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24 September 2007

**Response to Revised draft paper entitled:  
EIB's anti-fraud and anti-corruption policy review"**

**1. Preface**

**Scope of this Note**

There is much to say on the Bank's paper. The paper has not addressed many of the deeper recommendations made in the first round of consultation. This memorandum will, in turn, address, the lacunae in the paper, recommend a number of improvements to the Bank's proposed policy within the terms of its own assumptions, and end with a number of suggestions for greater precision in the statement of the policy.

**Implied Scepticism on Gravity of Issue**

The paper takes fraud and corruption too lightly. Implicit in the policy is the belief that there is little corruption or fraud in the projects that the Bank finances. The policy is incomprehensible unless this tacit factual assumption is articulated. What passes for policy is largely a statement of the Bank's practice in its demands on borrowers and promoters within the EU and outside. The paper is heavy on the internal division of competences between IG/IN and OCCO and on the rights and liabilities of staff. It is long on procedures for borrowing and managing the Bank's treasury. It is short on the chief matters that preoccupy those civil society bodies, which are active in this sphere of public interest, namely bribery and corruption in public contracts. The paper fails to reveal the Bank's thinking on the matter. Does the Bank share the views expressed by successive Presidents of the World Bank, and those estimates of worldwide corruption put out by, for instance, the World Bank Institute. If those figures are right, the Bank's assumption seems unsustainable. Many countries in which the Bank operates, including EU states rank low in the TI tables of integrity. Many of the Bank's operations are in spheres that are widely considered to be riddled with corruption and fraud, namely infrastructure works and notably airport construction.

**Discordance between Commitments**

The paper gives no hint of readiness to be active in rooting out fraud. It is notable that only 13% of complaints made in 2006, i.e. five cases, concerned fraud<sup>1</sup>. Yet the aims espoused by the Bank imply an active policy. The Bank's Corporate Social Responsibility Report for 2006 (the CSR) states, at page 22, that the Bank applies zero tolerance to credible evidence of fraud and corruption. Yet the degree of

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<sup>1</sup> Source: Inspector General's report for 2006. It would make the report more worthwhile, if types of alleged fraud were described. This could help make Bank staff more alert to the fraud they may encounter in their work. This statistic should be treated with suspicion. Why so few? Where fraud is alleged, and verified, it is likely that there is corruption. They tend to go hand in hand.

tolerance of a practice cannot depend on the evidence. If the practice is intolerable, the Bank should be active in seeking out evidence of the practice. If the Bank refuses to tolerate these prohibited practices, it must be because the Bank considers them to be harmful enough to justify sanctions when they are detected. The harm is independent of whether the Bank has evidence or not. For that reason, one can applaud the clarity of the boxed statement at the beginning of the paper, that the “*EIB will not tolerate prohibited practices [etc.]*”

In the same report, at page 23, the Bank declares that it “*requires that project promoters [and others] in Bank-financed contracts, observe the highest standard of ethics during the procurement and performance of contracts*”. It is an imperfect statement, since the concern for ethics is less to do with the promoter than with its suppliers. Nevertheless, it is a good statement, for it implies that the Bank that the Bank will monitor and enforce its requirement.

In paragraph 4 of the Uniform Framework,<sup>2</sup> the Bank committed itself to promote ethical business practices and good governance. This engagement, confirmed in the above-quoted statements in the CSR, finds scarce expression in the paper. Yet there are many means for the Bank to promote ethics and not merely wait for reports of breaches to come to it.

The Bank could make it clearer to what it is committed, if it would in the same paper define the limits of its concern and the limits to its chosen instruments of intervention in support of the policy. Such a statement is commonplace in national policy discussion papers. It allows a more focused public debate and it would invigorate the positive elements of the policy. I would recommend, therefore, the addition of a compact statement of the limits of the policy.

### **Keep Policy under Review**

These two statements of policy are made, rightly, without geographical restriction. They are statements of a kind that could well introduce the Bank’s paper under discussion. Yet the paper disappoints, since it fails to show an active demeanour towards these sound principles and because the principles are hedged with objectively arbitrary geographical limitations.

The Bank’s proposed policy should be considered an interim policy. This is for many reasons. Firstly, the paper itself acknowledges that one key aspect of the policy is under review, namely the debarment process. The comments below will show how the penalty of debarment is essential to a viable active policy consistent with the Bank’s avowed aims and principles. Secondly, the whistleblower rules are still to be put in place. Thirdly, the Inspector General’s report for the year 2006 shows an evolution in the complaints and especially in their geographical spread. It is therefore essential to conduct a thorough formal review of policy within a shorter period than the five years that the Bank proposes.

### **Dispersed Focus**

The Uniform Framework emphasises the struggle against corruption, and secondly fraud. The Bank’s paper weakens the focus. While money laundering and terrorist

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<sup>2</sup> Uniform Framework for Preventing and Combating Fraud and Corruption, signed September 2006: <http://siteresources.worldbank.org/INTDOII/Resources/FinalIFITaskForceFramework&Gdlines.pdf>

financing are serious crimes bringing adverse economic effects, they are not widely considered to be as critical for the EIB as corruption and fraud. The Bank, for the sake of political conformity, has given them equal weight. This should be changed, since it sends the wrong message to staff and collaborators, namely the message that the Bank has focused on these issues not out of conviction but as geo-political add-ons to its development goals. The Bank should affirm in this paper, as it does in the CSR, that the combat against corruption and fraud is integral to the work of the Bank.

This point needs emphasis. To fulfil its commitments, the Bank will need more human resources. The Inspector General in the consultation meeting stated that he had in his team access to all the resources he needed. That is not sufficient. An effective active policy is carried out not principally in the inspectorate but in the project departments. The policy requires more diligence in the appraisal of projects, supply contracts, national indicators of level of corruption.

The Inspector General also declared that there was little evidence of corruption. He gave no hint of his aim to carry out the commitment made in the Uniform Framework at paragraph 6 to develop tools to assess the incidence of corrupt practices. It is inconceivable that the Bank, without using any systematic long-standing protocol for navigating these rocks and shoals, should somehow have blindly steered around them.

## **2. Proposals for Policy Means**

Here follow some concrete measures. They should feature in the policy paper, since they are on a level of detail equal with other measures contained in the Bank's paper. The paper is indeed more concerned with policy means than with policy content. The present note proposes additions and refinements to those means.

### **Provide for Heightened Diligence**

Firstly, corruption is not detected without hard work. The Bank rides itself on its light touch. The Procurement Guide stresses the autonomy of the promoter and the limited supervision exercised by the Bank. However, this practice should be modulated. There are countries, spheres and sectors where corruption is more prevalent. The Bank should reserve the right to apply a stricter diligence in these cases. The Bank should ensure that, where the stricter diligence entails delay to a project or a loss of productivity of staff members, that this would not adversely affect the annual assessment of the performance of staff and their managers.

One means to show earnestness could be for the Bank to establish an independent certification scheme for major infrastructure projects in countries where corruption is prevalent. The suggestion made by Protimos merits study.

### **Treat Corruption and Fraud Uniformly**

Secondly, the Bank should align its practices across all its regions of operation. Differences of treatment should be founded on the substantive differences in the perceived incidence of fraud and corruption, and in the quality of judicial control, not on the formal difference of the mandate under which the Bank operates.

The Bank's commitments in the Uniform Framework and in the CSR make no distinction between projects in the Member States and projects outside the EU. Despite the restraints under which the Bank operates, the Bank has scope to recognise that prohibited practices abound within certain EU states. Indeed in his first two years of operation, the Inspector General received twice as many complaints on projects

within the EU as on projects outside the EU. The Bank is committed to working with enforcement agencies in the Member States. The first means is to show that its ethical requirements are as strict within the EU as elsewhere.

Thus, for all these reasons, the instruments of the Integrity Commitment , as well as the Integrity Covenant, should be extended to the EU, or at least to certain classes of promoter and project within the EU.

### **Extend the Debarment Sanction**

Thirdly, the Bank should make the sanction of debarment an integral part of its future policy. It is committed to working with other IFIs on this matter. Without a sanction of debarment, the technique of the Integrity Covenant may be a mere lip service to business ethics. If the Bank would have a wider policy to debar contractors, it will strengthen the hand of promoters in their dealings with contractors and, in those cases where illicit conduct is suspected, it allows the Bank to address the contractor directly and, where necessary, bypass the channel of the promoter's own organization.

Indeed, the sanctionable practices should be extended to cover not only fraud and corruption and coercion but also obstructiveness towards investigations. The IBRD already may penalize obstruction; it is as important for the Bank. But without the power to threaten debarment, the Bank may find, when it comes to the test, that its right to investigate is an empty right. If the Bank is armed with the weapon of debarment, the contractor from whom the Bank seeks information will be readier to collaborate. This element is missing from the Uniform Framework.

Debarment policy should be designed to be flexible. Its aim is deterrence and not punishment. It is not an outlet for moral revulsion; it is an economic instrument to advance an economic aim. The penalty would be imposed only after due and fair civil process. It should be commensurate with the gravity of the case. It should be widely enough applied as to be effective. It should be published, since the Bank is committed to establish with other IFIs a pattern of cross-debarment (and, if necessary, the contractor should in advance have agreed to publication). The sanction could be suspended to allow the offender to reform, and the sanction should be limited in time and be subject to review once the offender has reformed.

The Bank should not ignore the legal constraints that may shackle progress on a debarment policy. The Bank should obtain formal advice on its scope to introduce such a policy.

The fact that the EU procurement directives provide a limited process of sanction against persons who have been convicted of certain offences does not prevent the Bank from taking action. While the Bank is bound to follow EU law and policy instruments, it is not limited by them. There are good particular reasons for not being bound by the EU sanction mechanism, namely the following:

- Firstly, while the directives require member states to set up sanctions for certain offences, the context for the EIB is different. Debarment by the Bank and debarment by a purchasing authority are independent matters.
- Secondly, the directives apply only to the public sector of the EU. That represents one-third of the Bank's activity. The directives do not apply to

private sector lending by the Bank; and they do not apply to lending outside the EU. The Bank is free to set its own policy in those spheres.<sup>3</sup>

- Thirdly, the aims of the Bank's sanctions would probably differ from the EU legislator's. There is no reason why the Bank should be pre-empted by the work of the EU legislator, since the latter pursues a narrower aim in a largely different sphere.
- Fourthly, the Bank has a power to collaborate with other MDBs, as provided by Article 16 of its Statute. It has exercised that power by signing the Uniform Framework and thereby undertaking to study the setting up of a system of reciprocal debarment. It should pursue that undertaking with due vigour.
- Fifthly, the EU process is limited to contractors that have been convicted. Member States could impose a stricter exclusion policy, save that it may be hard for them to show that such a policy has no improper discriminatory effect. A common debarment policy among the MDBs will not work well, if it is limited to debarring parties convicted of certain crimes. The process of conviction is so rare, slow and unpredictable that such a limitation would emasculate the policy. A policy founded on reasonable suspicion could be coherent and conformable to standards of natural justice and due administrative process.

Finally, in support of a policy of debarment, the Bank should immediately compile a database on contractors. Apparently, unlike the IBRD, it has not yet done so. The Bank staff should be able to ascertain the aggregate value of the contracts with individual contractors and suppliers that have been financed by the Bank. So long as this information is lacking, the credibility of a policy of sanctions will be impaired. A hint of the volume of its business that might suffer would grab many a contractor's attention.

### **Strengthen the Integrity Covenant**

Many CSOs have suggested extensions to the Integrity Covenant. Some of these suggestions seem to overstate the present shape and purpose of the Covenant. However, the covenant clearly needs a further look. For a start, its definitions of prohibited practices differ from those in the Bank's paper. The definitions in the Covenant are more explicit and better adapted to their context than are the brief definitions given in the paper; they should be aligned with the laconic text derived from the Uniform Framework, and be accompanied by with some explanation.

The Integrity Covenant could merit examination for improvement along these lines:

1. Extend its use to the EU, at least in certain countries and classes of project;
2. There could be a reciprocal obligation on the part of the promoter to inform the contractor of suspicions of corruption that may affect the latter's interests, e.g. by a rival tenderer.

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<sup>3</sup> The Bank's scope to sanction a contractor may not work in the EU public sector, since obstructiveness is not a ground for debarment admitted by the EU Directives. The Bank might itself lose business by such a policy, except where it could persuade a public promoter to adopt this ground of debarment, and provided that the European Commission (and eventually the Court of Justice) would accept that this was a legitimate extension of integrity policy.

3. There could be an arbitration clause that would be distinct from the dispute resolution mechanism of the contract. Alternatively, a binding process of conciliation may be worth consideration. The latter process could apply also to the Bank's demands for documents.
4. The tenderer could recognise a duty of care towards other tenderers and that, consequently, any breach of the covenant might render it liable to compensate other tenderers for the expense of tendering and eventual loss of profit. For this purpose, the tenderer should acknowledge that the owner might pass its suspicions of the corruption of one tenderer to the other tenderers.
5. The covenant should be an integral part of the supply contract, and breach of the covenant should be a breach of an essential term of the contract. It could be good to affirm this principle. Although redundant, it may serve as a warning.
6. Contractors should note that obstruction could be visited by the sanction of debarment.

### **Motivate Staff on the Policy**

The poor motivation of the policy may discourage staff from applying it. The paper should be addressed to staff as much as to the public. It should affirm the centrality of the Bank's drive against corruption. It should inform staff that they would gain and not lose in esteem of superiors, if they expose corruption, and if they take the time and effort to prevent or discourage it. Conversely, they should know that, if corruption comes to light in a later accounting period for the assessment of staff performance, that their performance might be reassessed *ex post*. Performance bonuses would reflect these principles.

This framework will be credible only if it has the consistent support of the President, the Management Committee and the head of Human Resources.

In the sensitive areas, the Bank may be short of staff. The relevant departments should be enabled to recruit additional resources for projects where the incidence of corruption is less unlikely. There could be created a central Bank budget to cover such extra burdens; this would eliminate one ostensible hindrance to due diligence. While the Inspector General's unit flourishes on anti-corruption, other departments may wither under its burden.

To ensure that staff members understand the priorities, the various targets of the policy should be differentiated. The policy tackles four different targets with the same instrument, namely fraud, corruption, money laundering and terrorist financing. The thrust of the policy is thus blunted. The Bank should restore focus, and ensure that staff members are aware of the policy. Terrorist financing is the concern of OCCO, and a brief call to OCCO will fulfil the loan officer's duty. Money laundering should not need especial vigilance, so long as the Bank adheres to sound disbursement procedures. Thus, in this sphere, staff should be instructed to concentrate on the prevention of fraud and corruption.

To assist staff, the Inspector General's annual report should describe the types of fraud and corruption that the Bank's staff may have encountered, omitting the features that might identify individuals.

It would be a mistake to suppose that these details are beneath the level of the paper. The Bank's paper is not just about principles but also about means, and these means give life to the policy. These elements should feature in the paper itself.

### **Disclosure would strengthen the Policy**

The policy needs the energy that sunlight brings. Here are some useful measures of transparency:

1. The model Integrity Commitment should be published. It is mentioned in the paper without explanation. Is it part of the finance contract, or is it a separate instrument?
2. As a more limited measure, the Bank should require that public borrowers publish the Integrity Commitment and related clauses. If they do not, the Bank should publish them itself. It should reserve for itself the right to do so.
3. The Bank should reconsider the publication of public-sector finance contracts. Countries that require parliamentary approval to public contracts already publish them.
4. The Bank should publicly identify the projects that will be the subject of closer and more diligent scrutiny.
5. The Bank should publish an amendment to its Procurement Guide to reflect the principles finally adopted in the revised integrity policy.

### **Collaboration on Integrity Issues**

The Bank's departments, other than the Inspector General unit itself, lack the means to devote much time to the policy. They lack the contacts, the public profile, the techniques and the networks that could make the policy work. The remedy is collaboration.

The Bank already works with the MDBs. It should also mention that it is observer at the FATF.

It should furthermore:

1. Announce that it may share with co-financiers any information relating to prohibited practices on projects financed in common.
2. Announce a policy of cultivating local civil society, especially in the countries and regions where the Bank has opened an office. Approaches of these kinds could boost local efforts to combat corruption and fraud, and could provide channels of information to the Bank. This field of work should be included in the job descriptions of the heads of the Bank's offices. The same duty would apply, to a lesser extent, to loan officers in countries where corruption is rife. They should also make contact with the chief of the public anti-corruption office.
3. Cooperate with judicial and other authorities in the member states, as provided by the Uniform Framework. Is it enough to leave that task to OLAF, where there are especial issues relating to national procurement, not directly affecting the sphere of OLAF, namely the Communities' financial interests?
4. The Bank should collaborate with fellow investors. This applies also to the EIF

5. Both the EIB and the EIF should, where they appoint nominee directors to the boards of their investments, ensure that the nominees receive training in governance and control of business ethics. It should be their duty to seek to ensure that the companies on whose boards they sit introduce formal and effective policies.
6. Following the pattern of the IBRD, the Bank should allow greater external supervision. For instance, the Inspector General should be subject to an external oversight board. There should be worldwide representation on this board. The Bank’s audit committee may not be the best vehicle for this task, since auditing is a different matter from fraud detection.
7. Finally, as proposed by Protimos, the Bank should examine the scope for an external certification process for large and complex infrastructure projects in spheres more susceptible to the bane of fraud and corruption.

### 3. Detailed Suggestions

Following the broad principles, there follows a list of possible textual improvements. Some are independent of the previous proposals; some implement them:

Paragraph reference	Proposal
Opening	State the aim of the policy, using phrases from the CSR
5	Is it enough for the Bank to be cognisant of the principles of these international documents? Especially in the case of item (iv), the Bank is directly committed to them.
7	Hopefully without quibbling, the paper uses the word “appropriate” or its derivatives twelve times in the course of this paper. One might suspect that the word is a cloak for incomplete analysis. Perhaps the Bank could work to define more precisely its intention. This would certainly give more force and clarity to the policy.  Reports are to be made of evidence or suspicion of prohibited practices, not just of the practices themselves. Align with §22 and §28.
8	May be better to delete from the third line the words “Relations between the EIB and...”, as in a previous draft.
9	Provide also for a definition of “ obstructive practice” as does the IBRD.  Consider aligning the Integrity Covenant on these definitions.
9.e, note 4	There is some confusion between directives and regulations.
10(i)	Repeats §2.
10(ii)	The directives apply only to the EU. That should be clarified.
12.i	Please explain here the Integrity Commitment.
12.iii	after “complaint” add “or admission.”
12	Add “(viii) Publish Integrity Commitments”, if not entire finance

	contracts.
12.b.i	Only EU public promoters should warrant compliance with EC Directives. In any case, directives are not addressed to promoters but to states. The wording needs sharpening. Borrowers should, if necessary, certify that their practices conform to applicable directives.
12.b.ii	Update to latest EU norms, if needed, as proposed by one CSO
13(iii)	Elaborate this exclusion policy along the lines suggested above. The NOTE should state that the Bank will also work with other MDBs on a reciprocal exclusion scheme.
14	This statement is at odds with the Bank's Procurement Guide. The goal is not <i>fair tendering</i> but <i>economic and efficient tendering</i> . The declaration of aims should be aligned.  More importantly, the Bank's aim is not limited to promoters "in the EU who fall under the Community Directives". It applies universally. It also applies to private EU promoters, even though they are not covered by EU Directives on procurement.
15	The reference is to prohibited practices relating to the contract in question, not to all prohibited practices.  Extend the concept of Integrity Covenant to EU projects and generally as proposed above in this paper.  The vaunted control over the procurement process is likely to need reinforcement along the lines proposed above.
16	The sanctions available to the Bank presuppose that a debarment list is already in place. The reference is perhaps intended to be to procurement on the project in question, not to any procurement process. It should be clarified.
17	Internal divisions of responsibility are of no public concern, except that the public should know to whom to address their reports and complaints.
20	Perhaps "monitored jurisdiction" should be defined.  One CS suggested extending the monitoring to certain kinds of project and classes of promoter worldwide.
23	There is no equivalence of protection within and outside the EU. The paper should align practices in all regions. If it does not, it should make it clear which apply within and which apply without. Differences of treatment should be based on objective criteria for differences in the need for due diligence and controls.

23.b	Add “or admission” after “complaint”. See §12(iii).
25	The procedure, as here stated, is confused. The person filing a complaint should have one point of contact. Normally that contact should not be changed. If the initial contact point passes on the complaint to another department, any acknowledgement and any change of contact point, should be communicated to the complainant by the Investigations Contact Point, and not by the department whose activity is the subject of the complaint.
Part VII	In footnote 15 there is perhaps confusion between the strict legal position and the current practice of OLAF. OLAF’s involvement is not necessarily limited to cases of misuse of EU funds. The ECJ judgement in case C-15/00 (the OLAF case stated that, because the Bank is a body closely associated with the EU, any matter affecting its financial interests could affect the Community’s financial interests. Consequently, except where the independent and effectiveness of the Bank would be impaired thereby, the OLAF would be competent to examine misuse of EIB funds. An allegation of money laundering is likely to involve an allegation of misuse of funds, since, if the project loan or equity funds are correctly applied to an approved project, there cannot be money laundering.. See <a href="#">ECJ case C-15/00</a> . See also the advocate-general’s opinion in that case.

#### 4. Conclusion

The consultation process should not delay the implementation of policies. It should go on. The Bank is optimistic and too “laid back”, if it believes that it may lock the process up for five years, as is said in §46 of the paper, until the next intended formal review. The scenarios shift. The Bank has much to do to give teeth and credibility to its policy. There should be constant review. The Bank could do more to show that, as a body, its management shares the belief that the prevention of corruption and fraud is integral to the Bank’s mission.