operation/project,"⁵⁵ other provisions in the draft Policy and Procedures make clear that the CM will typically not undertake any compliance or mediation processes until the financing is approved.⁵⁶

The draft Procedures assert that, "[b]efore a decision to finance an operation is made by the EIB Group Governing Bodies, technically maladministration regarding the project's environmental and social impacts or governance aspects cannot occur."⁵⁷ But maladministration is defined as a failure of the EIB to act according to its own policies, standards and procedures, as well as human rights, applicable law and principles of good administration.⁵⁸ The EIB has policies and procedures that apply prior to project approval, including information disclosure, consultation and due diligence.⁵⁹ The draft Policy even acknowledges as much when it says that the complaint "may relate to any aspect of the planning, implementation or impact of EIB Group projects, including but not limited to: Project's due-diligence; The adequacy of measures for the mitigation of social and environmental impacts of the project; Arrangements for involvement of affected communities, minorities and vulnerable groups in the project; Project's monitoring."⁶⁰ There are standards and procedures that apply at each of those stages. Compliance can be assessed against those standards, and, importantly, corrective actions can more easily be taken than following the decision to finance.

The draft Policy and Procedures would not allow complainants to access the dispute resolution or compliance review functions of the CM until after the non-compliance had occurred. Instead, the majority of complaints filed before approval would be forwarded to the appraisal team and closed.⁶¹ The burden would then lie on the complainant to file a new complaint if they were not satisfied by the response of the appraisal team. That puts the complainant in a difficult and disadvantaged position for a number of reasons.

First, complainants would not have the benefit of the CM analysis of what standards should have been followed when assessing the adequacy of the appraisal team's response. Second, it underestimates the time, resources and patience required to file a complaint. If complainants felt that their concerns were ignored in the first instance, it is unlikely that they would file again. Third, when complaints are simply passed to the appraisal team, there is no procedural guarantee that complainants will be heard on fair terms and that their concerns will be adequately addressed. Furthermore, the draft Procedures are unclear as to how the CM would handle the re-filed complaint if the project had not yet been approved. In exceptional cases, and unlike complaints filed after project approval, the CM may only undertake compliance review or dispute resolution with the approval of the Management Committee, which runs counter to the claims that the CM is independent.⁶²

The best time to file a complaint is before the impacts occur. And the best way to achieve an outcome that avoids those impacts is to have a fair and robust process - the same process that is available for complainants who have already suffered the impacts. The draft Policy and Procedures are significantly out of step with other IAMS and should be revised to adopt the standard of the CAO Operational Guidelines (para. 2.2.1), which can

⁵⁵ Draft Policy art. 4.3.10.

⁵⁶ Draft Procedures art. 3.1.

⁵⁷ Draft Procedures art. 3.1.1.

⁵⁸ Draft Policy arts. 3.1, 3.2.

⁵⁹ Such as EIB Transparency Policy or its Handbook.

⁶⁰ Draft Policy art. 4.3.12.

⁶¹ Draft Procedures art. 3.1.2(A).

⁶² Draft Procedures art. 3.1.2(B).

“The complaint pertains to a project that IFC/MIGA is participating in or is actively considering.”

- **Complaints should be admissible for a reasonable period of time following project completion.** The full implementation of applicable environmental and social standards – and the realization of their objectives – are sometimes only achieved after project loans have been fully disbursed and the “main” project activities (e.g. infrastructure construction) have been completed. Moreover, an activity’s social and environmental impacts may only be felt after project completion. For that reason, it is positive that the draft Policy would allow complaints filed after EIB’s contractual relationship with its clients have ended.⁶³ The draft Policy states that there may be “limitations in the handling” of those complaints, but the draft Policy and Procedures do not explain what those limitations might be.⁶⁴ It does say that that the EIB might not be able to restore compliance in those cases. That may be true, but it also raises the question, again, of the CM’s mandate.

It may be possible for the EIB to learn lessons from those cases in order to improve its policies and practices. It would also be possible for the EIB to try and address the complainants’ concerns itself through, for example, a remedy fund, described in the following section. Moreover, the ending of a contractual relationship does not mean that the EIB totally lacks the ability to use leverage with the client. It may still approach the borrower to seek cooperation or may use other leverage tools such as blacklisting of non-cooperative clients.

Article 4.1.5 imposes a provision that will lead to a subjective determination of when the facts upon which the allegation is based could have been reasonably known by the complainant. The complainant should be able to lodge a complaint at any time she/he feels negatively impacted by the EIB’s decision, action or omission.

Article 4.3.11 of the draft Policy would be further strengthened if it adapted language from the Guidelines of UNDP’s SECU (sec. 1.1) or the ADB’s AM, which exclude complaints:

“relating to projects or programmes [...] for which UNDP’s support has ended and its role can no longer reasonably be considered a cause of the concerns raised in the claim.” However, *“when UNDP’s support has ended, but impacts can fairly and reasonably be traced to UNDP’s involvement, the SECU will accept complaints that are likely to provide institutional learning, prevent future mistakes and abuses, or support resolution of concerns of communities.”* The ADB AM’s procedures state (para. 142(iv)): *“Complaints will be excluded if they are: ... about an ADB-assisted project for which 2 or more years have passed since the loan or grant closing date.”*

As in the case of the EIB there is no official closing date, complaints should be excluded if lodged two years after the Bank published its completion report or ended its monitoring process on a project.

- **Complainants should not be required to take other steps to resolve their grievances as a precondition to filing a complaint to the CM.** There are many reasons why project-affected people may not feasibly be in a position to attempt to resolve their grievances through other means. For example, EIB staff and EIB clients may not be accessible or equipped to address grievances. Additionally, project-affected people may fear reprisals if they attempt to challenge or oppose a project through local institutions and offices, and without their identities being kept confidential. Moreover, project-level grievance mechanisms, where they do exist, are frequently inefficient and

⁶³ Draft Policy art. 4.3.11.

⁶⁴ Draft Policy art. 4.3.11.

ineffective because they lack independence, capacity and resources. The draft Policy is consistent with this recommendation except for complaints filed before project approval, described above. For the complaints, complainants must first contact EIB Services.⁶⁵ There is no justification to treat complaints differently depending on when they were filed. The draft Policy should explicitly state that there are no preconditions to filing a complaint, like the ADB's AM Policy (para. 144), which states that the AM:

"will not require complainants' good faith efforts to solve problems with project-level grievance redress mechanisms as a precondition for their access to the Accountability Mechanism."

- **The CM should accept complaints from one or more individuals.** There is no correlation between the existence of harm and the number of complainants. Even just one complainant should have the right to seek redress for harm through the CM. The draft Policy is consistent with this recommendation.⁶⁶ For reference, the CAO Operational Guidelines state (para. 2.1.2):

"Any individual or group of individuals that believes it is affected, or potentially affected, by the environmental and/or social impacts of an IFC/MIGA project may lodge a complaint with CAO."

- **Judicial or other parallel proceedings should not automatically bar complaints.** The CM should only opt to bar or suspend a complaints process if parallel proceedings already instituted would interfere in their handling of the complaint, or vice versa. This is more likely to be the case with dispute resolution, as multiple processes involving the same parties and issues are usually not conducive to a positive outcome. As compliance review by CM uniquely relates to EIB policy, which will not be the subject of any other mechanism or proceeding, interference is unlikely, and the complaints process should be able to proceed. The draft Policy makes no such distinctions. It prohibits complaints that "have already been lodged with other administrative or judicial review mechanisms or which have already been settled by the latter are not admissible."⁶⁷ In so doing, it ensures EIB avoids accountability for its own actions and decisions. The draft Policy should be revised to incorporate language similar to that found in the CAO's Operational Guidelines (para. 1.1):

"CAO has no authority with respect to judicial processes. CAO is not an appeals court or a legal enforcement mechanism, nor is CAO a substitute for international court systems or court systems in host countries...where CAO is engaged in complaints that overlap the jurisdiction of other organizations' accountability mechanisms, CAO will collaborate ... to ensure that the complaint is handled in a manner that is fair and efficient."

- **Complainants should be allowed to have representation or advisors support them throughout the complaint process.** CSOs and other advisors can play an important role in informing, advising and otherwise supporting complainants throughout the complaint process, for both compliance review and dispute resolution. The CM should respect this relationship and be open to the involvement of legitimate advisors in a manner requested by the complainants. Moreover, due to potential reprisals, affected communities may need to file complaints via a representative. Both local and international organizations should be allowed to represent and/or support the complainants. The draft Policy makes a reference to the representatives of affected people,⁶⁸ but it does not describe the requirements for representation or how they will be included in the process. The draft Policy should include language similar to that found in the EBRD's PCM Rules (para. 5), which allows for an Authorised Representative to serve

⁶⁵ Draft Procedures art. 3.

⁶⁶ Draft Policy art. 4.3.1.

⁶⁷ Draft Policy art. 4.3.4.

⁶⁸ Draft Policy art. 2.4.

“point of contact for all formal communications between the PCM Officer and the Complainant.”

- **The CM should ensure that the complaint process is culturally appropriate, gender responsive and equally available to all.** For example, complainants should be able to submit complaints in a variety of forms, either in writing, orally or via recording and in their own language. The draft Policy appears to provide only for written complaints, not oral complaints⁶⁹ and has limits on the languages in which complaints can be submitted.⁷⁰ The draft Policy should provide for the options found in UNDP’s SECU Investigation Guidelines (sec. 7):

“Complaints are received by mail, email, telephone, facsimile, and SECU’s dedicated online submission form.” The Guidelines of the CAO state (para. 1.6): *“The working language of CAO is English, but CAO works to facilitate communications with its stakeholders in any language, including the submission of complaints and publication of CAO reports and materials. All publicly disclosed CAO reports relating to complaints – including assessment reports, agreements, compliance appraisals and investigations and conclusion reports – are translated into the local language of the relevant complainants. Where deemed necessary, CAO will translate these materials into addition local languages and present them in a culturally appropriate manner.”*

To ensure that the CM is equitable, complainants and other persons affected by projects and operations should have reasonable access to sources of information necessary to engage in the mechanism on fair, informed and respectful terms (see UN Guiding Principles on Business and Human Rights, principle 31(d)). Access to information also permits informed engagement by complainants during consultations with the CM and builds stakeholder trust in the complaint mechanism. Thus, the Policy and Procedures should incorporate more extensive provisions on sharing documents.

- **The CM should routinely conduct site visits during the eligibility phase and as often as necessary throughout the process.** Site visits allow the mechanism to explain its process to complainants, clients and bank staff and provide the mechanism with a better understanding of the issues and context germane to the complaint. While the draft Procedures do allow the CM to undertake a site visit during the initial assessment phase under its extended procedure,⁷¹ they should more explicitly state that the CM will undertake a site visit or provide a written justification for not doing so. The Inspection Panel’s Procedures (para. 37) provide useful language for this:

“During the twenty-one day period, a Panel team normally conducts a field visit to the project area to help confirm the technical eligibility of the Request and inform the Panel’s recommendation to the Board. During the field visit, the Panel team meets with the Requesters, and briefs them orally about relevant information in the Management Response, including any proposed remedial actions, as relevant to the Panel’s recommendation to the Board. Bank staff of the country office, officials of the implementing agency and other interested parties may provide relevant information.”

- **Complainants should be allowed to choose dispute resolution, compliance review or both and their sequence.** An IAM should be empowered to conduct dispute resolution and compliance review contemporaneously or sequentially, as appropriate and as requested by the complainants. The current Procedures of the CM exemplified IAM best practice, allowing dispute resolution and compliance review in either order. The draft Policy and Procedures represent a step backwards, though it appears there is a conflict

⁶⁹ Draft Policy art. 4.1.3.

⁷⁰ Draft Policy art. 4.1.4.

⁷¹ Draft Procedures art. 2.2.2.

between the Policy and Procedures. The draft Policy says that problem solving is a “credible alternative to full investigations, in cases where a compliance review can reasonably be excluded.”⁷² That provision, combined with the language that the CM is “predominantly compliance focussed [sic]”⁷³, would seem to suggest that a complainant could not request problem solving if a compliance review was viable, regardless of whether problem solving would better address their needs. That seems consistent with Article 2.3.1 of the draft Procedures, which seem to foreclose the possibility of mediation following a compliance review.⁷⁴ However, the draft Procedures state that if the parties do not reach an agreement through mediation, the CM could recommend an investigation.⁷⁵ But if it was possible to undertake an investigation, the draft Policy would direct the CM to do so in lieu of problem solving.

Under one interpretation, complaints would undergo compliance review or dispute resolution, but never both. Under a slightly better interpretation, a complaint could go from problem solving to compliance review, but only if problem solving failed. Either way, it does not provide the CM with the right tools and discretion to fulfill its mandate of providing a remedy to complainants and holding EIB accountable to its commitments. The CM should retain its current flexibility, and the draft Policy and Procedures should be revised to reflect the language in UNDP’s SECU Guidelines (sec. 8.3):

“[i]f both processes are applicable, the Complainant will be informed that both are applicable, and be given the choice to proceed with compliance review, stakeholder response [dispute resolution], or both.”

More importantly, the draft Procedures completely undermine the CM’s independence and disregard the interests of complainants by requiring the agreement of the IG in the determination of which function to use. A decision to undertake mediation not only has to have the agreement of the IG, but if EIB Services disagree with the decision, the Management Committee has to agree as well. Depending on which interpretation of sequencing described above is correct, EIB Services and management could prevent a compliance review by objecting to the CM’s decision not to undertake mediation. That gives the Management Committee a veto over compliance reviews. These Procedures are designed to protect the interests of EIB management, not complainants. This provision should be removed.

- **The CM should adhere to clearly established timelines for each stage of the complaint process.** Predictability and transparency of the complaint process is essential for communities’ trust in the mechanism. The CM should strictly adhere to its established timelines and provide clear reasons to complainants when it cannot meet those timelines. The draft Procedures provide fairly clear deadlines for some phases of the complaint process,⁷⁶ but do not specify the deadlines for the EIB Services or management. For example, EIB Services and Directors General are allowed to comment on a draft Conclusions Report before it is shared with complainants. The draft Procedures state that the CM will give EIB Services an “indication” of the deadline.⁷⁷ It is unclear whether the Directors General will have a deadline. Moreover, the Management Committee will be given an additional period to comment if Services disagree with the report. There is also no deadline for the CM to incorporate those comments. Setting aside for a moment that this is a stunning example of the CM’s lack of independence, the complainants are kept in the dark as to the status of their complaint. In contrast, complainants are given 10 working days to comment. Again, it is impossible to ignore how the process is weighted in favor of the EIB.

⁷² Draft Policy art. 5.3.4.

⁷³ Draft Policy art. 5.3.3.

⁷⁴ Draft Procedures art. 2.3.1.

⁷⁵ Draft Procedures art. 2.5.6.

⁷⁶ Draft Procedures art. 2.6.2.

⁷⁷ Draft Procedures art. 1.6.1.

We could mention here several examples of problems at the CM with handling complaints in a timely manner: the complaint about the Ambatovy mining project in Madagascar is still ongoing despite having been lodged in 2012; the CEE Bankwatch Network complaint regarding access to information on ETAP South Tunisia gas project was lodged in December 2015; and another ongoing complaint concerning Nam Thun 2 Hydropower in Laos in April 2016. According to the CM case register, there are even more complaints registered in 2011-2014 for which the process has been blocked at the stage of internal consultation and has not been finalized yet.

While still imperfect, the CAO Guidelines (paras. 2.3-2.4) provide deadlines for many key phases in addition to publicly disclosing when it has sent its report to the World Bank President for approval:

“CAO will complete the assessment within 120 working days of the date a complaint was determined eligible for assessment. CAO will provide an Assessment Report to the parties, the President, the Board, and the public...If the nature of the complaint or special circumstances requires more flexibility, CAO, in consultation with the parties, will review the timeline for handling the complaint.”

Then, while the Policy provides for extension of the timeline on mediation with the complainants, there may be other cases in which the complainants should have input into the timeline for the handling of the complaint. For example, article 1.6.2 of the Procedures states that the external stakeholders involved in the complaint process typically have 10 working days within which to submit comments. However, given the language and cultural differences, this may be too brief a period for certain persons to discuss and provide meaningful input and the policy should make this explicit.

- **The CM should keep complainants regularly updated on the status of their case.** Regular communication from the mechanism will reassure complainants that their complaint has not been forgotten even if there is little progress to report. Communication should be culturally and gender sensitive, in the complainants’ own language and should account for the complainants’ literacy levels. The draft Policy asserts that the CM is “committed to engaging with the complainant(s)...with a view to gathering additional data and information which are relevant to the processing of the complaint.”⁷⁸ While valuable, that falls far short of a commitment to *provide* information to complainants about the status of their complaint. It is also in stark contrast to the number of times that the CM must inform or consult with EIB Services. The draft Policy and Procedures should explicitly include a provision detailing the responsibility of the CM to keep complainants informed, similar to that of the AfDB’s IRM, which assigns this responsibility to the director of the CRMU (para. 79(e)):

“Sending out notices of registered Requests to all interested persons; noting the progress of each Request on the Register and, if required by the circumstances, providing additional updates on such progress to the Requestors and other interested persons; responding to requests for information from Requestors and other interested persons in respect of a particular Request.”

While the draft Policy memorialises the CM’s commitment to consult and exchange information with relevant stakeholders (5.2.3), there is no similar commitment in the draft Procedures. This CM commitment in its Policy to consult and exchange information with relevant stakeholders is made with the objective of ensuring “constructive collaboration” (5.2.3). Yet, the commitment should also be oriented toward the objective of protecting the rights of affected parties, including persons within marginalized communities, such as indigenous peoples, minorities and women, among others. Acknowledgement of this additional objective would move the CM toward greater rights-compatibility consistent with Principle 31 of the UN Guiding Principles on Business and Human Rights.

⁷⁸ Draft Policy art. 6.2.3.

- **The CM should take measures to prevent and address retaliation against complainants.** Globally, individuals defending their human rights and the environment have increasingly faced intimidation, violence and reprisals. While we welcome the intention of article 2.6 in the draft Policy that prohibits “any form of retaliation” against complainants, we believe that in light of the frequency and seriousness of this issue, this article should use an active formulation that states that the EIB will take steps to prevent and address potential risks to complainants instead of the current use of a passive formulation: “Complainant(s) must not be subject....” In addition, the last sentence in 2.6, which states that “This applies to the EIB Group as well as any other counterpart part of a business relation with the EIB Group,” does not adequately cover the range of potential actors that may seek to cause harm to a complainant, including local or regional governmental officials. Thus, we would suggest reformulating the article to express an active obligation on the part of the EIB without limiting its applicability.

The formulation by the Inspection Panel of its objective (sec. 3) provides important guidance as follows:

“(i) identify and monitor potential risks of retaliation, including emerging risks; (ii) plan and adopt preventive measures to address and reduce these risks; and (iii) identify appropriate responses if retaliation occurs.”

Moreover, the CM should also develop a protocol detailing what measures it will take to prevent retaliation and/or address it should it occur against complainants or those associated with the complaint process. Those measures go beyond simply offering confidentiality for the identities of those filing. The Inspection Panel and the CAO have both developed such protocols. These changes would assist in ensuring that the mechanism is rights compatible by ensuring that complainants are protected from reprisals.

- **Prior to publishing or disclosing the complaint to other parties, including the EIB, the CM should seek the complainants’ permission to do so and ask if they wish to keep their identities confidential.** Confidentiality is an important safeguard to protect complainants who may be at risk if their identities were disclosed either externally or internally, as demonstrated recently when the identities of the complainants in the Mombasa-Mariakani project were leaked, resulting in threats of retaliation.

There are two Articles in the draft Policy that relate to information disclosure and publication.⁷⁹ Provisions in Article 4.6 regarding confidentiality should be moved to a dedicated section and addressed separately. The remaining provisions in section 4.6 regarding disclosure and publication should be moved to Article 8 and conditioned on any measures agreed to protect the safety of the complainants or those associated with the complaint process. The CM should have the flexibility to consult and agree with the complainant what information must be withheld to protect their safety. In some cases it might be enough to redact the names of the complainants from the complaint before publishing, provided for in Article 4.6.4 of the draft Policy. In other cases, there may be information in the complaint that could reveal the identities of the complainants even if the names are redacted. In those cases, it may be necessary to publish only a summary of the case on the CM’s website. The draft Policy does not seem to allow for that possibility. Because complainants may also have reasons to lack confidence in EIB Services, the draft Policy should explicitly state that consent of the complainants is required before the CM shares the names of the complainants both externally and internally.⁸⁰ The Policy of the FMO/DEG’s ICM (para. 3.1.8) explicitly requires consent before disclosing complainants’ identities to internal parties:

⁷⁹ Draft Policy arts. 4.6, 8.

⁸⁰ Draft Policy art. 4.6.3 only requires consent for external communications.

“strictly respect and safeguard the absence of explicit consent by a complaining natural person, and refrain in such cases from disclosing the Complainants’ identity to internal and external parties.”

- **The CM should have the authority to recommend the suspension of a project in the event of imminent harm.** Complaint processes can take a year or more to complete. The CM should have the mandate to ensure that, if needed, measures are taken to protect affected communities from harm throughout the process. While we welcome Article 6.1.4 of the draft Policy, which provides the CM with the authority to make recommendations during the process, the language could be further strengthened by detailing the nature of those recommendations and the need to consult with complainants before making them. UNDP’s SECU Guidelines allow (sec. 13) the Lead Compliance Officer to:

“recommend to the Administrator that UNDP take interim measures pending completion of compliance review...Such interim measures could include suspending financial disbursements or taking other steps to bring UNDP into compliance with its social and environmental commitments, or to address the imminent harm. The Lead Compliance Officer will endeavor to consult potentially affected people on these measures, depending on time and related constraints.”

- **EIB management and staff should be required to fully cooperate with the CM in order to ensure the effective functioning of the mechanism.** Upon the request of the CM, both compliance review and dispute resolution, EIB management and staff should, inter alia, provide full access to project-related information, respond frankly to questions posed by the CM in the course of its activities and assist in arranging travel to the project site and field offices. Article 5.2.1 would appear to satisfy this recommendation. For reference, the ADB’s AM Policy, which we identified as best practice, contains a provision requiring ADB management and staff to cooperate in a number of listed ways in the mechanism’s processes (para. 137):

“ADB Management and Staff will (i) ensure that the OSPF and CRP have full access to project-related information in carrying out their functions; (ii) provide assistance to the OSPF in problem-solving; (iii) coordinate with the CRP on compliance review; [...]” etc.

COMPLIANCE REVIEW (CR)

A robust compliance review function is a hallmark of all IAMs. CR seeks to ensure that the DFI has complied with its environmental and social policies, standards, legal framework and other criteria. As such, the CR function is a critical tool to ensure the accountability of an institution to its policies and commitments. In addition, the results of CR should inform continuous improvements to policies and procedures, and their implementation, to prevent and minimize problems from arising in the future.

Most importantly, a compliance review process should end in material remedies for complainants. Restoring a project to compliance with the DFI’s requirements necessarily includes appropriate “fixes” that will prevent harms and the redress of any harm already done to complainants. **Achieving full and effective remedy through a compliance review process requires the active and constructive participation of DFI management.** Management must be required to engage meaningfully with complainants to find mutually agreeable ways to address the IAM’s findings. The process for management engagement should be elaborated either in the IAM’s policy or in a separate procedure governing management’s role in a complaint process.

The utter lack of independence of the CM is demonstrated through the compliance review process. The EIB itself – either represented by EIB Services, Directors General or the

Management Committee themselves – is judge, jury and defendant simultaneously. The CM cannot proceed to undertake a compliance review unless Management Committee – the entity that is ultimately responsible for the actions under review – agrees.⁸¹ Then EIB management has multiple opportunities to object to the CM’s findings and recommendations. Finally, if despite the pressure by EIB management to relent, the CM persists in keeping a recommendation in its final Conclusions Report to which EIB Management objects, EIB management can decide to disregard it and even prevent the complainants from seeing the final EIB response. There is no IAM whose system has codified to such a degree the undue influence by the very actors whose actions and decisions are under review. The availability of the European Ombudsman can provide no justification for a system as lacking in independence and fairness as the EIB’s. If the draft Policy and Procedures are not significantly revised to re-conceptualize the CM’s structure and process, the CM cannot be considered a credible IAM.

In order to effectively achieve both institutional accountability and redress for complainants, the following elements of a CR are necessary:

- **In addition to accepting complaints from internal and external stakeholders, the CM should have the authority to initiate a CR itself.** In limited circumstances – for example if the CM becomes aware of information suggesting serious non-compliance by the EIB or if the filing of a complaint would entail significant risk to project-affected people – the CM should initiate its own investigation. The draft Policy gives this authority to the Inspector General.⁸² As described earlier, to be effective and credible, the CM must also report directly to the Board. As a result, this power should be vested in the Head of the CM. The IFC’s CAO has exercised this authority, resulting in significant policy reform in a few cases. The CAO Operational Guidelines state (para. 4.2.1):

“Compliance appraisals of one or more IFC/MIGA projects are initiated in response to any of the following circumstances: A request from the CAO Vice President based on project-specific or systemic concerns resulting from CAO Dispute Resolution and Compliance casework.”

- **The CM should assess compliance against a set of criteria appropriate to the case at hand.** These criteria could derive from, for example, applicable EU law, the EIB policies, standards, guidelines, environmental and social assessments, host country legal and regulatory requirements and international standards. The definition of maladministration in Article 3 of the draft Policy, which encompasses EIB policies, human rights and applicable law, provides sufficient coverage for compliance criteria. However, Article 5.3.3 of the draft Policy provides a different definition. Instead of determining whether the EIB failed to act in accordance with a rule binding upon it, the CM would review whether EIB services had a “consistent and reasonable explanation of their position, and whether it is based on complete, accurate and reliable information identifiable at the time.”⁸³ Further the article states that the CM will establish an opinion in cases of “manifest error” or “manifest breach”, an ambiguous standard suggesting that other errors or breaches will simply be ignored. That potentially leaves open the possibility that the EIB could violate a binding policy if it could provide a reasonable justification for it. In other words, what should be assessed is the result, not the process that led to it. Article 5.3.3 should be revised to remove all of the text following, “The EIB-CM reviews the Bank’s activities with a view to determining whether maladministration has taken place which is attributable to the Bank.” For reference, the Operational Guidelines of the IFC’s CAO state (para. 4.3):

“The compliance investigation criteria include IFC/MIGA policies, Performance Standards, guidelines, procedures, and requirements whose violation might lead to

⁸¹ Draft Procedures art. 2.3.2.

⁸² Draft Policy art. 5.1.6.

⁸³ Draft Policy art. 5.3.3.

adverse environmental and/or social outcomes. Compliance investigation criteria may have their origin, or arise from, environmental and social assessments or plans, host country legal and regulatory requirements (including international legal obligations), and the environmental, social, health, or safety provisions of the World Bank Group, IFC/MIGA, or other conditions for IFC/MIGA involvement in a project.”

In the draft Procedures, a new provision has been proposed preventing the CM from reviewing activities under the sole responsibility of third parties, notably those of the promoter or borrower, or of authorities at the local, regional or national level, of European institutions or international organisations. A CM review shall not call into question the correctness of the transposition of EU law into national law by EU Member States.

This provision will effectively prevent reliable investigation of complaints raising project compliance with the EU law, to which the EIB is bound, in the EU countries. The essence of compliance investigations is to review the operation's compliance which sometimes is connected with the judgement on the merit of the project, for instance if the Environmental Impact Assessment process was conducted in line with the EU Directives, if there were reasonable alternatives proposed or if the project emissions are in line with the EU standards. Conclusions drawn upon the basis of a CM investigation into project compliance will inevitably concern activities under the responsibility of the borrower and may also lead to the conclusion that the Member State's national law does not enable project implementation in compliance with the EU law. As far as opening an infringement procedure is a derogation of the European Commission, the EIB is obliged to ensure that its operations, including those within the EU, are in compliance with the EU law. The application of the "principle of legality" may not lead to the abrogation of this obligation and may not prevent the CM from conducting a substantial compliance investigation judging on the quality of project which in every case is conducted by the third party.

- **The CM should additionally seek to identify weaknesses and gaps in EIB policies and standards that result in adverse social and environmental risks and impacts.** The investigation of the risks and impacts that emerge from projects as they are designed and implemented provides the best opportunity to identify policy lacunae. Such identification should then lead to policy improvements, reducing the risk of negative impacts in the future. Article 2.4.1 of the draft Procedures seems to satisfy this recommendation by specifying that the outcome of an investigation will determine, *inter alia*, "The EIB Group's relevant policies, procedures and standards failed to provide an adequate level of protection and safeguards in relation to the allegations." For reference, the CAO Operational Guidelines (para. 4.2.1) seek to determine whether:

"[t]here are indications that a policy or other appraisal criteria may not have been adhered to or properly applied by IFC/MIGA" and whether "[t]here is evidence that indicates that IFC/MIGA's provisions, whether or not complied with, have failed to provide an adequate level of protection."

- **The CM should be allowed to seek outside legal counsel for advice.** A DFI's legal department will often be involved in legal matters involved in project preparation, approval and supervision. The legal department is also likely to be involved in preparing management responses to complaints. It is therefore an inherent conflict of interest if the legal department also provides advice to the IAM or the Board in the course of a CR. For that reason, the CM should be allowed to seek outside counsel. Article 2.4.4 of the draft Procedures, which allows for the CM to use external experts, might provide the CM with the discretion to seek external legal advice, but for more security, we recommend that language similar to that found in the MICI Policy (para. 64) be included:

"Except with regard to the Bank's rights and obligations, the MICI Director may also, at any time, seek external legal advice on Request-related issues as they arise."

- **The CM should make recommendations to bring the project into compliance and redress harms.** Where the CM finds non-compliance that has contributed to harms or the risk of harm, the CR report should include a set of recommendations for remedial measures. Both the complainants and the EIB should have an opportunity to comment on the recommendations at the same time as they comment on other parts of the draft CR report (see below). Under the draft Policy and Procedures, EIB Services and Management have repeated opportunities to review, comment and object to the CM's findings and recommendations.⁸⁴ Even if the CM persists in keeping a recommendation in the final Conclusions Report with which the EIB disagrees, the Management Committee can ultimately disregard it.⁸⁵ In contrast, complainants are provided one, brief opportunity to comment on the recommendations, and it is unclear if anyone except the CM sees those comments. The process renders the recommendations nearly meaningless, resulting only in actions that EIB is willing to take, not actions which it must take to redress harm. The draft Procedures should be revised to reflect best practice, represented by the EBRD's PCM Rules (paras. 44-45) which give the experts the authority to make recommendations, without undue influence by bank management and allow complainants to comment on them:

“If the Compliance Review Expert concludes that the Bank was not in compliance with a Relevant EBRD Policy, the Compliance Review Expert will issue a Compliance Review Report which will include recommendations to: a) address the findings of non-compliance at the level of EBRD systems or procedures in relation to a Relevant EBRD Policy, to avoid a recurrence of such or similar occurrences, and/or b) address the findings of non-compliance in the scope or implementation of the Project, taking account of prior commitments by the Bank or the Client in relation to the Project.” And: “Taking account of the Management Action Plan and Complainant’s comments, the Compliance Review Expert may adjust his or her recommendations.”

- **All parties should have the opportunity to comment simultaneously on a draft CR report.** Most IAMs allow complainants to review a draft of the CR report to suggest factual corrections. Best practice by the IAMs, represented by the IDB's MICI and the ADB's CRP, is to share the draft with complainants and the DFI simultaneously for their comment. Doing so preserves the integrity of the IAM and the complaint process by preventing the appearance that management has undue influence on the CR findings or recommendations. Not only does the EIB get to review and comment on the draft CR report before it is shared with complainants, the EIB is allowed to review and comment on the draft up to three times before the complainants review the draft report: first by EIB Services, then by the Directors General, and in the event of a disagreement, by the Management Committee.⁸⁶ No other IAM policy codifies the inequality between the parties so starkly. The draft Procedures should be revised to incorporate the language in the ADB's AM Policy (para. 185) and MICI Policy (para. 44):

“Upon completion of its compliance review, the CRP will issue a draft report of its findings to the complainants, the borrower, and Management for comments and responses within 45 days [...] Each party will be free to provide comments, but only the CRP’s final view on these matters will be reflected in its final report.” The MICI Policy (para. 44) stating: *“Once the MICI has completed its investigation, it will issue a draft report including a review of its main findings of fact and recommendations, and forward them to Management and the Requesters for their comments. Management and the Requesters will have a term of 21 Business Days to send comments on the draft report.”*

Actually, already at the stage of assessment, the CM should, in addition to consulting the EIB Group services concerned, also be obligated to consult the complainants and identify

⁸⁴ Draft Procedures arts. 1.6.1, 1.6.2, 1.7.1, 1.7.3.

⁸⁵ Draft Procedures art. 1.8.2.

⁸⁶ Draft Procedures arts. 1.6.1, 1.6.2.

local communities and any additional stakeholders that are relevant to the complaint as part of the assessment. Also, while the Procedures provide that comments are to be obtained from the EIB Group's relevant services in the Extended Procedure (2.2.7), there is no opportunity for the complainants to provide comments before the Initial Assessment Report is finalised.

- **The final CR report should be shared simultaneously with complainants and the EIB Board and Management.** Complainants should have access to the CR report before entering into dialogue with management regarding the action plan to give effect to the recommendations. Complainants also require the final report in order to inform the Board of their perspectives on its findings and the proposed recommendations to address them. Under the draft Procedures, not only do complainants have to wait until the end of the process to see the final Conclusions Report,⁸⁷ complainants may never see EIB Services' response to the report if the Management Committee decides not to attach it.⁸⁸ The CM first sends the final report to the Directors General for its formal response and then to the Management Committee.⁸⁹ The CM may be asked by the Inspector General to review its final report, depending on the "reaction" of the Management Committee.⁹⁰ The Conclusions Report should be sent to the complainants at the same time it is sent to Services for its response, similar to the process at the AfDB's IRM (para. 63):

"...the Compliance Review Report shall be made available to the Requestors at the same time as it is submitted for consideration and decision [by the President or Board]."

- **EIB management must be required by Board-approved policy to implement corrective action plans as approved by the Board.** In the absence of this requirement, management may simply disregard the CR findings and prevent the CM from fulfilling its mandate. In fact, that is exactly what would happen under the draft Procedures. While EIB Services is required, under the Procedures, to prepare a response, the EIB Board is not required to ensure that the response is adequate to fulfill the recommendations. Instead, the EIB itself - either represented by EIB Services, Directors General, or the Management Committee - is judge, jury, and defendant simultaneously. The EIB management is the entity that is ultimately responsible for the actions under review. Yet, they can object to the CM's decisions throughout the process and force the CM to reconsider them repeatedly. If any disagreements remain, the Management Committee gets to cast the final vote. For example, the EIB management did not follow the recommendations of the CM in at least two well documented cases in 2014: the Mopani copper mine in Zambia⁹¹ and a public procurement case in Bosnia-Herzegovina⁹². Later on in those cases, the European Ombudsman made it clear that the EIB should have respected the recommendations stemming from Conclusion Reports of the CM, and ruled maladministration against the EIB.

The Board must take its institutional responsibility seriously and ensure that the CM's recommendations are considered by a body that does not have an inherent conflict of interest. The Policy of the ADB's AM represents best practice (para. 190):

"If the CRP concludes that ADB's noncompliance caused direct and material harm, Management will propose remedial actions to bring the project into compliance with ADB policies and address related findings of harm."

⁸⁷ Draft Procedures art. 1.9.1.

⁸⁸ Draft Procedures art. 1.8.3.

⁸⁹ Draft Procedures arts. 1.7.1, 1.7.2.

⁹⁰ Draft Procedures art. 1.7.3.

⁹¹ See Decision of the European Ombudsman closing the inquiry into complaint 349/2014/OV against the EIB <http://www.ombudsman.europa.eu/cases/decision.faces/en/59317/html.bookmark> .

⁹² See Decision of the European Ombudsman closing the inquiry into complaint 178/2014/AN against the European Investment Bank <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58171/html.bookmark> .

- **Complainants should be consulted on the development of the remedial action plan, and the Board should have the benefit of the complainants' perspective on its adequacy prior to approving the plan.** Obtaining the ideas and perspectives of the complainants in the development of the action plan is essential to ensuring that the measures will satisfactorily address their grievances and redress harms they have suffered. As described previously, at no time do EIB Services have to consult with the complainants about the response to the CM's conclusions report to seek their input on what would help them. Complainants are only allowed one opportunity to provide their input to the CM on the draft report.⁹³ The draft Policy and Procedures should be revised significantly to ensure that the complainants' views are taken into consideration when the final decisions are made as to how the EIB will respond to the CM's findings. The Procedures of the World Bank's Inspection Panel (para. 70) and the rules of the EBRD's PCM (para. 46) provide a model:

"Management will communicate to the Panel the nature and the outcomes of the consultations with the affected parties on the action plan agreed between the Borrower and the Bank. The Panel may submit to the Board, for its consideration, a written or verbal report on the adequacy of these consultations." Under the Rules of Procedure for the EBRD's PCM, complainant's comments on the action plan are shared with the Board (para. 46): "The PCM Officer will then: ... b) submit the Management Action Plan and the Complainant's comments on the Management Action Plan to the Board of Directors or the President, as the case may be, who may decide to accept the Management Action Plan or to reject it in whole or in part."

- **The CM should have the mandate to monitor the case until all instances of non-compliance have been remedied.** It is not sufficient for the IAM to monitor the implementation of the action plan because the measures taken by management might not bring the project back into compliance. The duration of the monitoring period should not be prescribed by the policy. Under the draft Policy and Procedures, the CM only has the mandate to monitor the implementation of agreed corrective actions and recommendations, not its findings of non-compliance.⁹⁴ They also specify that the monitoring report be issued no later than 24 months after the date of the Conclusions Report.⁹⁵ That is too long to wait to know whether or not actions are being taken to address compliance issues. The draft Policy and Procedures should be revised to ensure that the CM monitors the underlying non-compliance and reports on it no later than 12 months after the Conclusions Report. The Guidelines of the IFC's CAO represents best practice in this regard (para. 4.4.6):

"In cases where IFC/MIGA is/are found to be out of compliance, CAO will keep the compliance investigation open and monitor the situation until actions taken by IFC/MIGA assure CAO that IFC/ MIGA is addressing the noncompliance. CAO will then close the compliance investigation."

- **The CM should consult with parties in the development of its monitoring reports and conduct site visits, as appropriate, to verify information provided to it.** Cases should not be closed unless there is verifiable evidence that the non-compliance has been remedied. That will require the CM to consult with all parties involved and conduct site visits to document progress or lack thereof. Cases often receive less attention after the CR report has been published, but ensuring that findings have resulted in concrete improvements on the ground is critical to an effective grievance mechanism. The draft Procedures, though, would only allow the CM to undertake a site visit if its proposal to do so was approved by the EIB Management Committee.⁹⁶ The EBRD's PCM Rules (para. 47) and the ADB's AM Policy (para. 194) in combination represent best practice:

⁹³ Procedures art. 1.6.2.

⁹⁴ Policy art. 6.2.6, Procedures art. 1.10.1.

⁹⁵ Policy art. 6.2.6, Procedures art. 1.10.1.

⁹⁶ Procedures art. 1.10.2.

“The PCM Officer will issue Compliance Review Monitoring Reports at least biannually or until the PCM Officer determines that monitoring is no longer needed. In the preparation of each report, the PCM Officer will consult with the Relevant Parties as appropriate.”
And: *“The methodology for monitoring may include (i) consultations with the complainants, the borrower, the Board member concerned; Management; and staff; (ii) a review of documents; and (iii) site visits. The CRP will also consider any information received from the complainants and the public regarding the status of implementation.”*

In addition, the CM should consult with **other affected individuals and groups in the case of environmental and social impacts of financed projects/operations.**

We believe the following innovations would help ensure a more effective compliance review and remediation process:

- **The CM should have the power to suspend a project if non-compliance is not remedied.** Several IAMs have the mandate to recommend the suspension of disbursements to a project if it is possible that serious harm would result (see section on Complaints Process), but that mandate should extend to suspending disbursements if non-compliance is not remedied in a reasonable period of time and to suspend other applications for EIB financing of projects by the Borrower.
- **The EIB should establish a fund to assist in providing remedy to complainants for harm that it contributed to by its non-compliance with its commitments.** Clients should not be solely responsible for providing remedy; the DFI must discharge its own responsibility for the harm that was caused. The fund should also be available when the client is unable or unwilling to address the harm. There are several examples where DFIs have contributed their own funds to seek solutions for complainants. The EIB should establish a permanent fund available for this purpose.

DISPUTE RESOLUTION (DR)

Nearly all IAMs have a dispute resolution (sometimes called a “problem-solving”) function. In general, this function allows the IAM to attempt to resolve grievances about negative social and environmental risks and impacts of a project through a range of approaches, including facilitated dialogue or mediation, joint fact-finding and other forms of multi-stakeholder problem solving as appropriate to the case at hand. **It is important that the DR function be broadly empowered and equipped to tailor its approach to the particulars of the case, its setting and the parties to the dispute.**⁹⁷ The decision to attempt to resolve grievances through DR should not preclude a compliance investigation; and a compliance investigation need not become an obstacle to DR and productive efforts to reach agreement among the parties. Such efforts should be taken into account in the compliance review.

There are three significant problems with the dispute resolution provisions of the draft Policy and Procedures: interference of EIB in the process, lack of flexibility between dispute resolution and compliance review and absence of provisions for monitoring dispute resolution. The last two are addressed in the detailed comments below. Dispute resolution requires the willingness and commitment only of the parties involved, the complainants and EIB’s client. Requiring the endorsement of the Inspector General, EIB Services or the Management Committee prior to initiating a dispute resolution misunderstands the nature of mediation and represents an inappropriate interference by bank management.⁹⁸ Similarly, there is no reason for EIB Services to be consulted on the terms of reference for the

⁹⁷ We applaud the fact that the EIB sees the spectrum of possibilities for dispute resolution as: collaborative resolution technique (Procedures 1.4.1), facilitation of information sharing (Procedures 1.4.1), dialog/negotiation (Procedures 1.4.1.), formal mediation (Procedures 2.3.1), pre-emptive dispute resolution (Policy 5.3.2) or conciliation (Policy 6.1.1(i)).

⁹⁸ Draft Procedures art. 2.3.2.

mediation.⁹⁹ Mediation requires considerable and specific expertise. It is unclear what contribution EIB Services could make to, for example, the mediation approach included in the terms of reference.¹⁰⁰

Complainants to IAMs are almost always poor, marginalized from decision-making and otherwise at a disadvantage to the owners, developers and operators of the project that affects them. In recognition of this power imbalance, **any DR process between complainants and clients of the EIB, and indeed EIB itself, should ensure the application of a set of protections to ensure fairness, legitimacy and trust.** The DR process should include the following protections, at minimum:

- **The DR function should appoint a neutral, professional mediator, or other facilitator as appropriate, agreed to by the parties.** The mediator's background and skills should be suitable to the context and dynamics of the case. Parties should agree to the mediator. The draft Procedures allow the CM to appoint a professional mediator, but do not require the agreement of the parties.¹⁰¹ The draft Procedures should be revised to include language similar to that found in the rules of procedure of the FMO/DEG's ICM (para. 3.2.6):

"In the Dispute Resolution phase, a Complaint may be handled by the Independent Expert Panel or mediators selected by the Panel, as long as all parties agree on the selected mediator."

- **The CM should raise awareness among all parties of the rights and entitlements of project-affected people, including entitlements under EIB's Environmental and Social Framework (ESF), which should form the basis of resolutions reached.** The CM should also ensure that any resolutions reached comply with host country and international law. The draft Procedures state that, "Any Mediation Agreement should in principle be compliant with the financing decision of the EIB Group, unless otherwise decided by the EIB Management and the EIF CE/DCE."¹⁰² It is unclear whether that means the EIB's policies, which would be included in the financing decision or something else entirely. The language should be clarified and explicitly reference compliance with national and international law, like the CAO Operational Guidelines do (para. 3.2.2):

"In pursuit of resolution, CAO will not support agreements that would coerce one or more parties, be contrary to IFC/MIGA policies, or violate domestic laws of the parties or international law."

Further, if compliance review is completed prior to or during a DR process, which currently appears to be prohibited by the draft Policy, the findings should be used to help ensure DR outcomes are consistent with EIB policies.

- **Complainants should have the right to withdraw from DR at any time and have their complaint handled by the compliance function.** The voluntary participation of parties is essential to mediations and other DR processes. If at any stage complainants believe that the DR process is not productive or fair, they should be free to withdraw, without repercussions or penalty. In this instance, their complaint should be transferred to the compliance function unless they explicitly request to withdraw their complaint entirely. The draft Procedures do allow the parties to withdraw from mediation at any time.¹⁰³ However, as discussed above (Complaint Process), the draft Policy could be interpreted to mean that dispute resolution would only be undertaken if a compliance review was not warranted. If that is correct, then a complainant could not request a compliance review after mediation fails. The draft Policy and Procedures should be clarified to ensure that

⁹⁹ Draft Procedures art. 2.5.2.

¹⁰⁰ Draft Procedures art. 2.5.2.

¹⁰¹ Draft Procedures art. 2.5.5.

¹⁰² Draft Procedures art. 2.5.6.

¹⁰³ Draft Procedures art. 2.5.1.

complainants have a choice of functions and their sequencing, similar to the Policy of the ADB AM that provides (para. 153):

“The complainants will decide and indicate whether they want to undergo the problem-solving or compliance review function. They can exit the problem solving function and file for compliance review. Complainants can also request compliance review upon the completion of step 3¹⁰⁴ of the problem solving process [...] if they have serious concerns on compliance issues. Complainants can exit or disengage from either the problem solving or compliance review function at any time, which will terminate the process.”

- **The CM should have the power to monitor the implementation of agreements reached and commitments made through the DR process.** A monitoring role is essential to the effectiveness of the DR process in bringing about material redress. The CM should consult with the parties as part of its monitoring role. The draft Policy and Procedures do not have any provisions regarding the monitoring of agreements reached through dispute resolution. A provision with language similar to that found in the CAO Operational Guidelines (para. 3.2.3) and the ADB’s AM policy (para. 174) should be included:

“Any agreements reached by the parties will usually contain a program and timelines for implementation. The CAO Dispute Resolution team will monitor whether the agreements have been implemented, and publicly disclose the outcomes on CAO’s website.” The Policy of the ADB’s AM states (para. 174): *“As part of the monitoring process, the [Special Project Facilitator] will consult with the complainants, the borrower, and the operations department concerned.”*

In addition, we believe the following innovations would help ensure a more effective dispute resolution process:

As with CR, the experience of DR processes at other IAMs have revealed the need for a **dedicated fund that can be accessed to cover costs associated with mitigation or remedial actions that are agreed to through a DR process, but which fall outside the scope of the client’s responsibilities.** For example, following an agreement reached by an EIB client and complainants on land boundaries between the project and the affected households, the fund might cover the costs of land registration for the households to give full effect to the agreement and ensure the community’s tenure security, preventing the reemergence of disputes.

ADVISORY

If systematically captured and utilized, the CM’s experiences can provide a valuable source of learning to improve the EIB’s performance and outcomes for project-affected communities. As at other IAMs, an advisory function would authorize the CM to provide pragmatic, evidence-based recommendations gleaned from the CM’s dispute resolution and compliance casework, shedding light on gaps in the EIB’s policies and their implementation. Additionally, the advisory function helps to embed an institutional culture of continuous learning and improvement of policy and practices.

The CM’s advisory function is currently the least well-developed of the three functions. The draft Procedures should, but do not, contain a section detailing how the CM will undertake its advisory function. The lessons learned from the CM’s cases should not only be shared internally, but with external stakeholders as well. That would allow the public to monitor whether and to what extent the EIB takes them into account by strengthening its policies and

¹⁰⁴ Step 3 is the actual problem solving process in which the mechanism facilitates engagement of the parties to resolve the problem. This can be completed on the initiation of the complainants themselves (or any other party) if they decide to walk away from the process because they do not consider it purposeful.

practices. And the CM should have a system to monitor whether the EIB implements its advice. Specifically:

- **The CM should undertake and publish independent analysis on trends and systemic issues arising from its cases.** The CAO has published advisory papers on numerous re-occurring issues from its dispute resolution and compliance work, including the: *CAO Grievance Mechanism Toolkit* (July 2016); *Advisory Series Lessons from CAO Cases: LAND* (August 2015); and *Participatory Water Monitoring: A Guide for Preventing and Managing Conflict* (2008). The publications identify tools to help project-affected communities and clients overcome common challenges. The draft Policy and Procedures do not seem to require or allow the CM to publish its advice to the EIB. While the scope of the advice includes systemic issues derived from the complaints received, the draft Policy prescribes that the advice should be provided “internally”.¹⁰⁵ That language should be revised to include the possibility that the CM could also publish its advice, if appropriate.
- **The CM should provide input on the development and revision of the EIB’s policies and guidelines.** Drawing on the lessons from its cases, the CM will have valuable recommendations to contribute to the development and revision of the EIB’s policies and practices. For example, the CAO published its *Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information* (May 2010) to inform the IFC’s review of its Sustainability Framework. The CAO’s recommendations to strengthen the IFC’s Framework were based on 10 years of casework. Similarly, the Inspection Panel’s lessons learned series from its caseload were important considerations in the update of the World Bank’s environmental and social safeguard policies. The World Bank benefited from the Inspection Panel’s insights - despite the absence of the mechanism’s official advisory mandate. The draft Policy and Procedures should be revised to provide the CM with the mandate to engage in the EIB’s policy reviews.
- **The CM should provide its advice to the EIB Board and management in writing and monitor the EIB’s implementation of its advice.** To maintain the transparency and accountability for the advice provided, the CM should provide advice in writing and disclose it publicly. Just as with the dispute resolution and compliance review functions, the CM should monitor the actions taken to implement its advice under its advisory function. The draft Policy and Procedures do not specify the form of the advice nor provide the mandate to monitor it. They should be revised to incorporate language similar to that found in the CAO Operational Guidelines (paras. 5.1.2 and 5.3.3):

"CAO advice is given formally in writing." And: "Advice will be integrated into CAO's monitoring and evaluation activities. CAO monitors IFC's/MIGA's implementation of advice and reports CAO's findings to the President."

¹⁰⁵ Draft Policy art. 5.3.1.

ANNEX C

REVISITING THE APPEALS TO THE EUROPEAN OMBUDSMAN FOR A REINFORCED AND PRO-ACTIVE SCRUTINY OF EIB OPERATIONS

As analysed in the sections above, the CM is holding a marginal position at the EIB – its independence often threatened and its recommendations largely ignored. In this context, in addition to the specific recommendations issues earlier in this report, governance changes and a stronger external scrutiny – including via the European Ombudsman’s role as a second layer of accountability – are absolutely necessary for the CM to be a functional accountability mechanism.

A Memorandum of Understanding (MoU) signed between the EIB and the European Ombudsman establishes that citizens (even outside of the EU if the Ombudsman finds their complaint justified) can turn to the Ombudsman on issues related to ‘maladministration’ by the EIB.¹⁰⁶ "Maladministration" was described, in a recent Ombudsman publication, as the failure to respect "*fundamental rights, legal rules or principles, or the principles of good administration. This covers administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, and unnecessary delay, for example.*"

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

Later on, further principles for a genuine and effective complaints mechanism dealing with complaints on infringements of fundamental rights submitted by persons individually affected by the infringements and also in the public interest¹⁰⁷ were issued by the European Ombudsman in relation to the European agency Frontex. This was followed by the adoption in the European Parliament of a resolution establishing criteria of accessibility, independence, effectiveness and transparency for the recommended mechanism.¹⁰⁸ We would like to bring to the EIB’s attention those principles, which should be applied and reflected in the set-up of the CM.

So far, in a few cases, the European Ombudsman took a critical stance over the EIB and found maladministration.

The Bujagali dam in Uganda: delays and internal problems

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

¹⁰⁶ <http://www.eib.org/infocentre/publications/all/memorandum-of-understanding-between-the-eo-and-the-eib.htm> .

¹⁰⁷ Special Report of the European Ombudsman in own initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, November 2013.

¹⁰⁸ European Parliament Resolution of 2 December 2015 on the Special Report of the European Ombudsman in own initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 2014/2215(INI).

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

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

During the investigation, the Ombudsman found that the EIB went on to finance the project to construct a bridge over the Sava river in Bosnia and Herzegovina regardless of complaints from an Italian company Impresa Pizzarotti & C. SpA which had been excluded from the tender despite having offered the lowest bid.

The EIB's Complaints Mechanism had ruled that the complaint of the Italian company was grounded, yet the EIB management chose to ignore the ruling of its own policy-enforcing body. The European Ombudsman Emily O'Reilly found that the EIB management decision was based on an incorrect interpretation of the tender documents and said she was considering opening an own-initiative inquiry into the systemic issues underlying the EIB's handling of the case.¹⁰⁹

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

In November 2012, the UK based NGO Christian Aid requested access to an investigation report of the EIB's Inspectorate-General into allegations of tax evasion by a company to which the EIB had granted a loan for a mining project in Zambia.¹¹⁰ The EIB refused access to the report, a decision it maintained in July 2014 following an appeal by the complainant. As the complainant felt the EIB's response was insufficient it turned to the Ombudsman who made a recommendation to the EIB that it should reconsider its refusal and either grant access to a redacted version of the report or, should this not be possible, provide the complainant with a meaningful summary of the main findings of the report. In its reply, the EIB released to the complainant - and published on its website - a summary of the investigation report. However, since the summary did not contain any further information on the findings concerning the allegations, the Ombudsman concluded that the summary could not be considered as a meaningful summary. Furthermore, the Ombudsman noted that the EIB had failed to comply with the rules of its own Transparency Policy in its decision on this case. It therefore closed the investigation with those critical remarks. It is worth mentioning that the European Parliament, in its resolution 2014/2156(INI), "regrets the fact that in the context of a recent case (Mopani/Glencore), the EIB is refusing to publish the findings of its internal inquiry; [...] asks the EIB to follow the recommendations of the European Ombudsman."

CSOs welcome that in recent years, and especially under the impulse of the current Ombudsman Ms Emily O'Reilly, the Ombudsman's services have stepped up their scrutiny on the EIB, showing appetite to tackle EIB-related issues. Nevertheless, much is still to be done. Current limits to the Ombudsman competences and capacity undermine those efforts.

- **The European Ombudsman decisions are non-binding.** In the case of the Mopani copper mine for instance, the EIB did not follow the recommendation to disclose a redacted

¹⁰⁹ See Press release no. 21/2014, <http://www.ombudsman.europa.eu/en/press/release.faces/en/58173/html.bookmark> .

¹¹⁰ See Counter Balance report The Mopani copper mine, how European money has fed a mining scandal, <http://www.counter-balance.org/counterbalance-eib.org/wp-content/uploads/2011/01/mopani-web.pdf> .

version of its internal investigation and rather decided to publish a summary of the investigation – which was then to be considered as non-meaningful by the Ombudsman services. This emblematic case demonstrates the need to ensure that the Directors of the EIB are fully informed of the cases being handled by the European Ombudsman and that is not only up to the EIB management to deal with those sensitive cases.

- In her examination, **the European Ombudsman is limited to cases of maladministration**. This means she cannot judge the EIB practices upon their own merits, but only in connection to the EIB policies. Hence, the Ombudsman is competent to hear complaints arguing that the EIB contradicts its own policy guidelines by financing a given project, but could not handle a complaint aiming to change, correct or improve the policy decisions by the EIB if it is coherent with relevant legal provisions or policy guidelines.

As the Memorandum of Understanding between the EIB and the EO is being re-negotiated in the framework of the revision of the CM, we think this is a unique opportunity to further empower the European Ombudsman and enhance the accountability of the EIB. It is worth recalling here that the European Parliament, in a resolution adopted in April 2016,¹¹¹ called for the EIB to *“update the Memorandum of Understanding between the EIB and the European Ombudsman in order for the Ombudsman to exercise external scrutiny over the EIB more actively and to improve monitoring procedures and further accountability of the EIB.”*

Therefore, you will find below recommendations for the European Ombudsman to strengthen its scrutiny over the EIB. Some of those recommendations shall also be reflected in the CM draft policies and procedures.

Recommendations:

- **Eliminate Art 4.5.3 of the CM draft Policy which restricts the possibility to escalate a case to the European Ombudsman.** Indeed, this provision means that it would not be possible anymore to lodge a complaint to the EO before the CM has produced its conclusions. Hence, in the case of massive delays, the EO could not be activated. Knowing that this is currently the only way to unblock sensitive cases stuck at the CM (for instance it happened in the complaint on the Ambatovy mine in Madagascar), this is a very problematic provision. Finally, given that delays in dealing with a complaint can be considered as “maladministration”, there is no rationale behind this suggestion by the EIB.
- The MoU should not be renewed but rather broken if the CM policy to be adopted in 2018 is weaker than the current one. However, if the CM policy to be approved lives up to the expectation of a more independent and efficient CM, the revision of the MoU shall build on those improvements and reflect upon the experience of collaboration between the EIB and the Ombudsman’s services.
- First of all, in the revised MoU, it is crucial that the EO keeps the prerogative to accept complaints from citizens from outside of the European Union. This provision is essential to ensure the relevance of the two-tier accountability mechanism at the EIB and CSOs welcome this possibility. Such provision should also be referred to in the CM Policy as part of the principles around the cooperation with the EO.
- Confirming the mandate of the European Ombudsman by adding specific reference to her role in cases of maladministration AND human rights issues.
- Developing mechanisms to ensure that the Ombudsman recommendations are systematically taken on board by the EIB. For each decision of the EO related to the EIB, a formal note including a summary of the decision and main recommendations should be sent to the Board of Directors of the EIB. The case and needed follow-up

¹¹¹ European Parliament resolution of 28 April 2016 on the European Investment Bank (EIB) – Annual Report 2014 (2015/2127(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0200&language=EN>

by the EIB would then be discussed during their following board meeting. On an annual basis, the EIB should issue a report to the European Ombudsman and the European Parliament showing how it reflected the recommendations of the Ombudsman at project level, in its operations and in its policies.

- Tasking the Ombudsman with the more specific objective to carry out Own Initiative Inquiries (OII) as concerns specific structural issues linked to the EIB. It would enable the EO to tackle issues such as public procurement, the use of financial intermediaries and transparency challenges linked to it. To date, such crucial issues have not been sufficiently addressed by the EU institutions to which the EIB is accountable, despite signals sent by the European Parliament and the EO herself that these are problematic areas.

CONCLUSION

The signatories of this position paper hope that their recommendations will be taken into consideration and reflected in the revised drafts of the CM Policy and Procedures. It should be in the interest of all stakeholders involved in this process (the EIB itself, civil society and the European institutions) that the financial arm of the European Union is equipped with a strong internal accountability mechanism, also enabling the bank to learn lessons and improve the quality of its operations. At times when the democratic gap between the European Union and its citizens seems – for a wide set of reasons – to be widening, we consider it crucial that citizens affected by EIB operations can have their voices heard and their concerns dealt with properly. A step backwards in this regard would be a disturbing signal sent to citizens in and outside the EU. We are confident that the EIB will therefore seriously address the matters raised in this paper.

We hope to have a fruitful and beneficial collaboration with you and your services in this process and look forward to hearing from you on the points raised in this paper. We remain available to further explain the recommendations highlighted above.