

**COMPLAINTS MECHANISM**

SG/A/2023/02

# **Disclosure of a Data License Agreement**

CONCLUSIONS REPORT

4 December 2024





# Disclosure of a Data License Agreement Conclusions Report

**Complaint confidential:** No

**External distribution**

Complainant

**Internal distribution**

Management Committee  
Secretary General  
Inspector General  
Relevant EIB services

**Disclaimer**

The conclusions presented in this report are based on the information available to the EIB Group Complaints Mechanism up to 23 October 2024 representing the report's cut-off date. The conclusions are addressed solely to the EIB Group.

## The EIB Group Complaints Mechanism

The EIB Group Complaints Mechanism is a tool enabling the resolution of disputes if any member of the public feels that the European Investment Bank (EIB) might have done something wrong, i.e. if it has committed an act of maladministration. The Complaints Mechanism is not a legal enforcement mechanism and will not substitute the judgement of competent judicial authorities.

Maladministration means poor or failed administration. It occurs when the EIB fails to act in accordance with a rule or principle that is binding upon it, including its own policies, standards and procedures. The concept of maladministration includes failure by the EIB to comply with human rights, applicable law, or the principles of good administration. Maladministration may relate to the EIB Group's decisions, actions or omissions and this may include the environmental or social impacts of the EIB's projects and operations.

One of the main objectives of the EIB Group Complaints Mechanism is to ensure the right to be heard and the right to complain. For more information on the EIB Group Complaints Mechanism please visit: <https://www.eib.org/en/about/accountability/complaints/index.htm>.

Complainants that are not satisfied with the EIB reply to their complaint may file a complaint of maladministration against the EIB with the European Ombudsman<sup>1</sup>.

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<sup>1</sup> Available at: <https://www.ombudsman.europa.eu/en/home>.

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# 1 BACKGROUND

## 1.1 The complaint

1.1.1 On 20 July 2023, the European Investment Bank Group Complaints Mechanism (“EIB-CM”) received a complaint from an individual (“the complainant”) operating a blog focussed on access to information at international organisations. The complaint concerns the partial refusal of access to information contained in the Data License Agreement entered into by the European Investment Bank (“EIB”) and ILX B.V.<sup>2</sup> (the “Data License Agreement”). The document at issue was requested by the complainant on 13 April 2023 pursuant to the EIB Group Transparency Policy<sup>3</sup> (“initial application”).

1.1.2 The EIB is a founding member of the Global Emerging Markets (“GEMs”) Risk Database Consortium<sup>4</sup> (“GEMs Consortium”). The GEMs Risk Database Consortium compiles, calculates, maintains and owns rights in and to a database of certain credit risk information (“GEMs Database”). The Data License Agreement lays out the terms under which certain data on the GEMs Database was made available to ILX B.V. The Data License Agreement was put in place as a one-time pilot initiative; it has since expired.

1.1.3 The EIB provided partial access to the information requested by the complainant, by releasing a redacted copy of the Data License Agreement on 7 June 2023. Further, the EIB justified that the remaining information contained in the Data License Agreement could not be released to the complainant on the basis of the following exceptions set forth in the EIB’s Transparency Policy (“EIB-TP”):

1. **privacy and the integrity, safety and security of the individual, in particular in accordance with EU legislation regarding the protection of personal data** (Article 5.4(b) of the 2021 EIB-TP); and
2. **commercial interests of a natural or legal person** (Article 5.5 of the EIB-TP).

1.1.4 The complainant argues that the exceptions referred to above cannot justify, in the present case, the partial refusal of information. More specifically, the complainant considers that the EIB failed to: (i) draw a distinction between redactions relating to personal data and those relating to commercial interests; (ii) explain how the partially refused information could specifically and actually undermine the interest protected by the invoked exceptions; (iii) demonstrate that the risk being undermined is reasonably foreseeable and not purely hypothetical; and (iv) examine whether there was an overriding public interest in disclosure.

## 1.2 The initial application

1.2.1 On 13 April 2023, the complainant requested the disclosure of the Data License Agreement.

1.2.2 In its response dated 7 June 2023, the EIB disclosed the (redacted) document, specifying the grounds for its partial refusal of information:

*[...] This mainly concerns financial and fees-related information, which if disclosed, would undermine the commercial interests of the parties concerned, as well as information relating to identified or identifiable individuals which, if disclosed, would undermine their privacy and integrity. The EIB does not consider that an overriding public interest exists that would prevail*

<sup>2</sup> The Data License Agreement was signed in November 2019.

<sup>3</sup> Available at: <https://www.eib.org/en/publications/eib-group-transparency-policy-2021>

<sup>4</sup> Available at: <https://www.gemriskdatabase.org>

*over the applicable disclosure exceptions. In particular, none of the information redacted relates to emissions into the environment.*

*As indicated in past correspondence, this agreement is no longer operational.*

## 1.3 Recent developments

- 1.3.1 It is worth noting that since the lodging of the complaint at issue, recent developments have taken place that result in greater transparency around the GEMs Risk Consortium Database. Statistical publications by the GEMs Consortium have taken place for the first time.
- 1.3.2 On 25 March 2024, the GEMs Risk Database Consortium published the recovery rates of investments with private and sub-sovereign borrowers in emerging markets and developing economies for the period 1994-2022. According to the GEMs website, “[t]he new report is the result of the GEM consortium’s continued effort and commitment to provide, to a wider audience, statistics based on the GEMs database to support investments in emerging markets [...]”<sup>5</sup>. Moving forward, the GEMs Risk Database Consortium has committed to publishing default and recovery statistics on a regular basis.
- 1.3.3 On 15 October 2024, two new publications by the GEMs Consortium offered further insights into emerging market credit risk. These publications provide granular default and recovery patterns for over three decades of development finance, highlighting the key drivers of investment risk in emerging markets and developing economies.

## 1.4 Work performed

- 1.4.1 The EIB-CM is tasked with handling complaints concerning alleged maladministration – poor or failed administration – by the EIB. Over the course of its inquiry, the EIB-CM conducted a review of relevant documentation<sup>6</sup> and held meetings with both the complainant and staff of relevant Bank services. Moreover, the EIB-CM contacted the persons mentioned in the Data License Agreement regarding the possible disclosure of their personal data.

## 2 FINDINGS

### 2.1 General remarks

- 2.1.1 The EIB-CM has identified a total of thirty-two redactions contained in the Data License Agreement provided to the complainant. The number of duplicates is twenty-three, resulting in a total of nine redactions of differing content (four related to personal data (para 1.1.3(1)) and five related to commercial interests (para 1.1.3(2)).
- 2.1.2 Pursuant to the EIB-TP “[...] if, in order to safeguard the interests protected by this Policy, the EIB is unable to divulge the information requested, in full or partially, the reason(s) why such information cannot be provided shall be stated [...]”<sup>7</sup> <sup>8</sup>. In order to justify a (full or partial) refusal

<sup>5</sup> Available for free online at: <https://www.gemriskdatabase.org>.

<sup>6</sup> For example: the Data License Agreement, correspondence between the parties and inquiry responses provided by the EIB competent services.

<sup>7</sup> Article 5.25 of the 2021 EIB Group Transparency Policy.

<sup>8</sup> *The Code of good administrative behaviour for the staff of the European Investment Bank in its relations with the public* (Article 10) states: “If, for reasons of confidentiality and in particular banking secrecy, a member of staff is unable to divulge the information requested, he/she shall give the reasons why such information cannot be provided.” Likewise, *The European Code of Good Administrative Behaviour* states: “Every decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision. The

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of information, it is not sufficient, in principle and according to case-law<sup>9</sup> (refer to case example below), for the requested information/document to be covered by an exception mentioned in the EIB-TP. As a rule, the EIB is also expected to provide explanations as to how access to that information/document could specifically and actually undermine the interest protected by the exception(s) relied on. Moreover, the risk of that interest being compromised must be reasonably foreseeable and not purely hypothetical<sup>10 11</sup>.

- 2.1.3 In this regard, the EIB, in its response of 7 June 2023, while noting both applicable exceptions (para 1.1.3, bullet points 1 and 2), provided the following brief explanation for protecting commercial interests: ‘financial and fees-related information’. It must be noted that the EIB’s response was the first and only reaction to the complainant’s request and, therefore, its scope was limited by the complainant’s initial application. Nevertheless, the EIB-CM considers that the EIB could have expanded further on its statement of reasons without depriving the exception of its purpose.
- 2.1.4 Furthermore, the EIB, in its response of 7 June 2023, did not draw a distinction between redactions related to personal data and those related to commercial interests. The EIB-CM does consider that the EIB could have provided the complainant with more clarity in this respect, without creating a disproportionate administrative burden (given the reasonable redaction count contained in the Data License Agreement). Annex 1 provides more details in this respect.
- 2.1.5 As a general observation, the Data License Agreement contains a total of 27 pages. The EIB-CM notes that page 27 concerning the licence fee was not provided in the copy transmitted to the complainant given that the final redaction, marked as [...] on page 26, is intended to indicate further redactions on the subsequent page. In the EIB-CM’s opinion, the EIB could have provided the complainant with more clarity in terms of the length of the redaction, either by providing (a) an indication of how many pages succeed page 26 of the Data License Agreement or (b) the total number of pages that compose the Data License Agreement.
- 2.1.6 The EIB-TP does not require the Bank to distinguish redactions as such, or to indicate the length of the redactions. Nevertheless, the EIB-CM considers that providing more clarity on these aspects would have been best practice in the spirit of openness and transparency, and considering the reasonable redaction count contained in the Data License Agreement).

## 2.2 Article 5.4(b) of the EIB Group Transparency Policy concerning the protection of privacy and integrity of the individual

- 2.2.1 The Data License Agreement contains personal data, in particular names, initials, titles, an email address and handwritten signatures of natural persons (pages 2-26).
- 2.2.2 Pursuant to Article 5.4(b) of the EIB-TP, the EIB may refuse access to this information where its disclosure would undermine the protection of “*privacy and the integrity, safety and security*”

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*official shall avoid making decisions which are based on brief or vague grounds, or which do not contain an individual reasoning” (Article 18(1,2)); “If an official may not disclose the information requested because of its confidential nature, he or she shall, in accordance with Article 18 of this Code, indicate to the person concerned the reasons why he or she cannot communicate the information” (Article 22(3)).*

<sup>9</sup> The Court of Justice of the European Union case law of mention in this paragraph refers to the relevant exceptions of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

<sup>10</sup> See, for example, Judgment of 28 March 2017, Deutsche Telekom v Commission, T-210/15, paragraph 27. This case refers to exceptions laid down in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

<sup>11</sup> These principles were recently emphasised by the European Ombudsman in its *Decision on how the EIB handled a request for public access to the summary of a project it is financing on the modernisation of an electricity distribution network in Poland* (case 3/2023/OAM), available at: <https://www.ombudsman.europa.eu/en/decision/en/172566>.

*of the individual, in particular in accordance with European Union legislation regarding the protection of personal data*<sup>12</sup>.

2.2.3 The applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (“Regulation 2018/1725” or “the Regulation”)<sup>13</sup>. Article 3(1) of the Regulation provides that personal data “*means any information relating to an identified or identifiable natural person*”. The Court of Justice has specified that any information, which by reason of its content, purpose or effect is linked to a particular person, is to be considered as personal data<sup>14</sup>. In its judgment in Case C-28/08 P (Bavarian Lager)<sup>15</sup>, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Regulation becomes fully applicable.

2.2.4 For the application of Article 9(1)(b) of the Regulation as basis for the transmission of the personal data included in the Data Licence Agreement, one may note the following:

It does not suffice for a requester to simply invoke public interest when requesting access to a document containing personal data. Firstly, a specific purpose in the public interest (i) associated to the release of personal data must be established. If this (i) is confirmed, the EIB may proceed with the transmission of personal data provided that (ii) legitimate interests of the data subject(s) whose data are to be transmitted are not prejudiced.

2.2.5 The EIB-CM observes that, as part of the complainant’s initial application, he did not put forward any arguments to establish the necessity to have the personal data transmitted for a specific purpose in the public interest. However, in filing his complaint with the EIB-CM, he points to Article 9(1)(b) of the Regulation, while setting forward the following view:

*[...] The content of the ILX contract has a direct bearing on a significant policy decision now being considered by the EIB, one that could have significant economic ramifications, particularly for developing countries.*

*The EIB is the manager of a major database created with information from 24 major public lending institutions, such as the World Bank, the African Development Bank, and the EIB itself. The GEMs database houses information from these institutions on loans they made and what happened with them. Essentially this database describes the riskiness of lending, a valuable information commodity.*

*At the current time the database is available for use only by the international financial organizations that contributed to it.*

*However, consideration is currently being given to providing access to the database, or parts of it, to the private sector. This transparency is being requested by the private sector as way to improve its risk analysis capabilities, and, ultimately, to encourage more lending in developing countries.*

*The ILX contract is directly relevant to this ongoing debate because ILX was granted access to the database. The contract with ILX is described by the EIB as a pilot project run for the idea of*

<sup>12</sup> Available at: <https://www.eib.org/en/publications/eib-group-transparency-policy-2021>

<sup>13</sup> Available at: [https://edps.europa.eu/sites/default/files/publication/regulation\\_eu\\_2018\\_1725\\_en.pdf](https://edps.europa.eu/sites/default/files/publication/regulation_eu_2018_1725_en.pdf)

<sup>14</sup> Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, Peter Nowak v Data Protection Commissioner, request for a preliminary ruling, paragraphs 33-35, [ECLI:EU:C:2017:994](https://eur-lex.europa.eu/eli/jb/2017/994).

<sup>15</sup> Judgment of 29 June 2010 in Case C-28/08 P, European Commission v The Bavarian Lager Co. Ltd, paragraph 59.



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*sharing the database. Others in the private sector who requested such access were turned down.*

*One key question under discussion is how much access should be provided to the private sector. The ILX arrangement demonstrates the value of the information held within GEMs. Representatives of GEMs members have cast doubt on the value and quality of the GEMs data. Better understanding of the arrangement with ILX will contribute this policy debate.*

*The material redacted from the ILX contract likely has direct relevance. The missing material from the ILX contract apparently describes what information was provided to ILX. As such, it sheds light on what level of access the EIB allowed in the past.*

- 2.2.6 The EIB-CM takes the view that the argumentation of the complainant set forth above does not establish the existence of a specific purpose in the public interest. In this respect, it should be noted that no link has been established between the personal data at issue and the policy debate referred to by the complainant under paragraph 2.2.5 for which, the complainant points out, there could be significant economic ramifications, particularly for developing countries. As observed by the EIB-CM, this may be attributed to the fact that the specific interest (objective) pursued by the complainant was argued in reference to redactions justified under Article 5.5 of the EIB-TP and cross-referenced in relation to redactions justified under Article 5.4(b) of the EIB-TP.
- 2.2.7 Nevertheless, under the scope of this compliance review, the EIB-CM has verified whether the persons mentioned in the Data License Agreement give their non-objection to the disclosure of personal data concerning them<sup>16</sup>. Of the six persons concerned, none provided their non-objection.
- 2.2.8 Lastly, the EIB competent services redacted portions of the document which contain licensor and licensee contact information seemingly protected under Article 5.4(b) of the EIB-TP. The EIB-CM does not consider that this information (name of licensor and licensee, their addresses and fax number) falls within the definition of personal data for purposes of the Regulation given that data protection rules do not apply to companies or any other legal entities. Additionally, there is a single initial present on a number of pages of the Data License Agreement, which could not be identified, and therefore the EIB-CM considers such initial does not fall under the definition of personal data as set out in the Regulation.

## 2.3 Article 5.5 of the EIB Group Transparency Policy concerning the protection of commercial interests

- 2.3.1 During the course of the inquiry, the EIB relevant services provided clarifications to the EIB-CM which confirm that five individual redactions (pages 4, 7, 9, 23 and 27) contain information which the EIB considers as undermining the commercial interests of ILX B.V. and the GEMs Consortium members.
- 2.3.2 Pursuant to Article 5.5 of the EIB-TP, the EIB may refuse access (in part or in full) to a document “*where disclosure would undermine the protection of commercial interests of a natural or legal person*”, unless there is an overriding public interest in disclosure<sup>17</sup>. The EIB-TP provides the following common cases of commercial interests:

<sup>16</sup> This approach has been guided by the judgment in Case C-28/08 P (Bavarian Lager) which arrives at the conclusion that the Commission was right to verify whether the data subjects had given their consent to the disclosure of personal data concerning them.

<sup>17</sup> Article 5.8 of the 2021 EIB Group Transparency Policy.

- *Business, financial, proprietary or other non-public information/documents created or received by the EIB;*
  - *Information/documents relating to negotiations, legal documentation and related correspondence;*
  - *Information/documents covered by a confidentiality agreement or in relation to which a third party has legitimate expectations that they would not be disclosed.*
- 2.3.3 In assessing the relevance of the above exception, the EIB-TP stipulates that “[w]hile the EIB is committed to a policy of presumption of disclosure and transparency, it also has a duty to respect confidentiality in compliance with EU laws, including the obligation not to disclose information of the kind covered by the obligation of professional secrecy in accordance with Article 339 TFEU, as well as legislation to protect personal data. National regulations and banking sector standards covering business contracts and market activity may also apply. There are therefore certain limits on the disclosure of information/documents. In applying the exceptions to disclosure, the EIB shall, in line with Article 3.7 above, have due regard for its specific role and activities, and the need to protect its legitimate interests and the legitimate interests of its clients, and thus the confidentiality of the relationship between the EIB and its clients and other relevant counterparts.”<sup>18</sup>
- 2.3.4 The EIB-CM requested that the EIB competent services provide detailed reasons explaining how the disclosure of said information could specifically and actually undermine the interests protected<sup>19</sup>. The inspection of the Data License Agreement confirmed that it contains, in parts, contractual information<sup>20</sup> (e.g., the nature of the product, interest rate and license fee). The redacted information also contains banking information (bank name, account number and swift code) used for purposes of the GEMs Database.
- 2.3.5 It is reasonable to consider that the disclosure of specific contractual terms (in this case, interest rate and license fee information found on pages 4 and 27 of the Data License Agreement, respectively) and banking information (page 9 of the Data License Agreement) mentioned in paragraph 2.3.4 above could have foreseeably undermined the commercial interests of the third party concerned at the time of the initial application.
- 2.3.6 However, the EIB-CM is not convinced - based on specific reasons put forward by the EIB during the course of this inquiry – of such foreseeable risk in the case of information pertaining to the use of licensed statistics and the approved product (pages 7 and 23 of the Data License Agreement, respectively). From the EIB-CM’s perspective, the EIB has not met the burden of proof, i.e., establishing a foreseeable risk, in this respect<sup>21</sup>.

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<sup>18</sup> Article 5.3 of the 2021 EIB Group Transparency Policy.

<sup>19</sup> According to the EIB services, ILX B.V. was consulted with, in light of the initial application, in line with Article 5.11 of the EIB-TP.

<sup>20</sup> European Ombudsman guide on the right of public access to EU documents, November 2022, see section 7.11 on what is meant by the exception for protecting commercial interests, available at <https://www.ombudsman.europa.eu/de/document/en/163353>. This guide was developed to provide information and guidance on the right of public access to EU documents, and how this is applied across the EU institutions, bodies, offices and agencies. Section 7 of this guide deals with the exceptions laid down in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

<sup>21</sup> Please refer to the EIB-CM’s recommendation under para 3.1.1 which recommends that the EIB relevant services further justify the need for confidentiality should these specific contractual terms remain confidential.

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- 2.3.7 It must be noted that time plays a role in whether information remains commercially confidential<sup>22</sup>. The Data License Agreement was under four years old at the time of the initial application. As of 11 November 2024, the Data License Agreement will reach five years<sup>23</sup>.
- 2.3.8 As regards Article 5.5 of the EIB-TP specifically, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment (article 5.8 of the EIB-TP). As previously stated, the complainant did not provide an express justification to the EIB at the time of his initial application. Nonetheless, the EIB-CM does not consider there to be an overriding public interest in so far as neither the requested information nor the complainant's argumentation set forth above (para 2.2.5) relates to emissions into the environment.

### 3 OUTCOME

The EIB-CM proposes that the EIB should review its position, taking into account the above observations, with a view to granting the widest possible access to the complainant of the requested document.

#### 3.1 Recommendations

- 3.1.1 The EIB-CM recommends that the EIB reassess whether redactions pertaining to the use of licensed statistics and the approved product (para 2.3.6) foreseeably undermine the interest protected by the exception relied on. The EIB's assessment outcome should be shared in correspondence with the complainant. In the event that said redactions do foreseeably undermine the interest protected by the exception relied on, detailed reasons explaining how the disclosure of said information could specifically and actually undermine the interests protected should be provided to the complainant (para 2.1.3).
- 3.1.2 The EIB-CM also recommends that the following non-personal data be made available to the complainant:
- Licensor and licensee contact information (para 2.2.8).

#### 3.2 Suggestions for improvement

- 3.2.1 In undertaking the recommended reassessment (para 3.1.1), and having regard to the passage of time (para 2.3.7), it is suggested that (1) the EIB additionally reassess whether the application of the exception at issue pertaining to specific contractual terms and banking information (para 2.3.5) continues to be justified and (2) consider the totality of its reassessment in the context of the recent publications described in section 1.3 above<sup>24</sup>.

<sup>22</sup> European Ombudsman guide on the right of public access to EU documents, November 2022, see section 7.11 on what is meant by the exception for protecting commercial interests, available at <https://www.ombudsman.europa.eu/de/document/en/163353>. This guide was developed to provide information and guidance on the right of public access to EU documents, and how this is applied across the EU institutions, bodies, offices and agencies. Section 7 of this guide deals with the exceptions laid down in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

<sup>23</sup> The absence of a presumption of commercial confidentiality (according to case law, five years is regarded as a useful benchmark in this regard) does not mean that the EIB cannot provide *specific reasons* why *specific information* remains confidential. Such case law refers to the relevant exception under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not directly to the EIB.

<sup>24</sup> The information provided under Section 1.3 of this report could not have informed the EIB's reply to the complainant's initial application. However, under a reassessment, the EIB-CM suggests that this information be considered.

3.2.2 The EIB-CM also suggests that the following non-personal data be made available to the complainant:

- the single initial present on a number of pages of the Data License Agreement (para 2.2.8).



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## Annex 1: Redactions contained in the Data License Agreement

	<b>Page number(s)</b>	<b>Personal data Art 5.4(b)</b>	<b>Commercial interests Art 5.5</b>
1	2-21, 23-27	X (Initials located on the bottom right corner of the pages indicated)	
2	4		X
3	7		X
4	9		X
5	20	X	
6	22	X	
7	23		X
8	27		X