

Berlin, 13 September 2007

**Transparency International's Submission
to the European Investment Bank on its second draft
"Policy on Preventing and Deterring Corruption, Fraud, Collusion,
Coercion, Money Laundering and the Financing of Terrorism in
European Investment Bank Activities"**

1. Introduction

Transparency International welcomes the opportunity to participate in the second round of the consultation process to review the EIBs "Policy on Preventing and Deterring Corruption, Fraud, Collusion, Coercion, Money Laundering and the Financing of Terrorism in European Investment Bank Activities"

As it was mentioned in our submission during the first round of consultation, TI considers that the EIB, as an economic development agent within and outside of the EU, with a mandate to fulfill the EU's development objectives, has a responsibility to ensure that its resources are used for the purposes for which they were intended and not fall prey of corrupt or fraudulent practices or that EIB funds are diverted to finance terrorist activities. Furthermore, as a contributor to the implementation of the EU's aid and cooperation policies, the EIB needs to strengthen its efforts to ensure that its practices in fighting corruption are developed to match the highest international criteria and to include the existing best practice. The policy to be approved should be a clear step forward in this direction.

Transparency International was pleased to find that some of the issues included in our previous submission were taken into account into the new draft of the policy, in particular specific notes related to debarment and the protection of whistleblowers. However, still many of our former recommendations are applicable to this new version so we want to insist on our previous arguments on some issues and include new comments in some others.

2. General Comments

2.1. On civil society engagement

While recognizing that the draft policy relates to the protection of EIB funds, and not to anti corruption initiatives more broadly, TI encourages the EIB to add provisions providing for civil society engagement and monitoring of its financed projects. Civil society participation and consultation can play an important role in ensuring borrower accountability and reducing diversion of bank funds. Incorporating Integrity Pacts with monitors into the anti corruption measures applicable to procurement would be an example worth exploring.

Such provisions are already included, for example, in the United Nations Convention Against Corruption, and therefore will become standard practice in the over 120 countries which are Parties to this convention. The EIB could take advantage of such measures at national level and explore how these could be useful for civil society engagement in activities or projects where EIB funds are used.

We understand that the Bank is already open to civil society engagement when any organisation takes the initiative to monitor a EIB financed operation/project: However, we advise the Bank to take a more active position in promoting such engagement, by discussing with borrowers/promoters specific measures to get civil society involved.

2.2. On implementation

All policies depend on a successful implementation to achieve its goals. Such a policy will not only demand decision making at the highest levels, but dissemination, training and compliance measures all across the EIB to make sure all actors within the EIB and all stakeholders contracting or carrying out activities jointly with the EIB are aware of this policy.

TI encourages the EIB to publicly announce the steps towards implementation of this policy and report on its progress, successes and lessons learned, as this can only improve and reinforce the process. The information obtained in compiling results of the implementation should also feed back into the periodic review process of this policy that has been included in the latter draft.

Regarding the period for the policy review, it would be recommendable to perform such revision in shorter periods at the beginning (2 or 3 years) while the process is stabilised and experience gained can be adequately taken into account.

3. Specific Comments on particular sections of the policy

3.1. On IV: Definitions

TI considers that the definition of Money laundering as used in section IV should be adapted to international standards, pointing out that also reckless behaviour ("wilful blindness") constitutes a criminal act. The current definition, that takes reference to the EU Directive 2005/60 might be misleading to EIB's employees. Therefore, TI strongly recommends to amend the definition in a way that money laundering is to be understood as

*"the conversion or transfer of property, knowing (**or recklessly not knowing**) that such property is derived from criminal activity..."*

3.2. On V. Measures to minimize the risk of fraud and other illegal acts.

TI understands that efforts to minimize the risk of prohibited practices, money laundering and financing of terrorism are wide and demand a broad spectrum of measures to work simultaneously to succeed. Preventive measures play an important role as an additional safety net to the existing legal frameworks -both within and outside the EU.

3.2.1. Scope of the measures within and outside the EU

The presence of high level corruption has continued to exist in western and central EU member states whilst corruption in general is a serious concern especially in those countries which have recently joined the EU.

At present the policy proposed by the Bank assumes that within the EU if laws are in place this should be enough. However, this has not always prevented corruption, even in countries with solid institutions and judicial systems. For instance, there is a very poor record in pursuing the OECD Anti Corruption convention in courts, where legal systems exist to prevent and fight fraud and corruption. Also, recent cases have been known of within the new Member States (infrastructure sector; mainly airports) where no EU Public Procurement rules at all had been applied, despite being mainly financed by the EU.

In that sense, even though the case might be more serious in countries outside the EU, where institutions might be weaker, being active in preventing risks of corruption in EU countries should also be a priority for the EIB. We advise the Bank to consider preventive measures such as those outlined in this section for Finance Contracts and Procurement Procedures to be applied to all activities in all countries, and not just outside the EU, in particular regarding measures as the Integrity Commitments to be provided by borrowers/promoters, and the covenants of integrity to be required by the borrowers to the contactors, which are not part of the current EU legislation. We strongly believe that the Bank could adopt such measures within the existing EU framework since they don't contradict but in fact take further the transparency and integrity provisions of the EU guidelines.

3.2.2. Preventive measures regarding borrowers/promoters within Finance Contracts

TI considers that EIB, when making loans or investments, should continue to conduct its own effective due diligence regarding the financed institution, especially whenever the recipient is not directly a government but a State Owned Enterprise, other type of public sector entity, a private agent to a government institution or a public-private partnership. The EIB should review not only credit worthiness, but the track record of the recipient of funds in relation to integrity policies (including its individual members when it comes to partnerships), in order to check whether the funds are going to reputable entities.

TI welcomes the proposal to demand borrowers/promoters to provide Integrity Commitments within the Finance Contracts where they warrant that neither they nor any other person of which they are aware of has committed any prohibited practices. However, there needs to be further elaboration on this matter to ensure that the highest possible standards are applied to these Commitments.

TI therefore urges the EIB to take this requirement of the Integrity Commitment one step further, and demand that borrowers/promoters prove to the Bank that they have an actual active anti-bribery program in place. Especially when the borrower is a private company, acting as an agent to a government or a group of businesses within a public-private partnership, the EIB can have a strong impact in being a positive influence on corporate behaviour, improving the performance of the private sector on EIB funded projects. The Integrity Commitment is an opportunity for the Bank to demand from the borrowers to provide evidence that they have anti-corruption policies in place. TI's Business Principles for Countering Bribery (BPCB) and its related tools may be used as a basis for companies to be able to comply with this demand. TI has also produced a checklist that can be used by banks, both commercial and public, to check whether their funds are allocated to reputable entities.¹

Transparency International has continually highlighted the role of legal and financial professionals in facilitating corruption by, wittingly or not, allowing the proceeds of corruption to be moved, laundered, stored and invested. TI helped form the Wolfsberg Group, an association of twelve global banks, which aims to develop financial services industry standards, and related

¹ For more information about the Business Principles and TI's work in the private sector, please see: http://www.transparency.org/global_priorities/private_sector/business_principles

products, for Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies. The Wolfsberg Group seeks to establish standards and guidelines for the financial services industry to prevent the flow of corrupt money, having issued a statement against corruption last March².

TI encourages the EIB not only to consider the principles that inspired the policies adopted by the Wolfsberg Group in this policy, but also – beyond the common grounds of Wolfberg – apply all Principles set up by the Wolfsberg Group also in regard to corruption in private business (as opposed to "public corruption" as currently practised by the Wolfsberg Banks).

3.2.3. Preventive measures for private sector tenderers/contractors in Procurement

TI recommends that the EIB also require from the borrower to conduct its own effective due diligence process in the cases of private sector contractors/tenderers. For several years, TI has urged multilateral development banks to adopt a pre-qualification process for private sector bidders and contractors. A requirement for the borrowers to apply pre-qualification procedures that take into account good corporate practices could be included in the Finance Contracts, in relation to the procurement rules to be applied under an EIB loan.

TI also welcomes the inclusion of a requirement for Covenants of Integrity to be provided by contractors/bidders to the borrowers, which include a declaration where it is granted that the contractor/bidder has not engaged or will not engage in any prohibited practices. However TI recommends that this provision goes beyond such declaration. In our opinion, the Bank should ask the borrower/promoter to demand from the contractor/bidder evidence of practical measures taken within the company to prevent corruption, such as anti-bribery policies, training programs, codes of conduct for employees, etc.

In addition we suggest that, as part of its due diligence, the EIB could do sample checks of not only the correct application of the procurement rules by the borrower, but also the adoption of the Covenants of Integrity by the contractors/bidders, and the measures taken by the borrowers to verify the compliance of the contractor/bidder with the Covenant's provisions.

3.2.4. Sanctions available to the Bank

Transparency International welcomes the reference in the new version of the policy to the Bank's intention to establish an enhanced system of exclusion taking into account the new provisions in force within the EU institutional framework and ensuring the EIB has access to the European Commission's database of excluded entities. As it was mentioned in our submission to the first round of consultation, TI has previously produced a set of recommendations for the Development and Implementation of an effective Debarment System in the EU which the EIB is encouraged to examine and take into account in its discussions with the European Commission in this matter.³

TI would also encourage the EIB to continue with its coordination efforts with other IFIs to reach common best practices in debarment. Even though we would prefer to see the EIB adopt the best existing practices in this regard, it will be an important step forward for it to adopt at least the standards of the EC.

² For more information on TI's work on the Wolfsberg Principles, see: http://www.transparency.org/news_room/latest_news/press_releases/2007/20076_03_13_wolfsberg_group_statement

³ The full text of these recommendations was included as an attachment to TI's submission on the first round of consultation and can also be found at: http://www.transparency.org/content/download/5661/32802/file/TI_EU_Debarment_Recommendations_06-03-28.pdf

The recommendations made to the EU debarment system specify why debarment is not only a powerful sanction, but, more importantly, an effective deterrent for corruption. The paper also lays out in detail the conditions necessary to make a debarment system transparent, proportionate, fair, timely and accountable.

With these recommendations as the general framework, TI has the following specific comments to the EIB guidelines:

Debarment applicable to procurement cases

The reference to debarment in the policy is included in the section on sanctions available to the Bank associated to Finance Contracts. This creates confusion since the link to procurement is not evident. We recommend that the structure of the document is adjusted to allow for this relationship to be clear.

Debarment on the basis of non res judicata cases

The second draft of the guidelines still mention debarment of “any candidate tenderer who has been convicted by a final judgment”. TI insists on the importance of the EIB expanding the concept and allowing for debarment based on administrative (non res judicata) decisions, for the reasons included in TI’s first submission to the EIB.

3.2.5. Money Laundering Control issues

TI recognizes EIB's efforts to combat money laundering by all means usually available to the institution as a banking institution. TI nevertheless wishes to point out several shortcomings in the current draft policy which, mainly as a matter of clarification, should be reconsidered in the current draft:

As to **clause 12**, TI suggests that reporting obligations of any borrower should not be limited to changes in the ownership structure. As you might be aware, under the EU directive 60/2005, EIB will be obliged to investigate the shareholder's structure and identify each final beneficial owner who, either on a stand alone or an aggregate basis, controls 25 % or more of the share capital. We suggest that future borrowers shall be obliged to disclose, down to the level of the ultimate beneficiary, the ownership structure at least in regard to such shareholders / ultimate beneficiaries in possession of 25 % of the stated share capital or votes.

Taking into account latest trends in money laundering, we recommend expanding the measures described in No. 12 of the Draft Policy to mechanisms related to, or replacing, equity interests. Strong AML monitoring exists with regard to share capital. In TI's view, criminals tend to make less use of equity instruments, but use more complicated debt or hybrid debt/equity instruments. We recommend considering whether the identification processes should take care of these trends and should include such instruments.

In **clause 20** reference is made to the jurisdictions under close monitoring by the Financial Action Task Force on Money laundering –FATF-. TI wishes to point out that, according to international standards, the risk measurement for money laundering control purposes does not only include country risk, but also takes into consideration the risk exposure of the client itself and the risk exposure usually associated with the specific business. We therefore suggest redefining such high risk-customers and high-risk businesses, in which case OCCOs opinion should also be required.

3.3. On VI. Obligations to report suspected prohibited practices; money laundering and terrorist financing.

3.3.1. Government Accountability

As a preventive measure, in cases where the EIB lends money to governments, the EIB should also require the borrower to make public its receipt and expenditure of the loan to its citizens, and encourage fiscal (procurement, budget/expenditure, taxes) transparency in general. Fiscal transparency is a basic accountability mechanism that can serve to protect EIB funds and the integrity of the countries in which EIB funds are used.

Several anti corruption conventions -UN, African Union, OAS- already foster greater transparency in how governments are accountable to the public, asking them, among other things, to promote access to information legislation and to put transparent public contracting processes into place. This type of preventive measures can give citizens and other stakeholders a chance to monitor how projects are being carried out, and be able to report cases of suspected corruption, fraud or other illegal acts.

The fact that there is some information about the projects in the EIB webpage is not enough. Governments should take responsibility in reporting in detail to their citizens on the projects they are implementing and the EIB can play a role in promoting through the loan agreements that they do so.

3.3.2. Reporting obligations and procedures

In TI's opinion, the internal guidelines should make reference to the anti money laundering guidelines confirming that when a report is filed the client concerned is not to be informed of any reported suspicion.

3.3.3. Protection of whistle-blowers

TI welcomes the announced revision of the existing provisions regarding whistleblowers' protection and will be most willing to give the Bank feedback and any other input it may need for the preparation of this new policy.

3.4. On VII. Principles for the conduct of investigations

3.4.1. Disclosure of Findings

The new draft includes the provision for an annual report on findings of disciplinary actions. TI welcomes such intention and suggests that such report should include not only activities but also concrete results of completed investigations and sanctions applied, as well as information regarding on going investigations.

