



Comments on the European Bank for Reconstruction and Development (EBRD) Draft Public Information Policy

**CEE Bankwatch Network and ARTICLE 19
on behalf of
the Global Transparency Initiative**

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1. Summary

The revised EBRD Public Information Policy (PIP) adopts few of the proposals submitted during in the first stage of commenting by NGOs. We believe that this represents a significant lost opportunity for the Bank to improve its draft and insist that the detailed comments submitted in January should be further considered by the EBRD before drafting its final PIP. These comments concentrate on several priority issues, in addition to those submitted in January.

In particular, the draft is excessively referential to confidentiality, to the detriment to its openness principles. As a primary step, it needs to incorporate the Aarhus Convention into its activities. It also needs to increase the amount of information in affirmative disclosure including project level documents, environmental information, environmental and social covenants, risk assessments, and board votes and documents. In addition, the public interest test should be improved to fully reflect the multiple information needs of the public better. Finally, the Bank should join multi-stakeholder initiatives such as the IATI and EITI and incorporate their policies into the PIP.

2. Procedural Concerns

In January 2011 the European Bank for Reconstruction and Development launched its triennial revision of the Public Information Policy (PIP) by inviting comments on the existing PIP, adopted in 2008. On the basis of feedback received during the initial 30 day comment period, the EBRD reviewed the inputs and released a revised PIP. The revised version was published in advance of the second round of commenting on its website for 45 calendar days. In parallel, consultation workshops with nongovernmental organisations and other external stakeholders took place in both Moscow and London. Few changes based on input were adopted.

During the consultation meetings and later at the EBRD Annual Meeting in Astana, Bank staff responded to comments provided by stakeholders. However, even after the second phase of the

commenting period, it is still unclear for the majority of inputs from the public why these comments were neither incorporated into the revised PIP nor on what basis the comments were rejected.

This review process should be revised and include at least two stages in which the public is allowed to comment on two subsequent drafts and receive responses to the inputs provided. After both the first and second rounds of submissions and the public consultation meetings, and several weeks prior to the final policy going to the Board of Directors for approval, a summary of comments received by the EBRD and staff responses to these inputs should be disclosed. Such a process will enable constructive policy dialogue. The EBRD should change this practice in future and disclose a summary of comments provided during the consultation process and as well the staff responses in advance of policy approval.

We also recommend that the EBRD follow best practices and transparency and information disclosure principles adopted by other international financial institutions including the European Investment Bank and International Finance Corporation.

3. Principle of Openness and Excessive Confidentiality

Principle 1 on “transparency” positively asserts that “The EBRD is guided by the underlying presumption that whenever possible, information concerning the Bank’s operational and institutional activities will be made available to the public.” However, unfortunately, this principle is immediately limited by the caveat that it only applies “in the absence of a compelling reason for confidentiality.” Principle 4 on “Safeguarding the business approach to implementing the mandate” then reinforces the requirement for confidentiality. Throughout the document, the word confidentiality is regularly invoked, nearly 30 times in the draft.

We recognize the need to protect confidential in certain circumstances. However, the overall perception that is given by the draft is unfortunately one where confidentiality is given a primary role and transparency is only as exception to that role.

Our recommendation: *The EBRD should revise Principle 1 to make it only about the transparency and reduce excessive references to confidentiality.*

4. Affirmative Disclosure

We believe a significant area that needs improvement relates to the affirmative disclosure of key information that is crucial for public knowledge and informed participation in projects.

4.1. Release routinely updated project-level information and reporting throughout its lifetime

The EBRD should *provide continuous and proactive disclosure for project-level information and documents*. Disclosure of project-related information in all the phases of the project is a key element to effective public participation in the decision-making process. Information about EBRD-financed projects should be updated throughout the project cycle with an emphasis on project-level outcomes, as

is now practice at the IFC¹. This information can be drawn from client reporting documents so as not to burden Bank staff.

The EBRD should *update project summary documents (PSDs) on a regular basis throughout the project cycle, particularly during project implementation*, which in practice rarely happens after a project's initial approval of the EBRD Board.

The current PIP has no provisions for disclosure of factual and technical documents prepared in the early stages of a project, preventing timely input from project-affected communities. *Project based factual and technical documents, including full environmental and social impact assessment studies, should be available online and linked to PSDs.*

We advise the EBRD to follow the example of the EIB and *release at a minimum environmental information gathered by the Bank during project monitoring*. These documents include:

- Monitoring mission Reports
- Project progress Reports
- Project completion Reports
- Environmental and social studies provided by a project promoter or other third party

The EBRD should also *release topic-specific studies and analyses elaborated or commissioned from independent experts and consultants* such as the recent gender analysis. This would follow the positive example of the EIB in such an instance.

It is critical that the public is informed about the results and evaluations carried out by the EBRD. The EBRD should *release full versions of its OPER reports for public and private sector projects or at least their summaries* within six months from the evaluation mission. Without these it is impossible to verify what the EBRD learns from the projects it finances. There is no issue of commercial confidentiality here and other IFIs do release such evaluations. For example, "Operations Evaluations reports of the EIB".

We appreciate that the EBRD encourages participation of stakeholders during the completion phase of the project cycle by disclosing select documents of the Project Evaluation Department (EvD). However in stipulating that disclosing EvD documents is subject to commercial confidentiality, the EBRD limits the full and well-informed participation of stakeholders in the decision-making process. The business confidentiality interest should not override a public right to information. The EBRD should therefore clear the disclosure of EvD documents from any exception clauses. *Documents produced by the Project Evaluation Department should be released in their entirety and without confidentiality exceptions.*

In line with its transition mandate, EBRD projects must be oriented to achieve transition impact and are therefore assessed for their transition impact potential and risk. We believe that *qualitative transition impact ratings and information on possible risks to achieving transition impact should be publicly disclosed* in order to allow for public appraisal of how well a project delivered on such objectives and

¹ A recent review of the IFC's portfolio by its Compliance Advisory Ombudsman found that clients are not always reporting action plans or implementation results and other project-related information to affected communities and that up to a third of annual monitoring reports provide inadequate information about project. The CAO recommended strengthening project-level reporting by both clients and the IFC. See *Advisory Note on the Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability* http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

contributed to fulfilling this mandate. We suggest that *the transition rating is released as a part of the PSDs*.

In 2010 alone a number of derogations to the timely release of PSDs were recorded. The PIP allows for derogations to the timely release of PSDs in several circumstances outlined in the policy. The policy however fails to ensure that the public is informed about the justification for such derogations. We therefore ask that the PIP integrates a provision that details how and when derogations will be disclosed to the public. *The Bank should provide justification for derogations to the timely disclosure of PSDs as soon as PSDs are released to the public.*

Also under the current PIP, the terms for derogations to PSDs are not identified. It is assumed that with the publication of a PSD in case of derogations these happen after project signing. *The PIP should provide concrete guidance for releasing PSDs for derogated projects on the day of and not later than three days from project approval.*

4.2. Environmental information and the Aarhus Convention

We welcome the inclusion of the statement about the Aarhus convention into the text of the PIP - “The EBRD recognises the importance of the principles, purpose and ultimate goals of the UNECE Aarhus Convention.” However to reflect meaningfully the principles of the Convention, the policy document should *incorporate a definition of ‘environmental information’ and the principles of access to environmental information should be fully reflected in the text.*

While the EBRD “expects” and “will promote similar good practices amongst its client”, there is no clearly defined requirement for the client or the EBRD itself to provide access to environmental information to interested parties. This situation should be corrected. We note that, with only a few exceptions, the member states that made up the board of the EBRD and the target countries that the EBRD operates in are all signatories of the Aarhus Convention.

The 2008 Environmental and Social Policy provides for the disclosure by the client of full environmental and social action plans for Category A projects and summary ESAPs for Category B projects. However clients often ignore these obligations. *We recommend that the EBRD disclose this environmental information and documentation for Category A and B projects routinely on EBRD website.*

The EBRD should recognise that disclosure of project environmental information by clients during the environmental impact assessment procedure is for different purposes than disclosure of this information by the EBRD. The EBRD has also a duty to actively release environmental information and documents, including project-related ones, as they constitute a basis for the EBRD decision-making process.

We cannot accept that the EBRD refuses to release environmental documents that it is in possession of. Such a practice does not comply with the fundamental principles of the Aarhus Convention, the EBRD’s own basic principle on “Transparency” as well as with principles and practices of other IFIs. For example the European Investment Bank will not refuse to disclose any environmental impact assessment report it holds (irrespective of the fact who produced the document) as this would violate European Union transparency legislation as well as the EIB’s Transparency Policy. Very often the Bank publishes environmental impact assessments, and not only non-technical summary, on its website together with the project summary.

Increasingly more projects in high-risk industries like mining and energy are being categorised as B projects. We believe that the *categorisation* for certain projects can be different if it would be *based on the project risks* (including financing through financial intermediaries). This practice should be changed.

Early project disclosure and stakeholder engagement should be commensurate with project impacts, not the client type. The PIP provides different disclosure timeframes for private sector projects (30 days prior to Board consideration), providing only a very short time for consultations with interested parties. The practice of providing *disclosure based on potential project risks* should be elaborated and *PSDs for private sector projects should be disclosed 60 days in advance*.

4.3. Environmental and social covenants of loan agreements as an explicit part of PSDs

The EBRD should *disclose in its entirety all the initial discussion papers at the time they are produced*, including the Concept Clearance Memorandum, Concept Review Memorandum, Environmental Screening Memorandum, draft Environmental Summaries, Initial Environmental Examinations, Final Review Memorandum.

The EBRD should *release in a timely and proactive manner all environmental and social covenants within the loan agreement between the EBRD and the project sponsor*, including the client's Environmental Action Plan, a part of the loan contract related to social and environmental impact assessment documents. The EBRD should include provisions for the *disclosure of environmental and social covenants of the loan agreements as an explicit part of PSDs*.

4.4. Risk assessments on financial intermediary investments and high-risk subprojects in the PSD

PSDs rarely contain more than the very basic details of proposed financial intermediary (FI) loan and/or equity. An effective way to ensure that financial intermediaries will apply performance standards to its high impact sub-projects is to ensure public scrutiny through the disclosure of information on these high-risk sub-projects. The IFC is expected to implement such disclosure beginning in 2012. The PIP should similarly ensure *disclosure of FI portfolio risk assessment*, the adequacy of FI social and environmental management systems and *disclosure of high-risk sub-projects to the public, including this information into PSDs*. In relation to private equity investments, all projects and companies in which the EBRD holds a stake directly or through the equity fund should be disclosed to the public as soon as equity is acquired. In European countries the information on the owners of the companies is publicly available for anyone.

Local communities often deal with subcontractors and third parties rather than project sponsors directly. There is no explicit requirement or guidance in the PIP on how EBRD clients should engage subcontractors and project partners or of their community engagement requirements. The PIP *should specify the responsibilities of client subcontractors and environmentally and socially high-risk projects must be included in PSDs*.

There are other FI project details in the public interest that we request the bank to disclose and update in the PSDs or at a minimum annually in a separate document. Currently the following project information is disclosed by the EIB:

- FI sectoral breakdown
- Social and environmental impacts
- Environmental category A and B loans
- Percentage of the Board-approved amount that has been disbursed to the FI and loaned to final beneficiaries
- Number of sub-loans made for each project
- Average size of the sub-loans
- Average interest rate of the sub-loans made for each project
- Emissions reduction (on energy efficiency projects)

We also reiterate recommendations from the fourth Capital Resources Review that the EBRD needs to routinely *disclose qualitative, independent evaluations of FI activities to increase accountability and properly assess the extent to which the EBRD is achieving its stated goals with FI projects.*

4.5. Board voting records

We welcome the EBRD's commitment to release minutes of Board meetings and believe it is an important step towards good governance. However the public has the right to see how they are represented at the Board to hold its representatives accountable for its decisions. As such the *EBRD should also include as part of its minutes a record of voting with list of abstentions and negative votes; the opinions expressed; and where relevant written statements prepared by Executive Directors.*

While minutes provide a legal record of the decisions taken, they do not reflect the discussion in its entirety and for this reason, the EBRD should also *publish transcripts of Board meeting discussions.*

If in some of the states, the votes and opinions of elected representatives to the EBRD constitute public information, this should also be the norm in other states as it proves that confidentiality in that case is unjustified.

In this context it is also important to remember that EBRD Executive Directors are elected to represent the shareholding members of the bank and are publicly accountable for their actions. Moreover some Board constituencies already disclose opinions and votes. The EBRD should promote best practice and therefore *routinely disclose a record of voting, the opinions expressed and where relevant written statements prepared by Executive Directors.*

We also request the EBRD *to release the minutes* in a timely fashion after the Board approves the minutes at its next meeting but *no later than 15 working days after approval.* Currently Board minutes are sometimes made available online with a delay of more than two months. *The EBRD should release summaries and transcripts of Board discussions within 15 and 30 days of the meeting, respectively.*

Board reports currently contain the best publicly available overview of EBRD efforts to address environmental and social issues and as such the EBRD should release these for the private sector and/or significantly improve PSDs in order to fulfil goals of the Aarhus Convention on access to environmental information

The current policy contains only provisions for the release of Board reports for public sector projects, and this should be expanded to include private sector projects as well. We see the absence of such provision for private sector projects as unjustified and arbitrary. If the reports contain confidential information, this can be excluded from the reports subject to a principled harm test that disclosure of the

information would cause. *The EBRD should disclose public sector board reports on a routine basis and also make publicly available board reports for private sector projects.*

5. Public Interest Test

As a means of insuring that public information is released, we believe that the EBRD should adopt a public interest test to better balance the needs of the public with that of confidentiality. Under E(3), there is a limited public interest test for the disclosure of confidential information when “the Bank management determines that the disclosure of certain confidential information would be likely to avert imminent and serious harm to public health or safety and/or imminent and significant adverse impacts on the environment.” We note that this is weaker than the parties obligations under the Aarhus Convention which requires that all parties ensure:

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

In addition, it should also include information that would disclosure serious crimes such as corruption. We would suggest a more general public interest test such as adopted in the UK Freedom of Information Act. The UK Information Commissioner has suggested a number of reasons for disclosure of information under the test:

- furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority.
- promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.
- promoting accountability and transparency in the spending of public money. The public interest is likely to be served, for instance in the context of private sector delivery of public services, if the disclosure of information ensures greater competition and better value for money that is public. Disclosure of information as to gifts and expenses may also assure the public of the personal probity of elected leaders and officials.
- allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.
- bringing to light information affecting public health and public safety. The prompt disclosure of information by scientific and other experts may contribute not only to the prevention of accidents or outbreaks of disease but may also increase public confidence in official scientific advice.²

² UK Information Commissioners Office, Freedom of Information Act Awareness Guidance No 3: The Public Interest Test, 2007.

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_3_public_interest_test.pdf

We believe that all of these examples work equally well in the context of international financial institutions such as EBRD, especially as relating to projects with a significant national government activity.

6. Joining the International Aid Transparency Initiative (IATI) and Extractive Industries Transparency Initiative (EITI)

We also urge that the EBRD also join that International Aid Transparency Initiative (IATI) and release information where relevant to the EBRD projects. We note that the World Bank and the African Development Bank have already joined the initiative. We also urge that the EBRD join the Extractive Industries Transparency Initiative (EITI) and ensure that information relating to projects relating to extractive industries including mining, forestry, and oil.

7. Copyright as a restriction on access

In the London meeting in April 2011, there was a considerable discussion between Bank staff and participants on the role of copyright as a reason to justify the denial of information. This could come up in the context of the Bank refusing the release of a document that it had received because it would violate the copyright of the individual. We believe that this is a substantial misunderstanding of the role of copyright as applying to access to information laws.

Under national access to information laws, the Council of Europe Convention on Access to Official Documents, or the Aarhus Convention, there is no restriction on public access to information in the form of documents because of a claim of copyright by the original owner. Where copyright may be applicable is on how once the document is released, how it may be reproduced for commercial purposes by the users. In such cases, there may be limits imposed on reselling of documents.

We recommend that you clarify this either in the PIP or in training with information officials.

8. Conclusion

We urge the EBRD to review all of the comments of civil society and based on the principles of openness, further extend the PIP to better reflect the needs of the public. In particular by improving routine updating of project-level information, environmental information disclosure and disclosure of high-risk sub-projects to the public, Board transparency, de-emphasizing the role of confidentiality, improving affirmative disclosure, implementing the Aarhus convention requirements, joining IATI and EITI and clarifying the role of copyright.

We would welcome further discussions and an opportunity to work with you to further. For more information regarding these comments please contact:

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