

'Right to appeal' - International Financial Institutions and accountability – on the way to independent compliance and appeal mechanism for the European Investment Bank - Conference

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Mechanisms at EC level to hold the European Investment Bank accountable

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Background paper

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1. Introduction

The European Investment Bank (EIB) was set up, in 1957, by the Treaty on the European Economic Community, which later became the EC Treaty. The basic provisions in this regard are laid down in Articles 9, 266 and 267 Treaty. Its statutes are laid down in a Protocol which is annexed to the EC Treaty and is an integral part of it.

The EIB is located in 2950 Luxemburg, 100, Boulevard Konrad Adenauer. Members of the EIB are the EC Member States. The EIB is administered and governed by a Board of Governors – composed by ministers designated by the Member States -, a Board of Directors and a Management Committee.

The EIB has the task to contribute towards the balanced and stable development of the EC internal market, in the interest of the EC.

With regard to its relation with the public, the EIB adopted and published, in 2001, a “Code of good administrative behaviour for the staff of the EIB in its relations with the public”¹. This appears to be, together with a document issued in 2006, the only document issued by the EIB which is of relevance to the present examination.

¹ Document 2001/C17/08, OJ EC 2001, C 17 p.26. The published text does not indicate which body of the EIB has prepared or adopted it.

As the EIB was set up by the EC Treaty, the provisions of the EC Treaty and of the legislation and measures which are based on the EC Treaty, also apply to its activities. However, the EIB is not an EC institution, as it does not figure in the list of institutions of Article 7 EC Treaty. In normal Community language, the EIB is called a “body”; it shares this designation with a number of European agencies or authorities, the European Economic and Social Committee, the Committee of the Regions etc.

In the following text, the notion of “accountability” is understood as not to include the political accountability. Indeed, it is clear that the EIB, through its own administration, is politically accountable for its policy and its measures towards the European institutions as well as to the EC Member States. Accountability is rather understood as the question, to what extent the public or individual members of the public may be informed about policies and measures taken by the EIB, to what extent they may deliver opinions on certain projects or measures, furthermore, what means they have to challenge decisions or omissions by the EIB or its staff before, institutions, bodies or courts, in order to have them examined.

2. Access to the Court of Justice and the Court of First Instance

The competence of the Court of Justice, as far as this is relevant for the present study, is laid down in Articles 230 and 232 EC Treaty. The Court controls the legality of actions taken by the Council, the European Parliament or by the Council and the Parliament together, furthermore by the Commission and by the European Central Bank; under Article 232 EC Treaty, the Court also controls omissions to act by the European Parliament, the Council or the Commission which are not compatible with the requirements of the EC Treaty.

The EIB, not being an EC institution, is not mentioned in these provisions. This means that an action of a member of the public against the EIB may not be brought to the Court of Justice under Articles 230 and 232 EC Treaty.

The Court of First Instance is part of the Court of Justice. This follows from the fact that it is mentioned in Section IV EC Treaty, which is entitled “Court of Justice” and, furthermore from Article 225 EC Treaty. According to this Article, the provisions of the EC Treaty on the Court of Justice also apply to the Court of First Instance. Furthermore, the Council shall decide which cases are attributed to the Court of First Instance and which to the Court of Justice. This has been done in particular in the Statute of the Court of Justice. At present, the Court of First Instance has to decide on cases that are mentioned in Articles 230 and 232, furthermore in Articles 235 (compensation for damage suffered), 236 (staff litigation) and 238 (arbitration clauses) EC Treaty.

It follows from that that the Court of First Instance is not either competent to hear cases which are brought by a member of the public against the EIB.

3. Regulation 1367/2006 on citizens rights in environmental matters

However, secondary EC law may explicitly provide that the Court of First Instance is responsible to hear cases other than those that are mentioned in the EC Treaty. As regards the EIB, this has been done in a specific area: in September 2006, the European Parliament and the Council adopted Regulation 1367/2006 “on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies”². This Regulation shall become effective as of 28 June, 2007 (Article 13). It applies to Community institutions and bodies which are defined, in Article 2(1)(c) as: “any public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity. However, the

² Regulation 1367/2006, OJ EC 2006, L 264 p.13.

provisions under Title II (this Title is on access to environmental information, L.K.) shall apply to Community institutions or bodies acting in a legislative capacity”.

As Regulation 1367/2006 applies to all Community bodies, it also applies, as far as its field of application pertains, to the EIB. For the three sections covered by Regulation 1367/2006, the application to the EIB will be examined separately.

3.1 Access to environmental information

As regards *access to environmental information*, Regulation 1367/2006 requests on the one hand all institutions and bodies to provide for active information on the environment which is held by them (Article 4), in order to ensure “its active and systematic dissemination to the public”. On the other hand, it applies to requests concerning access to information by members of the public. In this regard, it first declares Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents³ also applicable to “bodies”, thus to the EIB (Article 3). As Regulation 1049/2001 only gave rights of access to documents made by citizens of the EC or persons residing within the EC, Regulation 1367/2006 extends the rights of access to environmental information⁴ to every person (Article 3(1)).

Article 7 of Regulation 1049/2001 provides that where access to documents is, in full or in part, refused, the applicant may, making a confirmatory application, ask for an internal review of this refusal. And where the refusal is repeated by the confirmatory decision, the applicant has the right to appeal to the Court of First Instance.

The Statutes and other provisions of the EIB do not yet contain any provision for such an internal review and for access to the Court of First Instance. According to Article 13 of Regulation 1367/2006, they will therefore have to be adapted by 28 June 2007.

Should this adaptation be delayed, the provisions of Regulations 1049/2001 and 1367/2006 will become directly applicable. This so-called “direct effect doctrine”, developed by the Court of Justice, provides that Member States may not take an advantage from the fact that they did not in time or correctly transpose a provision of EC law into their national legal order. The doctrine applies to provisions which are unconditional and sufficiently precise in order to enable individuals to refer to them before courts. This doctrine of direct effect also applies to obligations of EC institutions. As the provisions of Regulation 1367/2001 are clear, precise and unconditional, they will apply as of 28 June, 2007, even where the EIB has not adapted its own provisions.

3.2 Participation in environmental decision-making

As regards *participation in decision-making*, Regulation 1367/2006 only deals, in Title III, with public participation concerning plans and programmes relating to the environment (Article 9). However, the Aarhus Convention itself also deals with the public participation concerning individual projects. It will be discussed below, under section 4.2, whether EC law is, in this regard in compliance with the Aarhus Convention and what legal consequences flow from that. At present, it can only be concluded that Regulation 1367/2006 does not give any right to the public to participate in decisions by the EIB to finance or co-finance individual projects. This also follows from Article 2(1)(c) of Regulation 1367/2006 which gives a definition of “plans and programmes relating to the environment” and which in the second sub-paragraph states: “This definition shall not include financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed...” This provision shows the clear intention of Regulation

³ Regulation 1049/2001, OJ CE 2001, L 145 p.43

⁴ „Environmental information” is defined in Reg.1367/2006, Article 2(1)(d); Recital 8 of the same Regulation clarifies that the „definition of ‚document’ in Regulation (EC) No 1049/2001 encompasses environmental information as defined in this Regulation“.

1367/2006 to exclude the financing decisions concerning specific projects or activities from its field of application.

For plans and programmes, Article 9 of Regulation 1367/2006 provides for public participation in their preparation, modification or review. In substance, the public is entitled to obtain information on plans and programmes, submit comments, opinions and questions and must dispose of sufficient time to prepare an effective participation in the decision-making process. The Community institution or body shall take due account of the outcome of the public participation, shall inform the public of the decision on the plan or programme as well as on the reasons and considerations on which the decision is based.

Regulation 1367/2006 does not indicate what happens, if public participation is not granted, if the administration does not inform about the reasons and considerations for taking the decision or if the public otherwise was not able to fully participate in the decision-making. However, Article 10 of Regulation 1367/2006 grants to any non-governmental organisation which meets the criteria of Article 11⁵, the possibility to ask for an internal review of the decision taken. The Community institution or body is then obliged to state, "in a written reply" the reasons for its – confirmed or amended – decision as soon as possible, but within 12 weeks at the latest.

"Plans and programmes related to the environment" are not defined. Article 2(1)(c) provides that these are plans or programmes, prepared by a Community institution or body, required by legislation or administrative provisions and which contribute to the achievement of Community environmental policy.

It should be noted from the outset that the title which a specific document bears, is not decisive. Thus, a "strategy", a "framework", a "guideline" or a document with a similar title may be considered to be a plan. It is decisive that the paper constitutes an organised and coordinated system for reaching certain objectives⁶.

It may be assumed that, in its daily policy, the EIB follows certain plans or programmes which it has adopted, for example for co-financing projects in the Balkan region, for promoting alternative energies or for assisting in installing canalisations in rural areas. It may be doubtful, though, whether such plans or programmes fulfil the condition of Article 2(1)(c) of Regulation 1367/2006 and are "required" under legislative, regulatory or administrative provisions. The question, whether the EIB does work according to plans and programmes relating to the environment in the sense of Regulation 1367/2006, is not the subject of this study. However, at least EIB's Corporate Operational Plan which is set up annually⁷, constitutes a plan which comes under the notion of "plan relating to the environment" of Article 2(c) of Regulation 1367/2006. Indeed, it is unthinkable that such a plan is set up annually with a quite specific content, without there being administrative provisions inside EIB which require to set up such a plan. And such a plan which orient the EIB's investments in economic projects, clearly has significant (positive or negative) effects on the achievements of the Community as well as of the environmental policy of the State which is the actual or potential beneficiary of financial assistance by the EIB. .

It is therefore assumed, that there are some guidelines, orientations, instructions or other internal provisions issued by the EIB's management bodies which also refer to the environment or have the effect to contribute to the achievement of Community environmental policy. Should this be the case, the EIB is obliged to adapt, till 28 June, 2007, its internal rules in order to provide for public participation in the elaboration, modification or review of such programmes, and to provide for an

⁵ These criteria are: the organisation must be an independent non-profit-making legal person according to the law of an EC Member State; (b) it must have the primary objective of promoting environmental protection; (c) it has been active for more than two years and actively pursues the objective of environmental protection; (d) the subject matter in respect of which the request is made is covered by its objective and activities.

⁶ Court of Justice, case C-387/97, Commission v. Greece, (2000) ECR I-5047, para. 76; see also L.Krämer, Casebook on EU Environmental Law, Oxford: Hart 2002, p.364ss..

⁷ The Corporate Operational Plan and the fact that it is set up annually, is mentioned in the Disclosure Document, discussed under no.5.2, below, paragraph 50. In a certain contradiction to this, the most recent Corporate Operational Plan covers a three-year period, 2006-2008.

internal review procedure for those cases, where a member of the public pretends that he has not been able to fully participate in the decision-making.

The exemption of Article 2(1)(c) of Regulation 1367/2006, mentioned above at page 3s above, does not apply to general plans and programmes adopted by the EIB, as the exemption is limited to plans and programmes “laying down how particular projects or activities should be financed”; in the present case, however, general plans and programmes are in question.

Regulation 1367/2005 does not explicitly provide for access to the European Court in those cases, where the possibility of participation has not been granted. The provisions mentioned above, under section 2, are therefore applicable. It will be discussed below, under section 4, whether the application of the provisions of the Aarhus Convention leads to another result.

3.3 Access to justice in environmental matters

Regulation 1367/2006 refers, in its title, to the Aarhus Convention and therefore mentions “access to justice”. The Regulation contains, in this regard, only the provision for the internal review which refers to all administrative decisions – the Regulation calls them “administrative acts” and defines them in Article 2(2). As regards access to the European courts, Article 12 states that the non-governmental organisation which had made the request for internal review, may institute proceedings before the Court of Justice “in accordance with the relevant provisions of the Treaty”; the same clause is found in Article 12(2) for omissions by a Community institution or body. This reference means in clear terms that Regulation 1367/2006 does not modify or complete, as regards access to the European Court, the provisions of the EC Treaty described above under section 2

However, Regulation requires the EIB to set up an internal review procedure for giving environmental organisations the possibility to have administrative acts, adopted by the EIB, or omissions to adopt such an administrative act. “Administrative act” is defined in Article 2(1)(g) of Regulation 1367/2006 as “any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects”; an “administrative omission” is defined as “any failure of A Community institution or body to adopt an administrative act as defined in (g)”.

The decision by the EIB to finance or co-finance a specific project, has – at least together with the corresponding contract – binding and external effect. Such decisions must therefore be subject to the internal review procedure of Regulation 1367/2006.

Some details of such an internal review procedure, in particular as regards the delays, are laid down in Article 10 of Regulation 1367/2006. It is to be noted that the right to request an internal review does not depend of any personal interest of the environmental organisation, or on its earlier participation in the discussion of the specific project. The organisation need not either be a European organisation or be located in the country where the project is to be realised. Rather, Article 10 of Regulation 1367/2006 introduces a possibility for a request of internal review as soon as the request is made and substantiated in writing which is open to any organisation that complies with the requirements of Article 11 of Regulation 1367/2006. This means, the organisation must

- (a) be an independent non-profit-making legal person in accordance with a Member State’s national law or practice;
- (b) have the primary stated objective of promoting environmental protection in the context of environmental law;
- (c) have existed for more than two years and actively be pursuing the objective of promoting environmental protection in the context of environmental law;
- (d) cover, by its objectives and activities, the subject matter in respect of which the request for internal review is made.

Details for these provisions shall, at a later stage, be elaborated by the Commission (Article 11(2) of Regulation 1367/2006).

The EIB will have to give a written reply to such an internal review request. The objective nature of this procedure excludes, it appears, an automatic recourse to the Court of Justice, if the environmental organisation is not satisfied with the reply. Rather, it has access to the Court of Justice – as explained in section 2 above, to the Court of First Instance – where it is directly and individually concerned by the EIB's decision. This follows from Article 12(2) of Regulation 1367/2006, which indicates that the non-governmental organisation “may institute proceedings before the Court of Justice *in accordance with the relevant provisions of the Treaty*” (emphasis added, L.K.)

4. The Aarhus Convention

4.1 Generalities

The UNECE Convention on access to information, participation in decision-making and access to justice in environmental matters (hereafter called the Aarhus Convention) was signed in Aarhus(Denmark) on 25 June 1998. The Community adhered to it by Decision 2005/370⁸. According to Article 300(7) EC Treaty, this Convention has therefore become part of Community law. It is binding on the EC and the Member States – including those which did not ratify it.

As the Convention binds the EC, it is also binding on all institutions and bodies which are set up under the EC Treaties. Consequently, the Aarhus Convention is also binding on the EIB.

In order to transpose the provisions of the Aarhus Convention into Community secondary law, the European Parliament and the Council adopted Regulation 1367/2006 which was discussed under section 3, above. There is, however, the question, what happens if the provisions of Regulation 1367/2006 and those of the Aarhus Convention are not in compliance with each other, as both provisions are part of Community law. This problem does not occur, though, where the provisions of Regulation 1367/2006 go further than those of the Aarhus Convention, as the Aarhus Convention provides that in this case the provisions of Regulation 1367/2006 prevail⁹. Of interest for the present study is thus only the case, where the Aarhus Convention grants broader rights than the provisions of Regulation 1367/2006. According to a consistent line of jurisprudence of the Court of Justice, in such a case it is the international convention which was incorporated into EC law which prevails.

The details of the provisions of the Aarhus Convention will only be examined hereafter, where they diverge from the provisions of Regulation 1367/2006.

4.2 Access to information and participation in decision-making

As regards access to environmental information, Regulation 1049/2001 to which Regulation 1367/2006 refers, provides at several occasions that access to documents may be refused, whereas the Aarhus Convention does not provide for such a possibility. The details of these differences are not to be examined here, as this study concentrates on the remedies. It is relevant, though, that the possibilities under the Aarhus Convention to refuse access to environmental information are more restricted than under Regulations 1367/2006 and 1049/2001. In this case, access to the Court of First Instance is possible; and the Court, in analogous application of the “direct effect” doctrine to Community institutions and bodies, would have to set

⁸ Decision 2005/370, OJ EC 2005, L 124 p.1; the Convention is reproduced in the annex to that Decision.

⁹ See Article 2(5) of the Aarhus Convention: “The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention”.

aside the provisions of the two mentioned Regulations and only apply the provisions of the Aarhus Convention.

With regard to the participation in decision-making, the first question to examine is, whether a financing plan for a specific project (see section 3.2 above) comes under the provisions of the Aarhus Convention on the participation in environmental decision-making. However, this is not the case: Article 6 of the Aarhus Convention which deals with the issue of public participation in decisions on specific activities, concerns activities which lead to the issuing of a permit for such activities. The decision to co-finance a project is, however, different from the decision to grant a permit for the realisation of a project. As the decisions to finance projects are not either covered elsewhere in the Aarhus Convention, the provision of Article 2(c) of Regulation 1367/2006, not to provide for participation in the decision-making of financing a specific project is compatible with the Aarhus Convention.

Article 7 of the Aarhus Convention asks the Contracting Parties to “make appropriate practical and/or other provisions” for the participation of the public in the preparation of plans and programmes relating to the environment. However, Article 9 of the Convention which deals with issues of access to justice, only provides for judicial review where access to environmental information was not granted (Article 9(1)) as well as for cases, where the participation in the decision-making for permitting a project was not provided for (Article 9(2)). Article 7 is not mentioned in Article 9 of the Aarhus Convention. It can therefore be concluded that there is no specific provision in the Aarhus Convention which provides for judicial review in those cases, where participation of the public was not granted for the preparation of plans and programmes relating to the environment.

4.3 Access to justice

There is, though, a general provision on access to justice in the Aarhus Convention which reads as follows (Article 9(3) and (4)):

“3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedure referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible”.

The meaning of these provisions is heavily discussed in legal literature. Some authors are of the opinion that they grant an access to judicial review. Others are of the opinion that the provisions only refer to national law – and because the Community is a party to the Aarhus Convention, also to Community law – and that those criteria which are laid down in legislation with regard to standing before the courts, need not be changed, as Article 9(3) expressly refers to them. This last opinion is that of the Council which had laid it down in its Common Position to Regulation 1367/2006¹⁰; there, the Council stated that criteria for access to the European Courts had been laid down in Articles 230 and 232 EC Treaty and that no further provisions were necessary to comply with the Aarhus Convention. And the legal opinion of the Council obviously prevailed in the final text of Regulation 1367/2006 which does not contain any general rule on access to the European Courts.

The own opinion is that this opinion of the Council is not compatible with the Aarhus Convention, mainly for the following reasons:

¹⁰ Council, Common Position, OJ EC 2005, C 264E p.18.

- (a) There is no provision at all in EC law which lays down criteria that allow members of the public to challenge acts and omissions by private persons. It cannot be assumed that the Aarhus Convention intended to allow the Contracting Parties to fix criteria for actions against public authorities, but not against private persons;
- (b) If the Council legal opinion were correct, the national law of all Contracting Parties would not have to be amended at all, in order to comply with Article 9(3) and (4). Indeed, in all Member States and also at Community level, some criteria already existed before the adoption of the Aarhus Convention, which determined under which conditions an action might be brought to a court. However, it cannot be assumed that Article 9(3) only intended to repeat the status quo. This interpretation would deprive Article 9(3) of its effet utile. This legal concept means that provisions in legislation are laid down to regulate specific situations. If they were just repeating the same rules that exist already in law, they would have no effect, and therefore be superfluous.
- (c) If the Aarhus Convention had intended to only refer to the status quo in the countries of Contracting Parties and of the Community, the provision of Article 9(4) which establishes detailed requirements for the judicial procedure would have been superfluous. Again, that provision would have no useful application (effet utile);
- (d) Recital 18 of the Convention states: "(The Parties to this Convention) Concerned that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced". This Recital indicates the objective of the provision of Article 9(3) and (4). Had the Convention only intended to refer to the existing legislation of the Contracting Parties, such a Recital would have been unnecessary. Also, the word "concerned" indicates that provisions were introduced to change the status quo, not just to repeat it.

The discussion on the correct interpretation of the Aarhus Convention will sooner or later find an end, inside the Community perhaps by an interpretation of the Court of Justice . In the case that the interpretation which is favoured here, is correct, a decision which does not provide for public participation in the preparation of plans or programmes and which is contrary to Regulation 1367/2006, could be applied to at the Court of Justice (Court of First Instance). In the light of the direct effect doctrine, such an access to the Court of First Instance could be derived directly from the Aarhus Convention, even if no corresponding provision was introduced into secondary Community law.

Furthermore, Regulation 1367/2006 could itself be tackled before the Court of first Instance, because it did not provide for a provision that transposes Article 9(3) into Community law.

With regard to the situation of the present study, this means that the Community is obliged to introduce provisions which allow members of the public, including environmental organisations, to tackle acts and omissions of the EC institutions and bodies, including the EIB, that are not in compliance with environmental law.

4.4 Compliance monitoring

The Aarhus Convention itself does not contain a provision which provides for its interpretation by an international court. However, under the Convention, the Meeting of the Contracting parties adopted Decision 1/7 by which compliance checking procedure was established¹¹. This Decision set up a Compliance Committee which is charged to check, whether the legislation and the practice of the Contracting Parties is in compliance with the provisions of the Aarhus Convention. Members of the public may submit a communication to the Committee on cases of presumed

¹¹ Deciiion 1/7 of 2 April, 2004, ECE/MP.PP/2/Add.8

non-compliance. The Committee then examines the situation and may come out with a report and with recommendations. The reports is approved by the Meeting of the Parties.

There are no enforcement mechanisms against a Contracting Party. It is obviously considered that the authority of the Committee, backed by the Meeting of the Parties would lead to the necessary changes in order to ensure full compliance.

The manual on the compliance checking which was issued by the Secretariat of the Aarhus Convention¹² mentions that there is no strict requirement that all domestic remedies are exhausted, before a member of the public may send a communication to the Secretariat of the Convention which passes it on to the Compliance Committee. It also states that only anonymous, abusive, manifestly unreasonable and those communications are inadmissible which are incompatible with the text of the Convention itself or of Decision 1/7.

Members of the public, including environmental organisations, could thus address the Compliance Committee and submit that the provisions which the EIB has laid down with regard to access to information, participation in decision-making and access to justice in environmental matters are not in compliance with the requirements of the Aarhus Convention.

5. The Court of auditors

The EC Court of Auditors is an EC institution. It has the task to “examine the accounts of all revenue and expenditure of the Community” as well as “of all bodies set up by the Community, insofar as the relevant constituent instrument does not preclude such examination” (Article 248 EC Treaty). As the Statutes of the EIB do not contain any such preclusion, the Court of Auditors is also responsible for examining the accounts of the EIB. This also follows from Article 248(3) EC Treaty which provides for details of an eventual auditing of the EIB to be negotiated.

Though the task of the Court of Auditors is limited to check the compliance of revenue and expenditure activities with the legal requirements, its annual reports and in particular its special reports on specific subjects contain important statements on the compliance of such activities with the policies of the Community. It would thus be possible that the Court of Auditor examines, whether the policy of the EIB is in compliance of the Community’s policy in specific sectors.

According to the last annual reports published by the Court of Auditors on its activities¹³, such an auditing of the EIB has not taken place during the last years. The reason is presumably that the Court of Auditors has other priorities and that the EIB has its own autonomous auditing system.

The activities of the Court of Auditors are independent from individual complaints.

The Court of Auditors determines its own work programme. Environmental organisations may address the Court of Auditors and suggest an auditing of the EIB. However, it is doubtful that such a suggestion will have any impact on the Court’s planning.

6. Complaints to the EIB

6.1 The Code on good administrative practice

In its Code on good administrative practice in relations with the public¹⁴, the EIB provided for the possibility to complain, where “a person considers that replies (given by the staff of EIB, L.K.) violate his/her interests”. This possibility to complain is thus limited to answers given . It is available to citizens of the EC and to any natural or legal person residing in the EC. The complaint is to be addressed, within two months, to the Secretary-General of the EIB. The Code does not contain any further details on the conditions for submitting complaints, delays or other

¹² http://www.unece.org/env/pp/compliance/manualv6.doc#_Toc147215646

¹³ Court of Auditors, Annual Report 2002, OJ EC 2003, C 286 p.1; Annual Report 2003, OJ EC 2004, C 293 p.1; Annual Report 2004 OJ EC 2005, C 301 p.1.

¹⁴ See note 1, above

aspects. Also, the annual reports of the EIB do not contain any details about complaints introduced, handled, about the follow up etc.

The Code does not indicate what happens, when the complainant does not get satisfaction on his complaint. As mentioned above, under no.1, EC law does not provide for access to the European Court against acts or omissions by the EIB. However, Article 29 of the EIB's statutes provide that any dispute between the EIB and natural or legal persons shall be submitted to the national courts of the Member States. Thus, a complainant may, once his or her complaint has been rejected by the EIB – again, it is not clear which body of the EIB will decide on such complaints – appeal to a court of a Member State. As the application would be directed against the EIB which is located in Luxemburg, normally a Luxemburg court would be competent for such applications.

6.2 The Document on Public Disclosure, of 28 March, 2006

On 28 March, 2006 the EIB Board of Directors adopted a document on “Public disclosure, principles, rules and procedures”¹⁵(hereafter called the Disclosure Document). The Disclosure Document is intended to supersede earlier other publications. Therefore, it may be presumed that the Code of Conduct, discussed under section 6.1 above, will at least in part be replaced by the new provisions. The new Disclosure Document shall apply to all staff of the EIB.

The Disclosure Document states in paragraph 20 that the “EIB will also respect the tenor, aims and provisions” of Regulation 1367/2006 which was, at the time of adoption of the Disclosure Document, not yet finally adopted by the Council and the European Parliament. However, it follows from what was said under section 2, above, that EIB is fully bound by Regulation 1367/2006 and has no discretion, whether to respect or not the provisions of this Regulation.

The Disclosure Document explains in detail the disclosure policy of the EIB. It mentions that EIB's disclosure policy is subject to continuous internal evaluation and quality assessment and will be reviewed every three years (paragraph 39). Paragraphs 86ss. deal with the handling of requests for information. Generally, these provisions are not fully in line with the requirements of Regulation 1367/2001 and, where relevant, Regulation 1049/2001. Where access to information is, in full or in part, refused, the applicant may make a confirmatory application (paragraph 102). Against the confirmatory decision, he has the possibility to appeal to the Secretary General of the EIB (paragraph 106). If then he does not obtain satisfaction, the Disclosure Document orients him towards a complaint to the European Ombudsman (paragraph 107), when he is a citizen of an EC Member State or residing within the EC. Citizens or residents from non EU countries may complain to the EIB's Inspector General (paragraph 108).

These provisions do not mention at all that under Regulation 1367/2006, read together with Regulation 1049/2001, any person, whose request for access to information has been rejected, may apply to the Court of First Instance (see comments under section 3, above). While it is clear that Regulation 1367/2006 was adopted after the Disclosure Document, it needs to be pointed out that already the Commission's proposal for Regulation 1367/2006, which was published in October 2003, provided for this access to the Court of First Instance.

The Disclosure Document does not refer to participation in decision-making on projects, plans and programmes. In this regard, the EIB will have to adapt its rules to Regulation 1367/2006 on the one hand, to the Aarhus Convention on the other hand. The same applies to the provisions of the Aarhus Convention on access to justice in environmental matters.

7. Complaint to the EC Commission

The European Commission has, according to Article 211 EC Treaty, to ensure that the provisions of the EC Treaty “and the measures taken by the institutions pursuant thereto are applied”. This

¹⁵ See http://www.eib.org/Attachments/strategies/public_disclosur_policy_en.pdf
It is announced that the document will be published in the EC Official Journal.

provision makes the Commission to a large extent the “guardian of the Treaty”. In implementing this function, the Commission has, over the years, developed a rather sophisticated complaint system, under which everybody may complain that EC law has been breached. The Commission has issued a complaint form in order to facilitate complaints¹⁶, and originally had committed itself to investigate each complaint as to its merits. Changing its policy during the last years, it has established criteria for prioritising complaints¹⁷. This means that the Commission does not necessarily investigate each complaint, but only those which are of a more strategic character. The provisions on the complaint procedure and on priority or strategic complaints are not laid down in any legally binding form. Thus, the Commission cannot be controlled as to whether it sticks to its own rules. Appeals to the Court of Justice or the Court of First Instance against a complaint that was rejected or badly investigated or against the omission to take legal action are, according to the jurisprudence of the Court of Justice and the Court of First Instance, not admissible.

Article 211 EC Treaty refers to measures that are taken by the “institutions”. However, the EIB is not an EC institution. The question is thus, whether the notion of “institution” in Article 211 EC Treaty only refers to those institutions that are mentioned in Article 7 EC Treaty or also to bodies such as agencies or the EIB. Doubts in this regard occur, because the Commission has to ensure that the law is applied; and the European law may also be breached by a European body.

This question has, as far as can be seen, not yet been decided or even discussed by the Court of Justice. It need not be examined in all detail at this place. Indeed, it was mentioned above that under Articles 230 and 232 EC Treaty, the EIB cannot be brought before the Court of Justice. Thus, even where the Commission would find that the EIB does not comply with provisions of Community law, it would have no means of ensuring – via procedures before the Court of Justice – that such infringement is stopped. The only way would be to go, according to the statutes of the EIB, before a national court. However, this again has never happened and it is hardly imaginable that the EC Commission would sue a European entity, the EIB, before a national court.

As the Commission is not under a legal obligation to investigate complaints – there are no legal provisions in this regard – the question, whether it should accept and investigate complaints against the breach of Community law by the EIB, is a political, not a legal question. The Commission has this possibility, as it has to ensure that the law is applied. The more general a complaint is – covering a large number of cases, demonstrating that there is a systematic setting aside of Community law etc. – the greater might be the chances of the Commission actually accepting it.

However, the present Commission which tries to promote at almost any price economic growth and interests of economic operators, does not appear to be politically inclined to investigate complaints against the EIB systematically. One might thus at best imagine that a model complaint which is well argued, strategically and politically important and accompanied by corresponding public attention, could be investigated by the Commission. It seems excluded, however, that the Commission would handle several or even numerous complaints against the EIB. The official argument would probably be that the EIB has a complaint system of its own – see in this regard no. 6.2, above – that it is not an EC institution and that the Commission lacks the enforcement tool to bring the EIB before a European Court.

Complaints to the European Commission on breaches of EC law by the EIB do not, therefore, appear to be a realistic way.

8. Petition to the European Parliament

Article 194 EC Treaty grants the right to every EU citizen or person residing within the EU to submit a petition to the European Parliament. This right is limited to fields of activity of the

¹⁶ Complaint form, OJ EC 1999, C 119 p.5.

¹⁷ Commission COM(2002)725 of 13 December, 2002.

European Union. The petitioner has to use one of the languages of the EU and submit his petition in writing. The petition may take the form of a complaint or a request.

Parliament's rules of procedure do not contain significantly more details (Article 191). In practice, petitions are discussed in the Committee of Petitions. Where the Committee of Petition considers it appropriate, it may draft a resolution which is later on approved by the plenary of the European Parliament.

The specificity of the procedure in the European Parliament is that Parliament does not examine itself the substance of a petition. Rather it submits the petition to the relevant EC institution and asks for – written and/or oral - comments. Should therefore a petition be submitted to the European Parliament which concerns the practice of the EIB, it is likely that the Parliament will transmit that petition to the EIB and ask for written comments. According to the specific case, it may also ask a representative of the EIB to appear before the Committee of Petitions and explain the EIB's practice in the are of the petition. It is most unlikely that the Parliament will use other sources of information than the petitioner himself and the institution or body which is concerned by the petition.

9. Complaint to the Parliamentary Ombudsman

The European Ombudsman¹⁸ was instituted by Article 195 EC Treaty. He is appointed by the European Parliament and has the task to examine cases of maladministration of the Community institutions and bodies, either following a complaint or at his own initiative. Any citizen of the EC Member States and any natural or legal person residing within the Community may complain. In practice, the Ombudsman only treats complaints, where the applicant proves that he had previously contacted the institution or body in order to get remedy.

The Ombudsman has issued a complaint form¹⁹ which contains questions that must be answered in order to have the complaint treated. The substance of the complaint need not refer to a specific breach of legislative requirement. The complaint may also concern administrative behaviour, such as, for example, silence to letters which had been received, impoliteness or other breaches of good administrative practice. The Ombudsman does not deal with cases that are or were pending in court, in order to avoid duplications or contradictory assessments.

The Ombudsman does not have the power to apply to a court himself. He is limited to making a critical remark to the administration with regard to the administrative practice, or to send a report with or without draft recommendations to the Community institution or body concerned, as well as to the European Parliament.

The Ombudsman would thus also take complaints against administrative malpractice of the EIB or of its staff. In view of the rather formalised procedure and of the Ombudsman's limited human resources, it should be noted, though, that it takes normally a considerable amount of time, before the Ombudsman has dealt with a case completely.

¹⁸ See Statutes of the European Ombudsman, OJ EC 1994, L 113 p.15; amended OJ EC 2002, L 92 p.13.

¹⁹ See <http://www.ombudsman.europa.eu/form/en/form2.htm>

10. Complaint to Member States

As the EC Member States are the members of the EIB, a complaint could, at least in theory, also be made to them. They would then have the possibility of raising the issue within the administrative structures of the EIB, where they are represented.

It should, however, be underlined that a possibility to address a complaint to a Member State and see it subsequently handled by the EIB's administration, is purely hypothetical. There is no structure whatsoever foreseen for such procedure. And the Member States might argue – with some justification – that a complaint which concerns the activity of the EIB, should be addressed directly to the EIB and not to its members. For this reason, this possibility is not further discussed here.

11. Conclusions

The existing mechanisms at EU level to keep the European Investment Bank accountable, are poor. The EIB is hardly exposed to litigation before the Court of Justice or the Court of First Instance (sections 1 and 2 above). Complaints to Member States do not appear to be more than a theoretical possibility (section 10). It is unlikely that the European Commission would investigate complaints which concern the activities of the EIB (section 7). A petition to the European Parliament is possible, but in view of Parliament's practice not to investigate the substance of a petition itself, of limited value (section 8). The Court of auditors has the possibility to audit the EIB, but appears not yet to have done it (section 6).

The situation is slightly better with regard to environmental issues that are handled by the EIB. The recently adopted Regulation 1367/2006 grants persons larger access to environmental information than previous EC law or the EIB's self-commitments (section 3). It supersedes Regulation 1049/2001 and has, furthermore, to be interpreted first of all in conformity with the Aarhus Convention itself; also Regulation 1049/2001 must be interpreted in the light of the Aarhus Convention which is part of EC law. Regulation 1367/2006 also grants participation rights to the public when the EIB elaborates plans or programmes relating to the environment. And the Aarhus Convention requires Contracting Parties to introduce possibilities for access to the courts in cases of breach of environmental law (section 4). This would open the possibility to submit cases against the EIB to the Court of First Instance, though it will take some time, before this possibility will have been generally recognised. One way to accelerate this recognition is the submission of the EC's transposition of the Aarhus Convention into EC law to the Aarhus Convention Compliance Committee (section 4.4).

In early 2006, the EIB adopted a decision concerning its policy on public disclosure (section 6.2). This decision constitutes a considerable improvement with regard to the previous situation. It is too early to assess its practical relevance. As this decision is to be constantly assessed and will be reviewed every three years, it is recommended to enter into a dialogue with the EIB authorities in order to identify aspects, where public disclosure and accountability can be further improved, without impairing the EIB's legitimate interests as a bank.