

**EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT**

**PROJECT COMPLAINT MECHANISM**

**ELIGIBILITY ASSESSMENT REPORT**

**COMPLAINT: SOSTANJ THERMAL POWER PROJECT**

**REQUEST NUMBER: 2012/03**

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## Executive Summary

On 17 January 2012, three civil society organizations, Focus Association for Sustainable Development, Environmental Legal Service and CEE Bankwatch Network, submitted a Complaint requesting a Compliance Review of the Sostanj Thermal Power Project, Termoelektrarna Šoštanj (“TES,” or the “Project”), pursuant to the European Bank for Reconstruction and Development’s (EBRD) Project Complaint Mechanism (PCM) process. TES is a state-owned, coal-fired power plant in northeast Slovenia currently generating one-third of Slovenia’s electricity. It is undergoing a large-scale modernization programme with loans from the EBRD, the European Investment Bank (EIB) and several commercial banks.

The Complainants claim the Bank’s assessment and approval of the Project did not comport with European Union (EU) environmental standards or, as a consequence, with the Bank’s 2008 Environmental and Social Policy (ESP) requiring compliance of EBRD-funded projects with relevant EU environmental requirements. They argue EBRD’s assessment of TES as “Carbon Capture and Storage (CCS) Ready” fell short of the assessment required by Article 33 of the EU’s 2009 CCS Directive, thereby violating the Bank’s ESP. The Complaint also argues EBRD acted contrary to the ESP, by assessing and approving the Project without sufficient grounds to believe its emissions levels will be consistent with the 2050 Climate Goals set by the EU, which would require Slovenia to reduce its carbon emissions by 85-90 percent by 2050 – a target Complainants argue is rendered impossible given projected emissions from the TES plant.

The PCM Eligibility Assessors find **the Complaint satisfies the PCM criteria for a Compliance Review of the Project** as set out under the Project Complaint Mechanism (PCM) Rules of Procedure (RPs). The Complaint alleges shortcomings in the process of assessing environmental and social risks of the Project, in accordance with criteria for eligibility.

Consistent with PCM Rules of Procedure, Terms of Reference for a Compliance Review have been prepared and are included in this Eligibility Assessment Report (EAR). The focus of the Compliance Review is whether or not EBRD complied with its own policy provisions. As the PCM does not review EBRD’s clients, the PCM will not assess compliance on the part of EBRD’s client.

**European Bank for Reconstruction and Development**  
**Project Complaint Mechanism (PCM) Eligibility Assessment Report**  
**Sostanj Thermal Power Plant**

**I. Overview of the Eligibility Assessment process**

- 1) The Project Complaint Mechanism (PCM) provides an opportunity for an independent review of Complaints from one or more individual(s) or organization(s) concerning an EBRD-funded project that allegedly has caused or is likely to cause harm. The goal is to enhance EBRD's accountability through the PCM's two functions – Problem-solving and Compliance Review.
- 2) When the PCM receives a Complaint about an EBRD Project, the Complaint is referred to the PCM Officer who will make a decision regarding Registration of the Complaint. Following the decision to register it, the PCM Officer will appoint a PCM Expert to work jointly with the PCM Officer to determine whether the Complaint is eligible for a Problem-solving Initiative, a Compliance Review, for both, or for neither, based upon eligibility criteria set out in Paragraphs 18-24 of the PCM Rules of Procedure (RP). In making their determination, the Eligibility Assessors will take into account the PCM function requested by the Complainant.
- 3) A PCM Eligibility Assessment for a Compliance Review is a preliminary assessment to determine whether the PCM should proceed to a Compliance Review of EBRD. The purpose of the compliance review function is to ensure compliance with policies, standards, guidelines, procedures, and conditions for EBRD involvement. The focus of the Compliance Review is on EBRD and how EBRD assured itself of Project performance based upon their own policies and procedures. However, in many cases it will be necessary to review the actions of the clients and verify outcomes in the field, in assessing the performance of the project and implementation of measures to meet the relevant requirements. Through a PCM Eligibility Assessment the PCM ensures that Compliance Reviews are initiated only for those cases that meet the PCM RP eligibility requirements.
- 4) The next section describes what an Eligibility Assessment for a Compliance Review is, and what it is not. The purpose of the section is to promote a common understanding among all the parties about what to expect from the Eligibility Assessment process.

*Eligibility Assessment for a Compliance Review – What It Is*

- 5) An Eligibility Assessment is a preliminary process that must be satisfied before a Complaint is deemed eligible for a Compliance Review. The eligibility criteria allow broad access to the PCM and assure the conditions under which a Compliance Review takes place are not prescriptively limited. The Assessors make sure the Complainant has standing to bring a Complaint according to the PCM Rules of Procedure and check to confirm that the Complaint contains the required information necessary for a Compliance Review. Independent evaluation and verification of the information presented are not normally part of an Eligibility Assessment.
  
- 6) The relevant eligibility criteria are set forth in the Project Complaint Mechanism: Rules of Procedure. Table 1 (below) summarizes the basic criteria any Complaint must meet to be eligible for a Compliance Review:

*Table 1. Summary of PCM Eligibility Criteria Relevant for a Compliance Review*

Requirements to be held eligible	PCM Rules of Procedure
The Complainant is one or more individual(s) or organization(s) seeking a Compliance Review.	PCM RP 2
The Complaint relates to a Project that has been approved for financing by the EBRD. The Bank has agreed to support the Project.	PCM RP 19 (a)
The Complaint describes the harm caused, or likely to be caused, by the Project.	PCM RP 19 (b)
The Assessors, however, do not investigate or evaluate the validity of the harm described in the Complaint. That is the responsibility of the Compliance Review Expert. For eligibility purposes, it is sufficient that the Complainant identify potentially significant adverse social or environmental outcomes now or in the future.	
The Complaint does not fall under any of the exclusion categories.	PCM RP 24

<b>“If possible” requirements<sup>1</sup></b>	<b>PCM Rules of Procedure</b>
The Complaint contains an indication of which PCM function the Complainant expects the PCM to use in order to address the issues raised in the Complaint. The Complainant can request a Problem-solving Initiative, a Compliance Review or both.	PCM RP 17 and 20 (a)
The Complaint offers an indication of the outcome sought as a result of the use of the PCM process.	PCM RP 20 (b)
The Complainant has supplied copies of correspondence, notes, or other materials related to its communications with the Bank and or other Relevant Parties.	PCM RP 20 (c)
<p>The Complainant has provided details of the Relevant EBRD Policy (i.e. the Environmental and Social Policy 2008) it believes to be at issue in the Complaint.</p> <p>It is sufficient that the Complainant provide these details. The Assessors do not judge the merits of the allegations in the Complaint. This task is undertaken during the Compliance Review if the Complaint is deemed eligible.</p>	PCM RP 20 (d)
<b>Requirements Eligibility Assessors will also consider</b>	<b>PCM RP</b>
<p>The Complaint relates to alleged actions or inactions that are the responsibility of the Bank; it alleges more than minor technical violations of EBRD policy.</p> <p>Again, no assessment of the legitimacy or validity of the claims of action or inaction is undertaken during the Eligibility Assessment process.</p>	PCM RP 23

*Eligibility Assessment for a Compliance Review – What It Is Not*

- 7) The Eligibility Assessment is not a systematic process of evaluating evidence to determine whether environmental and social activities, conditions, management systems, or related information are in conformance with Bank requirements (e.g., EBRD policies, performance requirements, guidelines,

<sup>1</sup> PCM Rules of Procedure 20 (a), 20 (b), 20 (c) and 20 (d) set out details to be included in a complaint, if possible; however, they are not strict requirements.

procedures and standards whose violation might lead to adverse social or environmental consequences). The Eligibility Assessment does not involve the verification of evidence from the Bank, the Client or the Complainant.

- 8) The task of investigation, assessment, and making judgments and findings about the merits of the Complaint is the purview of the Compliance Review. Whether EBRD is or is not in compliance with its own policies and procedures can only be determined through the process of a Compliance Review, which is a separate process with significantly different criteria from those of an Eligibility Assessment procedure.
- 9) As a result, it is quite possible that a Complaint could well meet the eligibility criteria for a Compliance Review, and based on the subsequent Compliance Review, the Bank could be found to be in compliance with relevant EBRD policies and procedures.
- 10) No party should reach any conclusions about whether or not EBRD is or is not in compliance with its policies based upon the PCM’s decision that a Complaint is eligible for a Compliance Review. It is important that no party misinterpret the PCM’s decision to investigate as an indication that the PCM agrees with the claims presented in a Complaint.
- 11) These points are discussed in more detail in the Table 2 below.

*Table 2. What the Eligibility Assessment Does Not Do*

1.	Does not assess the merits of the allegations of non-compliance submitted by the Complainant.
2.	Does not judge the validity of the evidence presented by the Complainant, the Bank or the Client related to adverse social and environmental outcomes now or in the future.
3.	Does not verify allegations or evidence presented in the Complaint. For example, as long as the Complaint describes the harm the Complainant perceives has been caused, or is likely to be caused, by the Project, the Complaint meets the requirement for harm under PCM RP 19 (b). The Eligibility Assessors do not analyze or verify whether the harm referred to in the Complaint, is or is not likely as a result of actions or inactions of EBRD. The processes of analysis and verification happen once the Complaint meets the requirements for a Compliance Review.
4.	Makes no judgment regarding the value of undertaking a Compliance Review or whether EBRD can readily document compliance.

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| 5. | Does not assess whether the cause of adverse social and environmental outcomes can be readily identified and corrected through the intervention of the project team without a detailed investigation of the underlying causes or circumstances. |
| 6. | Does not make findings about whether there is evidence or perceived risk of adverse social and environmental outcomes that indicates that policy provisions may not have been adhered to or properly applied.                                   |
| 7. | Does not evaluate evidence that indicates that EBRD provisions, whether or not complied with, have failed to provide an adequate level of protection.   |

## II. Factual Background of the Sostanj Thermal Power Plant PCM Proceeding

### *Background for TES Project and PCM Proceeding*

- 12) Termoelektrarna Šoštanj (“TES”), a coal-fired power plant in northeast Slovenia currently generating one-third of Slovenia’s electricity, is undergoing a large-scale modernization programme with loans from the EBRD, the European Investment Bank (EIB) and several commercial banks. The Project replaces 5 low-efficiency, high-carbon units that are reaching the end of their operational life with a new, higher-efficiency unit (Unit 6)<sup>2</sup>. TES will continue to burn lignite coal from the nearby Velenje coal mine. Both TES and Velenje are owned by the Holding Slovenske Elektranne d.o.o. (HSE), the biggest producer and wholesaler of electricity in Slovenia<sup>3</sup>.
- 13) The stated goals of the Project are to increase efficiency, lower CO<sub>2</sub> emissions, and bring the facility into compliance with international Best Available Techniques (BAT) and environmental requirements of the EU’s Industrial Emissions Directive (IED)<sup>4</sup>.
- 14) While the Project does not include funding for carbon capture and storage (CCS) technology, a tool for reducing emissions which is not yet commercially

<sup>2</sup> Non-Technical Summary (NTS) of Modernisation and Reconstruction of TES Power Plant, at 2-4.

<sup>3</sup> *Ibid.* at 6-7.

<sup>4</sup> *Ibid.* at 2-3. The IED applies to existing plants beginning in 2016, replacing the EU’s Large Combustion Plan (LCP) and Integrated Pollution and Prevention and Control (IPPC) Directives. *Ibid.* at 3.

available, TES claims to be designed for future CCS installation, and both EBRD and TES consultants found the plant to be “CCS-ready”<sup>5</sup>.

- 15) The EIB loan was signed in September 2007 and amended in April 2010, and the EBRD loan was approved in July, 2010 and signed in January 2011. A Notice to Proceed was issued in December 2009, and the Project is now over 70% completed. EBRD has designated the Project as Category A under the ESP<sup>6</sup>.
- 16) On 17 January 2012, three civil society organizations, Focus Association for Sustainable Development, Environmental Legal Service and CEE Bankwatch Network, requested a Compliance Review of the Sostanj Thermal Power Project pursuant to EBRD’s Project Complaint Mechanism (PCM) process. The Complaint was registered on 17 January, 2012. The Bank filed its Response to the Complaint with the PCM Officer on 14 February 2012.
- 17) The Complaint argues that the Project does not comply with relevant EU environmental requirements or with the 2008 EBRD Environmental and Social Policy, which requires that Bank-funded projects comply with relevant EU environmental requirements and applicable national laws.

#### *Background for CCS Directive*

- 18) The EU Directive on Carbon Capture and Storage (“CCS Directive”) requires EU member states to establish a legal framework for the geological storage of CO<sub>2</sub> as a strategy for mitigating CO<sub>2</sub> emissions.<sup>7</sup> The Directive is part of the EU’s Climate Change Package, developed to reduce greenhouse gas emissions by 30 percent by 2020 and 60-80 percent by 2050 in developed countries<sup>8</sup>.
- 19) Although CCS technology is not yet commercially available, Article 33 of the Directive requires all new combustion plants with electrical output of 300 megawatts or more to assess whether they are “CCS-ready”<sup>9</sup>. Article 33 requires states to ensure that operators of such plants assess: (1) the availability of suitable CO<sub>2</sub> storage sites; (2) the technical and economic feasibility of transporting the compressed CO<sub>2</sub>; and (3) the technical and economic feasibility of retrofitting with CCS technology once it becomes commercially

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<sup>5</sup> Bank Response at 2-4.

<sup>6</sup> *Ibid.* at 2.

<sup>7</sup> Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the Geological Storage of Carbon Dioxide (“CCS Directive”).

<sup>8</sup> See <http://www.ucl.ac.uk/cclp/ccsdedlegstorage.php>.

<sup>9</sup> Article 33 of the Directive adds a new article 9a to the EU’s LCP Directive. See note 2, above.

available. If this availability and feasibility is established, based on the operators' assessment and other "available information," states must ensure that plants set aside sufficient on-site space for capture and compression of CO<sub>2</sub> with future CCS technology<sup>10</sup>. Article 33 does not discuss any repercussions for plants being assessed as *not* CCS-ready.

- 20) The CCS Directive entered into force in June 2009, with the requirement that EU member states "transpose" the Directive into national law by June 2011. Slovenia first passed legislation adopting the Directive into national law in January 2012<sup>11</sup>.
- 21) However, the "Carbon Capture Readiness" (CSR) provisions of Article 33, unlike the rest of the CCS Directive, were to be applicable immediately. Under Article 33, countries were immediately required to enforce its CCR provisions against operators of any plants for which a construction or operating license was issued after the entry into force of the Directive on 25 June 2009<sup>12</sup>.

### III. Steps Taken in Determining Eligibility

- 22) The Eligibility Assessors have examined the Complaint to determine whether it satisfies the applicable eligibility criteria of the PCM Rules of Procedure. They checked the online availability of the online documents cited in the Complaint for the purposes of PCM RP 20c. They reviewed the Responses received from Bank Management and the Client as well as various Project documents produced by the Bank. In addition, they held separate conversations, (in person

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<sup>10</sup> See language of Article 33, note 11 below.

<sup>11</sup> Client Response at 4. More recently, according to Complainants, Slovenia adopted legislation on 7 September 2012 fully transposing the Directive into its relevant national laws and regulations. Letter from Complainants to EBRD, 17 October 2012.

<sup>12</sup> Article 33.1 states "Member States shall ensure that operators of all combustion plants with a rated electrical output of 300 megawatts or more for which the original construction licence or, in the absence of such a procedure, the original operating licence is granted after the entry into force of Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide, have assessed whether the [subsequently listed] conditions are met...". Directive 2009/31/EC on Geological Storage of CO<sub>2</sub>. According to the International Energy Agency (IEA), the provisions of Article 33 were applicable to all new large-combustion plants upon the adoption of the Directive on 25 June 2009. IEA, "Carbon Capture and Storage: Legal and Regulatory Review," Edition 1, formerly available at [http://www.iea.org/ccs/legal/regulatory\\_review\\_edition1.pdf](http://www.iea.org/ccs/legal/regulatory_review_edition1.pdf) at 16 (stating Directive required states to transpose provisions of Article 33 as of June 2009), 19 (stating Article 33 applicable to new large combustion plants as of June 2009). See DG Climate Action, EU-Directive 2009/31/EC on the geological storage of carbon dioxide - CCS-Directive," [http://www.ucl.ac.uk/ccsp/pdf/s4\\_mdoppelhammer.pdf](http://www.ucl.ac.uk/ccsp/pdf/s4_mdoppelhammer.pdf) at 15 ("[member states] have to transpose the Directive by 25 June 2011 (Article 33 to be transposed from 26 June 2009)"; CO<sub>2</sub> Capture Project, "Update on Selected Regulatory Issues for CO<sub>2</sub> Capture and Geological Storage," November, 2010, at [http://www.co2captureproject.com/reports/regulatory\\_report.pdf](http://www.co2captureproject.com/reports/regulatory_report.pdf), at 12 ("In the EU, CCR regulatory requirements imposed by the EU CCS Directive were required to be transposed into law by 25 June 2009, rather than the Directive's principal deadline of 25 June 2011").

and by telephone), with the Complainants, Environmental and Sustainability Department staff, Bank Operations Team members, and the Client.

#### **IV. Summary of the Parties' Positions**

##### Complainants' Position

###### *CCS Directive*

- 23) Complainants argue the EBRD failed to properly apply the criteria of Article 33 when it concluded the TEC Project was CCS ready, and that such a failure violated EU environmental requirements and, consequently, EBRD policy.
- 24) Article 33 applies to combustion plants with an output of at least 300 MW “for which the original construction licence or ... the original operating licence” was granted after the signing of the Directive. The European Commission’s Directorate-General for Climate Action interprets this to mean the CCS-readiness provisions of Article 33 apply to such combustion projects as of 25 June 2009 without any further action by EU countries<sup>13</sup>. The Complaint argues that because TES’s “original” construction license or permit was issued on 16 March 2011, and the Project plans contemplate an electrical output of 600 MW, the Project clearly falls under the provisions of Article 33<sup>14</sup>.
- 25) Complainants concede there are no clear standards governing the type or level of assessment required by Article 33, in terms of how to adequately evaluate the suitability of storage, technical and economic feasibility of CO2 transport, and retrofitting a plant with CCS technology. Nonetheless, Complainants argue Article 33 can and should be interpreted under the “effectiveness doctrine” to require a meaningful assessment that furthers the Directive’s ultimate goal of promoting CCS technology and usage. In other words, the assessment should not be *pro forma*, but should evaluate whether it is truly feasible for the plant to employ CCS technology when it becomes available, or whether its use would present obstacles in terms of storage, transportation, technology, financial feasibility or on-site space that would render it unduly costly, burdensome or otherwise impracticable.<sup>15</sup> Complainants also state that, while EBRD does not

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<sup>13</sup> Complaint at 3 (citing Article 33 of CCS Directive and DG Climate Action position); *see also* [http://www.ucl.ac.uk/cclp/pdf/s4\\_mdoppelhammer.pdf](http://www.ucl.ac.uk/cclp/pdf/s4_mdoppelhammer.pdf).

<sup>14</sup> Complaint at 3.

<sup>15</sup> *Ibid.*

have detailed policies governing the implementation of the CCS Directive, they understand from the Bank that it adheres to the IEA’s definition of CCS readiness, meaning the discovery and elimination of factors that could prevent installation and operation of a CO2 capture system<sup>16</sup>.

- 26) In addition to being directly required by Article 33 of the CCS Directive, Complainants argue that a meaningful Carbon Capture and Storage Readiness (CCSR) assessment, consistent with the provisions of Article 33, is required under EBRD’s policies and commitments. Complainants point to EBRD’s participation in the European Principles for the Environment, which commits signatory financing institutions to adhere to environmental principles and standards identified in the EU Treaties and embodied in the EU “secondary environmental legislation”—in this case, the EU CCS Directive<sup>17</sup>.

The Complaint also argues the Bank failed to comply with Performance Requirement (PR) 3.5 of the ESP, which requires that Bank-funded projects comply with relevant existing international environmental requirements – here the CCS-readiness provisions of the CCS Directive, effective as of 25 June 2009<sup>18</sup>.

Complainants also cite the Bank’s stated environmental commitments and responsibility under the ESP for reviewing clients’ assessments and helping avoid or mitigate adverse impacts “consistent with the PRs”<sup>19</sup>. The Complaint notes the Bank’s stated commitment to environmentally sound and sustainable development in its constituent document<sup>20</sup>.

- 27) The Complaint alleges EBRD violated these commitments by inadequately assessing the CCS readiness of the Project and making conclusions without sufficiently analyzing, or in some cases addressing, the criteria in Article 33. Without meaningful analysis or methodology, Complainants argue, EBRD’s assessment cannot be said to comply with international environmental requirements such as an Article 33 CCSR analysis. The Complaint contends

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<sup>16</sup> *Ibid.* at 5. According to the IEA, CCS readiness means “Developers of capture-ready plants should take responsibility for ensuring that all known factors in their control that would prevent installation and operation of CO2 capture have been eliminated. This might include: (i) A study of options for CO2 capture retrofit and potential pre-investments, (ii) Inclusion of sufficient space and access for the additional facilities that would be required, (iii) Identification of reasonable route(s) to storage of CO2” [http://www.iea.org/papers/2007/CO2\\_capture\\_ready\\_plants.pdf](http://www.iea.org/papers/2007/CO2_capture_ready_plants.pdf) at 2-3.

<sup>17</sup> Complaint at 5

<sup>18</sup> Environmental and Social Policy (May 2008) Performance Requirements. PR 3.5 states “projects will be designed to comply with relevant EU environmental requirements as well as with applicable national law, and will be operated in accordance with these laws and requirements”.

<sup>19</sup> Complaint at 5 (citing ESP at 2-3, PR 3).

<sup>20</sup> *Ibid.* (citing Article 2.1(vii) of Agreement Establishing EBRD).

that EBRD has abrogated its responsibility to ensure compliance with relevant environmental standards under its ESP.

- 28) The Complaint references two studies conducted and submitted by the Client to EBRD on CCS feasibility of the TES Project: “Possibilities of Capture and Storage of CO<sub>2</sub> from Unit 6 of Sostanj Thermal Power Plant” (Milan Vidmar Electric Power Research Institute), May 2010 and September 2010<sup>21</sup>. It claims these studies lack (1) project-specific analysis concerning economic feasibility of capture, storage or transport; (2) technical feasibility of transport, in light of local geographical conditions, particularly for building pipelines; (3) suitability of local storage sites beyond information that was already available, although it was unclear from the Complaint why this was insufficient<sup>22</sup>. Complainants do not mention the several other studies that, according to the Client and Bank, the Client has commissioned<sup>23</sup>.

### *Climate Targets*

- 29) In 2009 the European Council (EC), through a Presidency Conclusion, announced the need to set an EU objective of achieving an 85-90 percent reduction in CO<sub>2</sub> emissions in developed countries by 2050 as compared with 1990 levels. The Complaint argues this announcement from the EU’s highest policy-setting body represents a “EU environmental requirement” under EBRD’s ESP<sup>24</sup>.
- 30) ESP Performance Requirement 3.5 states “projects will be designed to comply with relevant EU environmental requirements...” Complainants believe the EBRD was required to “take into account” this policy directive when assessing the Project and its consistency with international requirements. They argue EBRD failed to do so by assessing the Project for CCS readiness without a meaningful analysis of its compatibility with 2050 climate targets<sup>25</sup>.

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<sup>21</sup> *Ibid.* at 4, note 11.

<sup>22</sup> *Ibid.* at 4.

<sup>23</sup> Client Response at 4; Bank Response at 4. Both the Bank and Client refer to three additional studies; but the Bank also cites an additional study: “Possibilities for geological storage of CO<sub>2</sub> in Slovenia and out of Slovenia,” Geological Survey of Slovenia, University of Ljubljana- Faculty of Natural Sciences and Engineering Department of Geotechnology and Mining Engineering, HGEM, Nafta-Geoterm Lendava, ERICO. *Ibid.* See discussion below.

<sup>24</sup> Complaint at 6.

<sup>25</sup> *Ibid.*

- 31) Specifically, an 80-95 percent reduction in emissions from 1990 levels would mean that Slovenia could only emit 1 to 4 million tons of CO<sub>2</sub> annually, from all sectors, including transportation and energy. TES currently emits nearly 5 million tons of CO<sub>2</sub>; in 1990 it emitted nearly 4 million tons. While EBRD has claimed that the Project's increased efficiency will ultimately allow TES to reduce its carbon emissions by roughly 1.2 million tons, Complainants note this still amounts to TES emitting either much more than or close to Slovenia's entire carbon emissions allotment for all sectors in 2050<sup>26</sup>. Consequently, Complainants argue, TES's operation, enabled in part by EBRD's funding, essentially makes it impossible for Slovenia to meet the 2050 climate goals established by the EU.
- 32) The Complaint does not explain whether, if TES were to begin using CCS technology at a certain point, the Project could be compatible with the 2050 climate goals. It insinuates that TES's operation would effectively prevent Slovenia from meeting its 2050 climate goals even if it began employing CCS technology when commercially available, but this is not clear from the Complaint<sup>27</sup>.
- 33) The Complaint maintains that, even if EBRD's approval of the Project is based on its assumption that the Project *will* use CCS at some point in the future, the assumption is sufficiently speculative and vague to make it inconsistent with "relevant EU requirements"<sup>28</sup>.

### Bank's Position

#### *CCS Directive*

- 34) The Bank claims Article 33 did not apply at the time of EBRD's approval in July, 2010, as the deadline for transposing the Directive into national law had not yet run and Slovenia had not yet passed legislation adopting the Directive<sup>29</sup>. Nonetheless, the Bank claims its assessment was consistent with the CCS-readiness criteria of Article 33 and in accordance with PR 3.5 of the

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<sup>26</sup> *Ibid.* Presumably this depends on whether emissions reductions targets for 2050 are 80 or 95 per cent, or somewhere in between. The Complaint also notes it is unclear whether the starting points for this reduction are 1990 levels or current levels, which makes a difference of millions of tons.

<sup>27</sup> *Ibid.* at 6-7.

<sup>28</sup> *Ibid.*

<sup>29</sup> Bank Response at 3 (stating Slovenia did not transpose the Directive until January 2012).

ESP<sup>30</sup>. The Bank does not specifically address the Claimants' contention that Article 33 was directly applicable as of the signing of the Directive.

- 35) As the CCS Directive is relatively new, the Bank notes there is no official, EU-endorsed guidance on how to conduct a CCS assessment for existing power plants. Because CCS technology is not commercially available, it claims it is impossible to comprehensively assess the economic impacts for an existing power plant<sup>31</sup>.
- 36) Nonetheless, the Bank required TES to conduct its own CCS-readiness assessment as well as hiring an independent consultant to do so as part of the Bank's due diligence. According to the Bank, both concluded Unit 6 has space for and would be able to accommodate future installation of Carbon Capture and Storage systems, once the technology becomes commercially available and is required by law<sup>32</sup>. The Bank claims TES will continue to update its CCS-readiness assessment, and that updates will need to take into account changes in CCS technology, laws and regulations, and the price of carbon certificates, all of which affect the economic and technical viability of CCS<sup>33</sup>. It notes TES has already undertaken a number of studies to this effect, though it does not discuss the conclusions of those studies<sup>34</sup>.
- 37) The Bank does not specifically address the criteria in Article 33 related to (1) the technical or economic feasibility of transporting the compressed CO<sub>2</sub>, (2) the suitability of potential storage options, or (3) the economic feasibility of retrofitting the plant with CCS technology. Although the Bank notes the TES studies referenced above, it does not address whether the studies assessed the specific criteria in Article 33<sup>35</sup>.
- 38) The Final Due Diligence Report submitted by the Bank's consultant in December 2009 stated the plant was "prepared" for installation of CCS technology should it become legally required. However, the Report also stated

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.* at 4.

<sup>32</sup> Bank response at 4.

<sup>33</sup> *Ibid.*

<sup>34</sup> The studies to which the Bank refers are: (1) Possibilities of capture and storage of CO<sub>2</sub> from Unit 6 of Sostanj Thermal Power Plant Milan Vidmar Electric Power Research Institute, May 2010; (2) Capture ready – possibilities of capturing carbon from the coal combustion plants in connection with the project solutions at Unit 6 of TES, Elek Svetovanje, May 2011; (3) Implementation of the ETS and CSS legislation into Slovenian legal order, Milan Vidmar Electric Power Research Institute 2011; (4) Development of CO<sub>2</sub> capture technologies, Elek Svetovanje, October 2010; (5) Possibilities for geological storage of CO<sub>2</sub> in Slovenian and out of Slovenia, Geological Survey of Slovenia, University of Ljubljana- Faculty of Natural Sciences and Engineering Department of Geo-technology and Mining Engineering, HGEM, Nafta-Geoterm Lendava, ERICo. *Ibid.*

<sup>35</sup> *Ibid.*

there were virtually no references to CCS in the documents reviewed and that plans for Unit 6 include limited extra space, so the feasibility of using CCS technology would need to be studied at more length<sup>36</sup>.

### *EU Climate Targets*

- 39) The Bank claims the TES Project contributes to the likelihood of Slovenia's achieving its long-term emissions reduction targets by significantly reducing CO2 emissions. The Project will lead, the Bank claims, to a carbon emission reduction of around 1.2 million tons CO2 per year, thereby contributing significantly towards achieving Slovenia's carbon emission reduction targets. The Bank did not seem to factor the use of CCS technology into this calculation. Nor was it clear to which specific targets the Bank was referring. Nonetheless, the Bank claims Unit 6 represents the lowest possible carbon output among the feasible alternatives, particularly given that TES supplies roughly one-third of the electricity produced in Slovenia<sup>37</sup>.
- 40) The Bank argues that Slovenia's energy policy, and whether it meets its 2050 climate targets, is a matter for the Slovenian government. It notes that EBRD finances projects only after they are approved by the competent national authority, and that EBRD develops its energy strategy with the approval of each host country<sup>38</sup>.

### *Other*

- 41) According to the Bank the Complaint fails to identify likely harm caused by EBRD's approval as required by PCM RP 19b<sup>39</sup>.
- 42) The Bank argues that the Complainants' concern about the inadequacy of EBRD policy should be addressed in the 2013 review of the ESP<sup>40</sup>.

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<sup>36</sup> Final Due Diligence Report prepared for EBRD by Poyry Energy Ltd., December 2009, Section 3.2.5, at 26.

<sup>37</sup> Bank Response at 5.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

## Client's Position

### *CCS Directive*

- 43) The Client rejects the argument that the Project does not comply with the CCS Directive, arguing it has been diligent in ensuring the Project meets whatever standards were set by the Directive, including commissioning several studies to assess the CCS readiness of the Project<sup>41</sup>. It claims the goal of these studies was to assess the Project according to the criteria in Article 33<sup>42</sup>.
- 44) The Client echoes the uncertainty noted by the Complainants and EBRD regarding the exact requirements of Article 33 of the CCS Directive, stating the technology is still in developmental stages and European standards have yet to be set in interpreting the contours of the Directive. It also notes some uncertainty regarding the deadline for transposing the CCS Directive into Slovenian law, in 2010-11, and suggests the Directive has not been fully transposed into Slovenian law even with the passage of the March 2012 legislation. It does not address the Complainants' claim that Article 33 was directly applicable as of June 2009<sup>43</sup>.
- 45) The Client emphasizes that the Project has repeatedly been found to comply with national and EU (as part of national) law, noting the rigorous due diligence process undertaken by the EBRD, and prior to that, by the government of Slovenia in permitting the TES Project. It explains that Austria, too, initially had a trans-boundary concern regarding the Project that was satisfactorily resolved<sup>44</sup>.
- 46) Regarding the Project's CO<sub>2</sub> emissions, the Client claims the replacement Unit 6 will emit 3.1 million tons annually through 2030; by 2050 it states its CO<sub>2</sub> emissions are expected to fall under 2 million tons based on an expected decrease in the plant's energy production<sup>45</sup>. The Client does not explain the

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<sup>41</sup> The studies to which the Client refers are: (1) Possibilities of capture and storage of CO<sub>2</sub> from Unit 6 of Sostanj Thermal Power Plant Milan Vidmar Electric Power Research Institute, May and September 2010; (2) Capture ready – possibilities of capturing carbon from the coal combustion plants in connection with the project solutions at Unit 6 of TES, Elek Svetovanje, 2011; (3) Implementation of the ETS and CSS legislation into Slovenian legal order, Milan Vidmar Electric Power Research Institute 2011; and (4) Development of CO<sub>2</sub> capture technologies, Elek Svetovanje, October 2010. Client Response at 4. It does not mention the study "Possibilities for geological storage of CO<sub>2</sub> in Slovenian and out of Slovenia," which the Bank claims the Client undertook in addition to the above studies. Bank Response at 4.

<sup>42</sup> Client Response at 4.

<sup>43</sup> *Ibid.* at 3-4.

<sup>44</sup> *Ibid.* at 2-3.

<sup>45</sup> Client Response at 1.

basis of these expectations, or the assumptions or factors upon which they rely<sup>46</sup>.

### *Climate goals*

47) The Client claims the Complaint improperly credits EBRD with responsibility for ensuring Slovenia meets its 2050 Climate goals, and argues any concern about Slovenia's ability to meet its 2050 targets should be raised as a matter of public policy with the Republic of Slovenia<sup>47</sup>.

### *Other*

48) Client questions whether the Complaint satisfies the PCM criterion requiring it to be signed by an authorized individual, as it claims the signatory for Focus Association for Sustainable Development is not the Chair of the organization as required by the organization's bylaws<sup>48</sup>.

49) Client argues the harm described by the Complaint is overly broad and does not meet the PCM requirement for describing harm likely to be caused by the Project<sup>49</sup>.

## **V. Determination of Eligibility for a Compliance Review**

50) The Eligibility Assessors have concluded the Complaint is eligible for a Compliance Review under PCM Rules of Procedure (RPs) 17-29.

51) The Complaint was submitted by the organisations Focus Association for Sustainable Development, Environmental Law Service, and CEE Bankwatch Network. The Complainants have standing to make the Complaint according to PCM RP 2 which provides that 'one or more individual(s) or Organisation(s) may submit a Complaint seeking a Compliance Review'.

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<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.* at 3.

<sup>48</sup> *Ibid.* at 5.

<sup>49</sup> *Ibid.*

- 52) The Complaint relates to a project – the modernisation of Sostanj Thermal Power Plant, Termoelektrarna Šoštanj – that was approved for financing by the EBRD Board of Directors in July 2010. Consequently the Complaint satisfies PCM RP 19a requiring that it ‘relate to a Project that has either been approved for financing by the Board or by the Bank committee which has been delegated authority to give final approval to the Bank financing of such Project’.
- 53) Pursuant to PCM RP 19b, the Complaint describes harm that could result from the alleged policy violations related to both the Project’s CCS readiness and compatibility with 2050 climate goals. The Complaint argues that, by claiming TES is CCS ready without an adequate basis, EBRD is likely to give false expectations regarding the plant’s ability to reduce its greenhouse gas emissions in the future, thereby hindering Slovenia’s achievement of its climate targets for 2050<sup>50</sup>. It claims that, if TES proves ultimately unable to use CCS technology because of feasibility or other practical issues, emissions from TES will constitute virtually all or possibly more of Slovenia’s entire emissions allotment for 2050 under EU climate targets<sup>51</sup>. In its recent EARs<sup>52</sup> the PCM already stated its position in determining, for the purposes of the eligibility requirements set out under PCM RP 19(b), that specific material harm need not be established in respect of an alleged failure to comply with certain due diligence obligations. In these EARs the PCM took a position that in cases where there is an allegation of failure that would inherently impact on the integrity of the relevant decision-making process, and thus on the quality and legitimacy of the decision taken, harm can be presumed. However, in this case the complaint is also claiming that the project will cause a specific adverse environmental impact, i.e. that it “threatens to perpetuate current or near-current levels of CO2 emissions, thus contributing to dangerous global climate change”, contrary to the objectives of the 2008 ESP.
- 54) Pursuant to PCM RP 20(d) which states that the Complaint should include details of the Relevant EBRD Policy at issue in the Complaint, if possible, the following provisions of the Bank’s 2008 Environmental and Social Policy are identified in relation to both issues raised in the Complaint:

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<sup>50</sup> Complaint at 4, 6.

<sup>51</sup> *Ibid.* at 6. As discussed above, the Client disputes that this claim is sufficiently specific to constitute “harm described” under the PCM Rules.

<sup>52</sup> See PCM EARs on Ombla [[http://www.ebrd.com/downloads/integrity/Ombla\\_ear\\_6.07.2012.pdf](http://www.ebrd.com/downloads/integrity/Ombla_ear_6.07.2012.pdf)] and Rivne Kiev [[http://www.ebrd.com/downloads/integrity/ear\\_rivne\\_kyiv.pdf](http://www.ebrd.com/downloads/integrity/ear_rivne_kyiv.pdf)].

- a. **ESP PR 3.5:** “Projects will be designed to comply with relevant EU environmental requirements as well as with applicable national law, and will be operated in accordance with these laws and requirements”.
- b. **ESP Para. B.6:** “The Bank recognises the importance of climate change mitigation and adaptation and their high priority for the Bank’s activities in the region. It intends to further develop its approach towards climate change, notably as regards the reduction of greenhouse gases, adaptation, promotion of renewables and improvement of energy efficiency, in view of strengthening the treatment of these elements in its operations”.
- c. **ESP Para. B.3:** “The Bank’s role is: (i) to review the clients’ assessment; (ii) to assist clients in developing appropriate and efficient measures to avoid or, where this is not possible, minimise, mitigate or offset, or compensate for adverse social and environmental impacts consistent with the PRs”.
- d. **ESP Para. A.1:** Stating EBRD’s commitment to promote “environmentally sound and sustainable development” in its activities, as set out under Article 2.1 (vii) of the Agreement Establishing EBRD.
- e. **ESP Para. B.3: Referring to the European Principles for the Environment** and the Signatories’ commitment to promote EU environmental standards that are embodied in EU Treaties and EU secondary environmental legislation.

55) Pursuant to PCM RP 23(a), both claims in the Complaint relate to actions or inactions that are the responsibility of the Bank. The Complaint contends EBRD inadequately appraised the CCS readiness of the Project during the assessment process by failing to require the Client to properly assess each of the three criteria set forth in Article 33 of the CCS Directive. It claims these provisions form both a “relevant EU environmental requirement” under ESP PR 3.5 and an “EU commitment embodied in secondary legislation” under ESP Paragraph 2, as of 25 June 2009. It also argues EBRD failed to incorporate the EC’s 2050 Climate Goals into its assessment process. Under EBRD’s Environmental and Social Policy (ESP), the Bank is responsible for ensuring the appraisal and monitoring process of any Bank-funded Project adheres to EBRD’s environmental, social, and procedural standards<sup>53</sup>. This Complaint

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<sup>53</sup> See ESP pp. 1-5, including ¶ 15, which provides:

“EBRD’s environmental and social appraisal includes consideration of three key elements:

- (i) the environmental and social impacts and issues associated with the proposed project;
- (ii) the capacity and commitment of the client to address these impacts and issues in accordance with this Policy; and
- (iii) the role of third parties in achieving compliance with this Policy”.

relates to potential non-compliance with ESP Performance Requirements and other commitments that are the Bank's responsibility to enforce<sup>54</sup>.

It is important to note, specifically, that the CCS-readiness allegations in the Complaint do not concern compliance with national law. Rather, the inquiry is whether the Bank complied with EBRD policies requiring adherence to applicable EU requirements as well as principles "embodied in secondary legislation"<sup>55</sup>. The applicability (or adequacy) of Slovenian law at any point is not at issue in the Complaint.

56) Pursuant to PCM RP 23b, the Eligibility Assessors have concluded the alleged violations of EBRD's policies in the Complaint are more than technical. As discussed above, both issues – (1) the Bank's CCS-readiness assessment, and (2) the Project's compatibility with EU 2050 climate goals – concern EBRD's commitment to sustainability and upholding EU commitments to reducing greenhouse emissions<sup>56</sup>. Such concerns are made all the more significant in the context of Category A projects<sup>57</sup>.

57) PCM RP 23c appears not to be relevant, as the Complaint does not allege a failure by the Bank to monitor Client commitments pursuant to Bank policy.

58) As required by PCM RP 20(a), the Complaint requests the PCM to undertake a Compliance Review in order to address the issues raised in the Complaint.

59) Pursuant to PCM RP 20(b), the Complaint indicates the outcome sought as a result of the use of the PCM process, specifically:

a. EBRD's re-assessment of the Project's CCS readiness and its compatibility with 2050 climate goals in light of EU commitments, and, if the Project is found not to be compatible with such EU requirements, cancellation of EBRD's support for the Project<sup>58</sup>.

b. Release of EBRD assessment documents related to the CCSR assessment<sup>59</sup>.

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<sup>54</sup> See *ibid.* at ¶¶ 3, 14, 28.

<sup>55</sup> E.g., ESP PR 3.5; para. B.3.

<sup>56</sup> See *ibid.*, para. 6, at 3.

<sup>57</sup> *Ibid.* at 6, ¶ 20, PR 10(17).

<sup>58</sup> *Ibid.* at 7.

<sup>59</sup> *Ibid.* at 4.

- 60) Pursuant to PCM RP 20c, the Complainant has supplied copies of correspondence, notes, or other materials related to its communications with the Bank and or other Relevant Parties.
- 61) Pursuant to PCM RP 22, the Eligibility Assessors have established that Complainants have made good faith efforts to address the issues raised in the Complaint by, in particular raising the issue with the Management of the Bank. The Eligibility Assessors have considered the status of the technical reviews currently being undertaken and have concluded that these recourses do not have any implications for the PCM proceedings.
- 62) The Complaint does not fall under any of the exclusion categories provisioned in PCM RP 24(a)-(d) and 24(f).
- 63) While the two principal allegations are specific to the Project rather than relating to the adequacy of EBRD policies, as proscribed by PCM RP 24(e), the Complaint makes additional policy suggestions that fall outside the purview of a Compliance Review under PCM RP 24(e). These include:
- a. Urging EBRD to establish guidelines for best practice in interpreting Article 33 and the conduct of a CCS assessment<sup>60</sup>.
  - b. Arguing that ESP Performance Requirement 3, Greenhouse Gas Emissions (paragraphs 17-19), should be strengthened and amended to foreclose projects with high greenhouse gas emissions, rather than being limited to requiring such projects to project greenhouse gas emissions and assess potential mitigation measures<sup>61</sup>.
- 64) As required by PCM RP 25, the Assessors have considered the Complaint, Bank's Response, Client's Response, other relevant project documentation submitted by the Bank, the Non-Technical Summary of the Project, Final Technical Due Diligence Report (Poyry Energy Ltd), "CCS-Readiness at Sostanj: Ticking Boxes or Preparing for the Future" (Environmental Law Service, Bellona); and so forth; as well as relevant EBRD policies and EU legislation. The PCM Assessors have also consulted with the Complainant, the Bank and the Client in the process of determining whether the Complaint satisfies the eligibility criteria for a Compliance Review under the PCM RPs.

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<sup>60</sup> Complaint at 4-5.

<sup>61</sup> *Ibid.*

- 65) Consequently, based on an evaluation of the eligibility criteria set out in the PCM RPs 18-24, and on the analysis of the relevant documents including the Complaint, Bank Response, Response by the Client and other relevant documentation submitted or referenced by the Bank, the Client or the Complainant, the Eligibility Assessors declare the Complaint **eligible** for a **Compliance Review**.
- 66) The Compliance Review should assess whether and – if so, which – EBRD policy or policies may have been violated and if harm has been or may be caused due to action or inaction on the part of the Bank. In line with PCM RP 28(b), the terms of reference for a Compliance Review, identifying the type of expertise required to carry out the review, as well as the scope and time frame for the review, are presented in the following section.

**COMPLAINT: SOSTANJ THERMAL POWER PROJECT**  
**Request Number: 2012/03**

**Terms of Reference (TOR) for the Compliance Review**

**Compliance Review Expert**

1. In accordance with PCM, RP 35, the PCM Officer appoints PCM Expert Owen McIntyre as the Compliance Review Expert for this Compliance Review.
2. The Compliance Review Expert shall conduct the Compliance Review in a neutral, independent and impartial manner and will be guided by principles of objectivity and fairness giving consideration to, *inter alia*, the rights and obligations of the Relevant Parties, the general circumstances surrounding the Complaint and due respect for EBRD staff.

**Scope**

3. These Terms of Reference apply to any inquiry, action or review process undertaken as part of the Compliance Review, with a view to determining, as per PCM RP 36 if (and if so, how and why) any EBRD action, or failure to act, in respect of the Project has resulted in non-compliance with a relevant EBRD Policy – in this case Environmental and Social Policy 2008 – and, if in the affirmative, to recommend remedial changes in accordance with PCM RP 40.
4. These Terms of Reference are limited to reviewing actions or inactions by the EBRD in relation to the relevant EBRD policy, and do not cover any actions or inactions by the Client, Termoelektrarna Šoštanj.
5. In conducting the Compliance Review, the Compliance Review Expert will examine any relevant documents and consult with the Relevant Parties. The Compliance Review Expert may also carry out a site visit, and employ such other methods as the Expert may deem appropriate, as per PCM RP 37.
6. Upon completion of the Compliance Review, the Compliance Review Expert will prepare a Compliance Review Report setting out his or her findings. The Compliance Review Report will include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review, as per PCM RP 38.
7. Such processes shall be conducted in accordance with these Terms of Reference subject to modifications which the Compliance Review Expert and the PCM Officer may, at any time, expressly agree upon, except modification that may prejudice the interests of any Relevant Party or is inconsistent with accepted review practice.

8. The Compliance Review shall confine itself to the Compliance Review issues raised in the present Complaint<sup>62</sup>. It shall not go beyond the parameters of the Complaint to address other issues.

### **Time Frame**

9. The Compliance Review will commence when the Eligibility Assessment Report containing these Terms of Reference is publicly released and posted on the PCM website.
10. Every effort shall be made to ensure that the Compliance Review is conducted as expeditiously as circumstances permit and it is intended that it shall be concluded within sixty (60) Business Days of its commencement, within which period a draft Compliance Review Report will be prepared and sent to the Bank's Management, pursuant to PCM RP 41. However, the PCM Officer may extend this time period for as long as is strictly necessary to ensure full and proper implementation of the Compliance Review. Any such extension shall be promptly notified to all Relevant Parties.

### **Procedure: Identification of Core Compliance Issues**

11. As an initial step, the Compliance Review Expert will determine the precise requirements, in the specific context of the present Project, of each of the relevant provisions of the ESP and of the Performance Requirements contained therein, in respect of which non-compliance is alleged in the Complaint. Relevant provisions of the ESP include PR 3.5, and B.3 and B.6 (*Purpose; EBRD's Commitment*).
12. The Compliance Review process will examine the core questions of compliance raised in the Complaint, including (but without limitation):
  - (i) *Regarding EBRD's assessment of the Project as CCS-ready:*
    - a. Is Article 33 of the CCS Directive considered an "EU requirement" under PR 3.5 or other provisions of the Bank's ESP? Even if it is, is there a material question in this case about when, and to what entities, Article 33 applied, which would in some way render Article 33 inapplicable to EBRD's assessment of this Project?
    - b. What does Article 33 require of EBRD in terms of a CCS-readiness assessment? Has EBRD taken reasonable steps to assure itself that the CCS-readiness assessment carried out in relation to the Project has met these criteria?

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<sup>62</sup> Request No. 2012/03, Sostanj Thermal Power Project. See Annex 1 to this report.

- (ii) *Regarding whether EBRD's assessment and approval of the Project was consistent with EU 2050 climate targets:*
- a. Can the European Council Presidency Conclusion declaring 2050 climate targets constitute a "European requirement" under PR 3.5 or other provisions of the ESP? If so, what does this EC Presidency Conclusion require in terms of EBRD's Project assessment in this case?
  - b. If the above climate goals are a "European requirement" or are otherwise required under the ESP, did EBRD act consistently with those climate goals in assessing and approving the Project, in light of the Project's forecasted emissions? Has EBRD taken reasonable steps to assure itself that its assessment was consistent with these climate targets and any emissions-reduction requirements embodied therein?
13. Any elements identified that are beyond the scope of the Compliance Review will be excluded. It is also important to state emphatically that the PCM will not be seeking to make any determination regarding Slovenia's compliance with EU targets or EU environmental directives. It will, however, seek to identify and to review Bank's compliance with corresponding obligations applicable to Bank-funded projects, where they arise under such directives. Such project-related obligations are made relevant and applicable by the 2008 ESP.

**Procedure: Conduct of the Review**

14. The Compliance Review Expert may conduct the Compliance Review process in such a manner as she or he considers appropriate, taking into account the Rules of Procedure of the PCM, the concerns expressed by the Complainant as set out in the Complaint, and the general circumstances of the Complaint. Specifically, the Compliance Review Expert may:
- i. review the Complaint to identify the compliance issues to be included in the Compliance Review, specifically whether EBRD complied with its Environment and Social Policy 2008;
  - ii. review all documentation, including internal memos and e-mail exchanges relevant to the Complaint;
  - iii. consult extensively with EBRD staff involved in the Project, including personnel from the Bank's Environment and Sustainability Department, the Project Team Group, and the relevant EBRD Resident Office;
  - iv. solicit additional oral or written information from, or hold meetings with, the Complainant and any Relevant Party;
  - v. conduct a visit to the Project site to ascertain disputed facts accompanied by

such officials of the Bank, the Complainant or his representatives, or the Client, or other persons, as he may consider necessary and appropriate;

- vi. request the PCM Officer to retain additional expertise if needed;
- vii. identify any appropriate remedial changes in accordance with PCM, RP 40, subject to consideration of any restrictions or arrangements already committed to by the Bank or any other Relevant Party in existing Project-related agreements;
- viii. take any other action as may be required to complete the Compliance Review within the required time-frame.

### **Procedure: General**

- 15. The Compliance Review Expert shall enjoy, subject to the provision of reasonable notice, full and unrestricted access to relevant Bank staff and files, and Bank Staff shall be required to cooperate fully with the Compliance Review Expert in carrying out the Compliance Review.
- 16. Access to, and use and disclosure of, any information gathered by the Compliance Review Expert during the Compliance Review process shall be subject to the Bank's Public Information Policy and any other applicable requirements to maintain sensitive commercial information confidential. The Compliance Review Expert may not release a document, or information based thereon, which has been provided on a confidential basis without the express written consent of the party who has provided such document.
- 17. The Compliance Review Expert shall take care to minimise the disruption to the daily operations of all involved parties, including relevant Bank staff.
- 18. Generally, all Relevant Parties shall cooperate in good faith with the Compliance Review Expert to advance the Compliance Review as expeditiously as possible and, in particular, shall endeavour to comply with requests from the Compliance Review Expert obtaining access to sites, submission of written materials, provision of information and attendance at meetings.

### **Compliance Review Report**

- 19. In accordance with PCM RP 38, the Compliance Review Report shall include a summary of the facts and allegations in the Complaint, and the steps taken to conduct the Compliance Review.
- 20. The recommendations and findings of the Compliance Review Report shall be based only on the facts relevant to the present Complaint and shall be strictly impartial.

21. If considered necessary following the Compliance Review, arrangements for monitoring and implementation of any recommended changes pursuant to PCM RP 40b shall be included in the Compliance Review recommendations.
22. Prior to submitting the Compliance Review Report to the Relevant Parties and to the Board in accordance with PCM RP 39, or sending the draft Compliance Review Report to the Bank's Management, in accordance with PCM RP 41, the Compliance Review Expert shall ensure that all factual information relating to the Relevant Parties is verified with them.

**Exclusion of Liability**

23. Without prejudice to the privileges and immunities enjoyed by PCM Experts, the Compliance Review Expert shall not be liable to any party for any act or omission in connection with any Compliance Review activities undertaken pursuant to these Terms of Reference.

## Annex 1: Complaint



Project Complaint Mechanism  
Ms. Anoush Begoyan, PCM Officer  
European Bank for Reconstruction and Development  
One Exchange Square London  
EC2A 2JN  
United Kingdom  
pcm@ebrd.com

17 January 2012

### Complaint regarding the Sostanj Thermal Power Plant project

Dear Ms Begoyan,

We would like to bring to your attention the following deficiencies in relation to the EBRD's assessment of the Sostanj Thermal Power Plant<sup>1</sup> (hereinafter "TES") project. As laid out in more detail below, the project threatens to prevent Slovenia from contributing to the EU's 2050 climate targets and threatens to perpetuate current or near-current levels of CO<sub>2</sub> emissions, thus contributing to dangerous global climate change. However in our opinion this was insufficiently addressed during the project appraisal by the bank.

We therefore ask the Project Complaint Mechanism to undertake a compliance review of whether the bank has complied with its Environmental and Social Policy 2008 in relation to the following:

1. Insubstantial claims by the EBRD that the project in question is „CCS ready“ and that the assessment submitted by the operator fulfils the criteria set up by Directive 2009/31/EC<sup>2</sup> (hereinafter "CCS Directive"), Article 33.1.
2. Insubstantial assessment by the EBRD of whether Slovenia can fulfil its obligations in meeting long-term EU climate goals if it undertakes the project.

According to Performance Requirement 3.5 of the EBRD's Environmental and Social Policy 2008: "Subject to paragraph 6 below, projects will be designed to comply with relevant EU environmental requirements as well as with applicable national law, and will be operated in accordance with these laws and requirements". It is with this understanding that we argue that the TES project does not meet 'relevant EU environmental requirements' and that the EBRD's assessment of the project was insufficient to confirm this and to 'take appropriate action based on this finding.

<sup>1</sup> <http://www.ebrd.com/pages/project/psd/2009/40417.shtml>

<sup>2</sup> Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006.

## 1) CCS Readiness

### The Bank's position on the alleged CCS readiness of TEŠ

In the Board Document of the EBRD, Slovenia, Šoštanj Thermal Power Plant Project, within the President's recommendations it is stated that: *"The new unit is also designed to be Carbon Capture Storage ready (CCS-ready), and will be the Bank's first project able to apply CCS technology"*. The section on the Rationale for the Construction of a Coal-Fired Unit reads as follows: *"In addition, preliminary studies requested by the Bank confirm that the new Unit 6 is Carbon Capture Storage ready (CCS-ready) and it is possible to install post combustion systems for the removal of CO<sub>2</sub> from the exhaust gases when this technology becomes commercially available"*. Moreover, it is added, that the Project would be *the Bank's first project that will be available to apply CCS technology, setting the standards for similar projects in the region*<sup>3</sup>.

Further, in the document "TEŠ Power Plant and Premogovnik Coal Mine Environmental Impact Assessment Addendum", from October 2009, part 5, the following claim is made: *"The possibilities offered by the CCS technology are already being examined in that respect; Unit 6 is designed as CCS Ready and in the spatial plans for the construction of Unit 6, there is also a location for the completion of the carbon capture technology."*<sup>4</sup>

A similar claim is presented in the project summary document on the Bank website<sup>5</sup>: *"The new unit will be designed to be "carbon capture ready", and initial studies indicated that carbon storage may be possible in the area"*. A press release from June 2010 repeats the aforementioned allegations that *"The new unit is also designed to be Carbon Capture Storage ready (CCS-ready), and will be the Bank's first project able to apply CCS technology"*<sup>6</sup>.

The Final Technical Due Diligence Report<sup>7</sup>, Revision 2, from December 2009 concluded that *"the plant is prepared for the installation of a later CO<sub>2</sub> abatement, should the future legislation require. Next to the plant there is extra space for construction of a facility for extraction of CO<sub>2</sub> from the flue gases at the location of the existing cooling tower of Unit 4, which will be obsolete after shutting down the unit in 2016. In the documents reviewed, there are no more references made to the provisions for later CO<sub>2</sub> abatement systems. The plant plot for the new unit is not provided with a lot of spare space. Therefore this potential future project will have to be investigated in more detail."*

From the e-mail communication with the Bank we have learnt that there is no established EBRD policy regarding CCS technology, however, as part of the technical due diligence and depending on the specific project situation, the Bank's team always examines the possibility for new fossil fuel power generation units to be CCS-ready, as this term is defined by the International Energy Agency (IEA). For new units that claim to be CCS-ready, the technical due diligence is performed by independent consultants to verify the validity of the technology.<sup>8</sup> In relation to TEŠ, the EBRD's technical due diligence consultant independently confirmed the general appropriateness of the unit, the compatibility with future installation of carbon capture, etc.<sup>9</sup>.

In respect to what is mentioned above it is obvious that the Bank maintains the position that the project is CCS ready and presents it as a milestone – the first supported project able to apply the CCS technology. However it is not clear what CCS-readiness means in this particular case, nor on what basis the Bank adopted its position, nor what are the requirements for fulfilling the claim that the project is CCS-ready.

<sup>3</sup> Document of the EBRD, Slovenia, Šoštanj Thermal Power Plant Project, p.22.

<sup>4</sup> TEŠ Power Plant and Premogovnik Coal Mine Environmental Impact Assessment Addendum, October 2009, Part 5: Assessment of alternatives and whether the project is carbon capture ready and is carbon capture feasible in this area, p. 94.

<sup>5</sup> <http://www.ebrd.com/pages/project/psd/2009/40417.shtml>.

<sup>6</sup> <http://www.ebrd.com/pages/news/press/2010/100721c.shtml>.

<sup>7</sup> ŠOŠTANJ THERMAL POWER PLANT, Due Diligence Services, Investment of New Lignite-fired 600 MW Power Generation Unit, European Bank for Reconstruction and Development (EBRD), December 2009, p.26.

<sup>8</sup> E-mail from 23/8/2011, EBRD Communications Department to Ms Kristina Šabová.

<sup>9</sup> E-mail from 7/10/2011, E.Smith, Senior Environmental Advisor, EBRD to Ms Kristina Šabová.

### **Carbon Capture Readiness of the Unit 6 of the Šostanj Power Plant subject to the CCS Directive**

The principle of carbon capture and storage method is to reduce CO<sub>2</sub> emissions from power generation from fossil fuels. At the EU level, the CCS method is regarded as one of the future potential techniques for the mitigation of climate change. On these grounds, the CCS Directive was adopted<sup>10</sup>.

Article 33.1 of CCS Directive obliges EU Member States to ensure that applicants for new thermal power stations above 300 megawatt electric capacity carry out an assessment of whether suitable CO<sub>2</sub> storage sites are available as well as of the technical and economic feasibility of CO<sub>2</sub> transport and retrofitting CO<sub>2</sub> capture technology, prior to the issuing of a construction permit for the power plant. There is no commonly agreed standard for these assessments, nor are exact requirements set forth concerning the quality, method, expertness or other prerequisites of such an assessment.

Nevertheless, we are persuaded that the essential requirements of such an assessment are implicit and necessarily result from an interpretation compliant with the *acquis communautaire* of Article 33 of the CCS Directive. In order to fulfil the aim and objective of the Directive the assessment of the feasibility of a CCS retrofit should be interpreted in a meaningful way conforming with the objectives and purpose of the EU legislation. In line with the doctrine of "effectiveness", which provides that once the purpose of a provision is clearly identified, its detailed terms will be interpreted so "as to ensure that the provision retains its effectiveness", we cannot be satisfied with only a "pro forma" assessment of the CCS feasibility in large projects such as TEŠ.

### **Transposition deadline in respect of Art. 33 of the CCS Directive**

As has been confirmed by DG Climate Action, the general transposition deadline of the Directive, i.e., 25 June 2011, does not apply to Art. 33. The provisions introduced by Art. 33 are applicable to "operators of all combustion plants with a rated electrical output of 300 megawatts or more for which the original construction licence or, in the absence of such a procedure, the original operating licence is granted after the entry into force of Directive 2009/31/EC". Directive 2009/31/EC entered into force on 25 June 2009. Consequently, according to the DG Climate Action, Art. 33 has hence applied ever since then, and should have been transposed by this date. In this respect, the provision of Art. 33 of the CCS Directive should have been followed since 25 June 2009.

### **TEŠ 6 subjected to CCS assessment**

The CCS Directive came into force on 25 June 2009. Pursuant to Art. 33 of the CCS Directive, those "combustion plants with a rated electrical output of 300 megawatts or more for which the original construction licence or, in the absence of such a procedure, the original operating licence is granted after the entry into force of Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide" fall within its scope. This is also the case with the proposed Unit 6 of Šostanj Thermal Power Plant:

- a) TEŠ 6 shall be of rated electrical output of 600 megawatts and
- b) the original construction licence (Construction permit) for TEŠ 6 was issued on 16/3/2011.

Consequently, TEŠ 6 is subject to a CCS assessment.

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<sup>10</sup> See Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 or Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: A Roadmap for moving to a competitive low carbon economy in 2050 (COM/2011/0112 final), further EU Climate and Energy Package [http://ec.europa.eu/clima/policies/package/index\\_en.htm](http://ec.europa.eu/clima/policies/package/index_en.htm).

### **Insufficient review and lack of standards for the CCS assessment under the Bank's policy**

The project promoter has developed two studies concerning the CCS-readiness of TEŠ and has submitted these documents to the EIB and presumably also to the EBRD.<sup>11</sup>

We have been concerned that the studies provided by the project operator do not comply with what should be reasonably expected by the provisions of Art. 33.1 of the Directive and we have carried out a review of these documents<sup>12</sup>. The assessment of the documents shows that the submitted documents fail to comply with Art. 33.1 of the Directive because of:

1. the absence of project-specific assumptions concerning economic feasibility, including lack of evaluation of economic feasibility of the capture, transport (in particular by sea) and storage;
2. the lack of consideration of local geographical conditions' impact on technical feasibility, in particular for building pipelines;
3. the absence of any information beyond already available data from GeoCapacity on suitability of storage sites;
4. the lack of consideration of the impact on protected areas and NATURA 2000 areas of transport and storage locations.

In sum, the information contained within the documents does not exhaust what can reasonably be expected under Art. 33.1 of the Directive. It does not allow for the assessment of the feasibility of the project – neither technical nor economic feasibility, nor the availability of suitable storage sites, thus the project was not subject to an appropriate carbon capture readiness assessment as required under the CCS Directive and therefore it is not possible to sufficiently examine its carbon capture readiness. As a result, the project cannot be considered “carbon capture ready”.

Though it is primarily the duty of the Slovenian authorities to ensure the compliance with the CCS Directive and Art. 33.1<sup>13</sup>, we are persuaded that the Bank is under an obligation to require a sufficient CCS assessment, to thoroughly review and assess the submitted documents and to carefully establish a quality threshold for such an assessment.

From the available information it is not clear on what basis the Bank has concluded that the project is CCS ready and what methodology it has applied. Moreover, it seems that the allegations are not supported by sufficient evidence. Therefore, we call for the release of the Bank assessment and appraisal documents concerning the alleged CCS-readiness of TEŠ.

We consider that the failed CCS assessment may cause harm with regard to false expectations that the project is CCS-ready, and could thus reduce its greenhouse gas emissions in the future by this method. Whether the project is CCS-ready or not may also have an impact on the economic viability of the project in its lifetime and could have a huge impact on the Slovenian climate targets agreed under EU climate policy.

Furthermore, the Slovenian case may recur in relation to other combustion plants in other countries, thus it is necessary to set forth clear limits and requisites concerning CCS assessment best practice. The EU sees CCS as a strategic technology that may be widely used in future in order to prevent further air pollution and related climate change. It is therefore important that the CCS assessment is done correctly and sufficiently

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<sup>11</sup> Study *CO2 Capture Readiness of Unit 6 in Thermal Power Plant Šoštanj*, Paper nr: 2034 Ljubljana, May 2010 concludes that: „The evaluation of the possibility of retrofitting carbon capture plant to the new Unit 6 of the Thermal power plant Šoštanj examines above all the space, technical, environmental and safety aspects. It passes an estimation of »capture readiness« of the new Unit 6. The study »CO2 capture readiness of Unit 6 in Thermal power plant Šoštanj« passes the estimation of the possibility of retrofitting of carbon dioxide capture plant to Unit 6 of the Thermal power plant Šoštanj. It establishes that the new Unit 6 is capture ready from the technical as well as from the space point of view. “Study *CO2 Capture Readiness of Unit 6 in Thermal Power Plant Šoštanj (Addition)*, Paper nr: 2034 Ljubljana, September 2010 states that the study from May „confirms that Unit 6 of Power plant Šoštanj fulfils requirements of capture readiness defined in European legislation and that an addition to the study in greater detail analyzes availability of CO2 storage sites in Slovenia, nearby countries and North Sea, it analyses economical parameters of retrofitting carbon capture and storage technology to Unit 6 like investment cost, operational and maintenance cost, transport and storage cost.

<sup>12</sup> CCS readiness at Šoštanj: Ticking boxes or preparing for the future? Bellona Foundation, Environmental Law Service, November 2011.  
[http://aa.ecn.cz/img\\_upload/a6ff2d4939ff74268dd80e1c2102b42/Ticking\\_boxes\\_or\\_preparing\\_for\\_the\\_future\\_2.pdf](http://aa.ecn.cz/img_upload/a6ff2d4939ff74268dd80e1c2102b42/Ticking_boxes_or_preparing_for_the_future_2.pdf).

<sup>13</sup> The Bank has been already informed about the Complaint to the European Commission in relation to the CCS-assessment. See Letter from 17/11/2011 from Ms. Živčič to Mr. Puliti - Two TES 6 Complaints to the European Commission.

right from the beginning as regards large combustion plants in progress. Although we are sceptical about the potential of CCS technology to significantly reduce CO<sub>2</sub> emissions in a timely manner, the CCS Directive is a valid law and therefore should be respected. Therefore the term “carbon capture ready” should be used responsibly and in line with existing standards. In this context, we would like to ask the Bank, in line with the prevention principle, to give some instructions or issue guidelines concerning the CCS assessment pursuant to Art. 33 of the CCS Directive best practice. This is strongly desirable as it would avert other malpractice in connection with CCS assessments and it would contribute to the attainment of the aims of the EU legislation and EU climate policy in general and on the other hand would contribute to achievement of the Bank’s own objectives and lending requirements.

#### **Obligation of the Bank in relation to the CCS-readiness assessment**

In respect of the TEŠ project the Bank should ensure that the allegations of the CCS-readiness of the project are properly examined and supported by feasibility studies that comply with the EU up-to-date legislation and best practice requirements. This obligation is set up by its policy documents as shown below.

The EBRD is committed to promoting “environmentally sound and sustainable development” in the full range of its investment and technical cooperation activities pursuant to its constituent treaty, the Agreement Establishing the EBRD<sup>14</sup>. The Bank believes that sustainable development is a fundamental aspect of sound business management.

Furthermore, the Bank is committed to promoting European Union (EU) environmental standards as well as the European Principles for the Environment, to which it is a signatory<sup>15</sup> – a declaration presenting a common approach to environmental management associated with the financing of the projects. On basis of this declaration the Bank shall engage with project sponsors in addressing environmental issues, thus contributing to good environmental management of the projects and sustainable development. The European Principles for the Environment are defined as the guiding environmental principles in the EC Treaty and the practices and standards incorporated in EU secondary environmental legislation. In the EU Member States, the Signatories thereby agreed to provide financing to public or private sponsors of projects only where the projects comply with the principles and the relevant secondary EU legislation. The CCS Directive is among the legislation that promotes environmentally sound and sustainable development and it is part of EU secondary environmental legislation.

Under its Environmental and Social Policy from May 2008, the Bank shall review the clients’ assessment; shall assist clients in developing appropriate and efficient measures to avoid or, where this is not possible, minimise, mitigate or offset, or compensate for adverse environmental impacts consistent with the Performance Requirements.<sup>16</sup>

In its own words, the Bank “recognises the importance of climate change mitigation and adaptation and their high priority for the Bank’s activities in the region. It intends to further develop its approach towards climate change, notably as regards the reduction of greenhouse gases, adaptation, promotion of renewables and improvement of energy efficiency, in view of strengthening the treatment of these elements in its operations”<sup>17</sup>. Under the Environmental and Social Policy, PR 3: Pollution Prevention and Abatement: “projects will be designed to comply with relevant EU environmental requirements as well as with applicable national law, and will be operated in accordance with these laws and requirements”<sup>18</sup>.

Although it is the responsibility of the client to ensure that the required due diligence studies are carried out in accordance with PRs 1 through 10, the Bank should review the information provided, and provide guidance to the client on how the project can meet the Bank’s requirements. On the other hand, the Bank should not knowingly finance projects that would contravene country obligations under relevant international treaties and agreements related to environmental protection, sustainable development, as identified during

<sup>14</sup> See Article 2.1 (vii) of the Agreement Establishing EBRD.

<sup>15</sup> <http://www.eib.org/about/press/2006/2006-052-the-european-principles-for-the-environment-adopted-by-five-european-multilateral-financing-institutions-.htm>.

<sup>16</sup> Environmental and Social Policy, May 2008, p.3., <http://www.ebrd.com/pages/about/principles/sustainability/policy.shtml>.

<sup>17</sup> Environmental and Social Policy, May 2008, p.3., <http://www.ebrd.com/pages/about/principles/sustainability/policy.shtml>.

<sup>18</sup> *Ibid*, p.26.

project appraisal.

We believe that the Bank has failed to ensure that the TEŠ project complies with the EU legislation, more specifically, the Bank did not ensure that CCS Directive was properly implemented in this project. Furthermore, the Bank shall not present the argument that the TEŠ will be CCS-ready without either proper evidence available or a thorough assessment. More importantly, the Bank cannot provide support for a project that is in breach of the relevant EU legislation and undermines the Bank's own policy and objectives.

## 2) Slovenia's ability to fulfil its EU climate obligations

Claiming that TEŠ will be CCS-ready without an adequate basis is all the more serious considering that unless CCS technology becomes commercially viable and technically effective, the new unit at TEŠ would emit almost or even more than the whole of the country's allowed greenhouse gas emissions in 2050, if Slovenia reduces its emissions by 80-95 percent as required by EU climate goals (see below).

The Intergovernmental Panel on Climate Change has no doubt that, in order to keep the global temperature increase below 2° Celsius compared to pre-industrial levels and avoid catastrophic, runaway climate change, a dramatic reduction of emissions must happen very quickly: 80-95 percent reductions in the developed countries by 2050 compared to 1990 levels and a substantial decrease compared to business as usual in the rest of the world.<sup>19</sup>

Following this, in 2009 the European Council, the highest decision-making body of the EU, called for at least 50 percent worldwide reductions and aggregate developed country emission reductions of at least 80-95 percent by 2050.<sup>20</sup> Under the Environmental and Social Policy, PR 3: Pollution Prevention and Abatement: "projects will be designed to comply with relevant EU environmental requirements as well as with applicable national law, and will be operated in accordance with these laws and requirements". Such a high-level commitment to these targets in our opinion clearly constitutes an 'EU requirement' that the EBRD needs to take into account when making decisions on carbon-intensive infrastructure that will be operating for around the next 40 years.<sup>21</sup>

In the case of Slovenia, a small country that in 1990 emitted 20.2 million tonnes of CO<sub>2</sub> per year,<sup>22</sup> an 80 percent reduction means that by 2050, Slovenia can emit only around 4 million tonnes of CO<sub>2</sub> – from all sectors - annually. A 95 percent reduction means that Slovenia can emit only around 1 million tonnes of CO<sub>2</sub> by 2050.

Among the claims that are made regarding TEŠ's greenhouse gas emissions are as follows<sup>23</sup>:

- *"Unit 6 will utilise state of the art high energy-efficient technology and will lead to significant carbon emissions reduction of around 1.2 million tonnes CO<sub>2</sub> p.a. in the long run. This carbon reduction represents around 8% of the total GHG emissions of Slovenia."*<sup>24</sup> However it is not clear whether this relates to 1990 levels or the most recent levels of emissions - there is a difference of nearly a million tonnes of CO<sub>2</sub> in these estimates.<sup>25</sup>

<sup>19</sup> Fourth Assessment Report Working Group III Report „Mitigation of Climate Change. Intergovernmental Panel on Climate Change, 2007, Chapter 13.

<sup>20</sup> Council of the European Union, Presidency Conclusions 1 December 2009 (15265/1/09).

<sup>21</sup> Further EU policy documents such as the European Commission's Roadmap for moving to a low-carbon economy in 2050 and Energy Roadmap 2050 have since followed this goal and shown that the energy, industrial and residential sectors will need to be almost completely decarbonised by 2050.

<sup>22</sup> UNFCCC: GHG Data 2006 – Highlights from Greenhouse Gas (GHG) Emissions Data for 1990-2004 for Annex 1 parties submitted under the United Nations Framework Convention on Climate Change (UNFCCC), p.16 [http://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/ghg\\_booklet\\_06.pdf](http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/ghg_booklet_06.pdf)

<sup>23</sup> It is widely claimed, for example in the EBRD Board Document, and the project Environmental Impact Assessment, that the carbon emission factor of the plant will be reduced from 1.2 to 0.9 tonnes CO<sub>2</sub>/MWh. However, for the purposes of this discussion, we can disregard the information on specific emissions or emissions per MWh, as what counts is the total amount of greenhouse gases in the atmosphere, not whether they come from efficient or less efficient coal plants.

<sup>24</sup> EBRD Board Document: Slovenia: Šoštanj Thermal Power Plant Project, 20.07.2010, p.5 and 11

<sup>25</sup> 1990 = 3 981 053 tonnes; 2007 = 4 906 889 tonnes. Environmental Impact Assessment, p.319

- In the 4<sup>th</sup> version of the Investment Plan CO2 emissions for unit 6 range between 3 Mt in 2015 and 2.2 Mt in 2054 per year.<sup>26</sup> The latter figure is based on an unproven assumption that the plant will decrease its operations towards the end of its lifetime.
- *With the beginning of operation of Unit 6 and by taking account of the planned use of coal, the emission of carbon dioxide will not be reduced and will stay at the same level (approximately 4 million tonnes of CO2)*<sup>27</sup> (A table also appears on p.356-358 with various scenarios that suggest lower emissions however there is no accompanying comment about which is the most likely so it is not clear whether it concurs with the information given on p.530).

Even the largest of these possible reductions comes nowhere close to what is needed in order for Slovenia to fulfil its part in the EU's 2050 targets, if extrapolated from the level of a whole block to individual countries. On a common sense level it is clear that if 80-95 percent reductions are to be achieved, the energy sector needs to be almost totally decarbonised. This was confirmed by recent policy documents of the European Commission<sup>28</sup>. Even if the emissions are 2 248 000 tonnes by 2050 – a scenario we find rather unlikely as it would require the plant to voluntarily work at less than full capacity - this single unit would at best emit more than 56 percent of Slovenia's total emission quota. In the worst case it would emit 300 percent. In both cases it would be virtually impossible for the country to meet the EU targets as even in the best case Slovenia would have to make extremely large emissions reductions in areas such as transport where it is much harder to reduce emissions than in the energy sector.

The EBRD was aware of these 2050 targets before it approved the project, as for example representatives from Focus discussed the issue with the staff and President at the bank's annual meeting in Zagreb in May 2010. The bank has never offered any satisfactory explanation of how the project could be compatible with the 2050 targets. The only solution implied in the project documents is CCS, however it is far from clear whether this will be a commercially viable and environmentally effective option within the necessary timeframe and it is unacceptable to rely on it as a means of meeting EU requirements. Even in the case that CCS technology does become available, there are a number of factors affecting its use, such as cost and the suitability of storage locations in or near Slovenia.

In approving this project, the EBRD has failed to ensure that TEŠ meets relevant EU environmental requirements as stipulated by the EBRD Environmental and Social Policy 2008 PR 3.5.

## Conclusion

In relation to this project, the complainant asks the following:

We expect the Bank to undertake a compliance review of the EBRD's assessment of the TEŠ project with relation to the EU legislation and the objectives of the EU Community, namely the review and revision of the CCS assessment delivered by the project promoter and the assessment of the project's compatibility with Slovenia's ability to meet its 2050 greenhouse gas emissions reductions commitments. If the CCS and climate assessments for the project are found not to be in line with the EU requirements, the Bank shall cancel its support as otherwise it will undermine its own policy. Secondly, we call for the Bank to establish a methodology and best practice guidelines on the basis of which future projects falling under the "carbon capture ready" obligation will be assessed.

We also note that the PR 3 paragraphs 17-19 on greenhouse gas emissions are currently very weak and do not prevent projects with high climate impacts from being financed. They merely require project greenhouse gas levels to be predicted and ways to be sought to reduce them. This is not sufficient to ensure that the EBRD does not finance projects which prevent the necessary greenhouse gas reductions from being made through locking countries (especially small ones like Slovenia) into carbon-intensive energy generation or transport means. We therefore also invite the Project Complaint Mechanism to comment on how these

<sup>26</sup> Amended Investment Plan, Rev. 4, 18 August 2011. Unofficial translation, page 140-1.

<sup>27</sup> Environmental Impact Assessment: p.530

<sup>28</sup> European Commission: A Roadmap for moving towards a low-carbon economy in 2050, 08 March 2011; European Commission: Energy Roadmap 2050, 15 December 2011.

provisions could be strengthened in line with climate science in order to prevent cases like TEŠ from being repeated.

Please note that in relation to these issues, the following complaints have been submitted to other bodies:

- Request to the EC for an infringement procedure regarding Slovenia's failure to correctly apply the CCS Directive in the case of TEŠ
- Complaint to the EIB on the climate assessment of TEŠ
- Complaint to the EIB on the CCS assessment for TEŠ

Please do not hesitate to ask if you have any questions,

Yours sincerely,

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Piotr Trzaskowski, CEE Bankwatch Network, piotr@bankwatch.org, +48 228920086



## Annex 2: Bank's Management Response to the Complaint

### DOCUMENT OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Project	40417, Sostanj Thermal Power Project, Slovenia
Project Team	Operation Leader: Georgios Gkiaouris OGC: Zaur Baghirov, ESD: Robert Adamczyk, Mikko Venermo, Dariusz Prasek
Date of issue to ExCom	6 Feb 2012
Date of approval by ExCom	13 Feb 2012
To: PCM Officer	Anoush Begoyan
From: Managing Director, ESD Director, PEU	Alistair Clark Nandita Parshad
Date of issue to PCM Officer	14 Feb 2012

On 17<sup>th</sup> January 2012, a request for a compliance review of the Sostanj Thermal Power Project under the EBRD Projects Complaints Mechanism (PCM) was filed by three Civil Society Organizations (CSOs), namely CEE Bankwatch, Focus Association for Sustainable Development and Environmental Legal Services. This complaint was officially registered on the 17 January 2011 and this is the 'Bank Management Response' to the Complaint as outlined in *PCM: Rules of Procedure* (Clause 15), which is due to the PCM Officer by 14 February 2012 to the PCM Officer.

The letter of Complaint states that the Sostanj Thermal Power Project - Termoelektrarna Šoštanj (henceforth referred to as "TES") does not meet 'relevant EU environmental requirements' and that the EBRD's assessment of the project was insufficient to confirm that the project would meet the EBRD Performance Requirement (PR) 3 Article 5 establishing that "subject to paragraph 6 below, project will be designed to comply with relevant EU environmental requirements well as with applicable national law, and will be operated in accordance with the laws and requirements." Performance Requirement (PR) 3, Article 6 provides that "...ESAP provisions to achieve compliance with these requirements should take into account any nationally agreed time frame to bring about compliance with EU legislation...".

The initial paragraphs of this “Management Response” briefly summarize the Project and the remainder is structured to respond to the issue raised in the Complaint. Management believe the project complies with the requirements in the EBRD 2008 Environmental and Social Policy and Performance Requirements.

### **The Sostanj Thermal Power Project**

The EBRD together with the European Investment Bank (EIB) have provided financing for the modernisation investment programme of Termoelektrarna Šoštanj (TES) power plant in the town of Šoštanj, north-east Slovenia. The investment programme focuses on the replacement of five existing low efficiency and high carbon intensity units of around 725 MW capacity with a new state-of-the art supercritical 600 MW Unit 6 with full environmental protection systems (the “Project”). The investment programme will upgrade an existing coal fired plant which dates from the 1950’s.<sup>63</sup> It should be noted that the Bank project does not include funding for CO2 capture systems. The first permit for the construction of the new unit was issued in May 2006 (energy permit for 600 MW Unit 6, issued by Ministry of Economy), and the project was permitted under the spatial planning development plans in September 2007 and June 2008<sup>64</sup>. The initial EIB loan was signed in September 2009 and was amended in April 2011, while the EBRD loan was signed in January 2011. The Project’s Notice to Proceed was issued in December 2009 and the Project is now 25% completed.

The planned TEŠ modernisation programme will substantially decrease the environmental impact from its current operations. More specifically, the new Unit 6, which replaces five existing units, will improve efficiency of the plant, by increasing the production of electric energy per tonne of coal. It will also reduce specific CO2 emissions (tonnes of CO2 released per kWh produced). The Project will lead to a carbon emission reduction of around 1.2 mln ton per years by replacing the old units.

Furthermore, the proposed modernisation programme will enable TEŠ to meet future environmental requirements as set out in the EU Industrial Emissions Directive (IED)<sup>65</sup> applicable to existing plants from 2016 onwards. The IED, which was in draft stage at the time of Project consideration, replaced the EU Large Combustion Plan Directive and the Integrated Pollution and Prevention and Control Directive. According to the project schedule, the new unit will become commercially operational in 2015 and will be fully compliant with the IED.

The Project was categorised A under the Bank’s Environmental and Social Policy (2008), requiring an Environmental and Social Impact Assessment (ESIA) of the proposed

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<sup>63</sup> Block 1 and 2 dating from 1956 and 1960 respectively have been recently shut down, whilst block 3 and 4 dating from the 1960 and 1972 are to be shut down in 2015. Block 5 was commissioned in 1977 and following upgrade will continue to operate.

<sup>64</sup> Spatial arrangement for construction of Unit 6 is arranged within two detailed municipal spatial planning documents (OPPN). The OPPN for arranging the common interest for Unit 6 TES with ancillary facilities was adopted in September 2007 and published in the Official Gazette of the Republic of Slovenia 88/07; the OPPNN for arranging the common interest for smoke-stack and cooling tower of Unit 6 TES was adopted in June 2008 and published in the Official Gazette of the Republic of Slovenia 64/04.

<sup>65</sup> Directive of 24 November 2010 on Industrial Emissions (Directive 2010/75/EU)

investment programme as well as a corporate audit of the associated facilities, namely the lignite mine.

An Environmental and Social Impact Assessment (ESIA) disclosure package was prepared by an independent international consultant. The disclosure package was based on the Environmental Impact Assessment (EIA) undertaken by TEŠ in line with National requirements and approved by national authorities. Additional information to meet EBRD requirements was added to the EIA, and released for a 60 day period for public review and comment. Disclosure was undertaken on the TES web site: [www.te-sostanj.si](http://www.te-sostanj.si), and a Non-Technical Summary, Stakeholder Engagement Plan, and Environmental and Social Action Plan were released by the Bank on web page (<http://www.ebrd.com/english/pages/project/eia/40417.shtml>). The documents were also available in four locations in Slovenia, as detailed on the EBRD web page.

The following sections summarise the separate issues in the Complaint (*in italics*) and are followed by the Management Response (plain text).

### **Compliance with EBRD Environmental and Social Policy 2008 and Performance Requirements**

*Complaint 1: The Project does not meet ‘relevant EU Environmental requirements’ and that the EBRD’s assessment of the project was insufficient to confirm this and to ‘take appropriate action based on the findings’ (citing PR 3.5)*

The Complaint includes reference to the application of art 33 of the EU Carbon Capture and Storage Directive (CCS Directive)<sup>66</sup>, which entered into force on the 25 June 2009 and was required to be transposed into EU Member States’ legislation by 25 June 2011.

### **Management Response**

The project was undertaken in full compliance with the Bank’s Environmental and Social Policy 2008, and the Bank took due account of all relevant EU environmental standards and requirements during the due diligence and subsequent Board presentation. No derogations were sought.

It should be noted, that the Bank commenced its due diligence on this project in early 2009. The Project was approved by the Board of Directors on the 20<sup>th</sup> July 2010. Therefore the due diligence was initiated before the CCS Directive entered into force and the Project was approved by the Board of Directors prior to the transposition deadline of the Directive.

The Complaint raised the issues of the direct applicability of Article 33 of the CCS Directive. The Bank notes that Slovenia implemented the CCS Directive with the adoption of the Act amending the Energy Act in Slovenian Parliament on January 28<sup>th</sup> 2012. The new Act shall enter into force on the day following that of its publication in the Official Journal.

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<sup>66</sup> Directive 2009/31/EC

At the time of the due diligence in accordance with EBRD's commitment to EU standards and prior to consideration by the Board of Directors, the Bank required that TES undertake a CCS readiness study in accordance with the principles of the Directive. Such study was undertaken by TES, in parallel and independently to the Bank's due diligence.

As part of the Bank's technical, environmental and financial due diligence, an additional appraisal of the Project was made by international consultants to ensure that it is designed in compliance with the existing and anticipated EU requirements and best practice. Given that the Directive had been published during the on-going due diligence, the Bank further assessed whether the Project could be defined as CCS Ready in accordance to the provisions of the Directive (CCSR Assessment). The independent technical advisor that performed the due diligence confirmed that the new unit is technically prepared for the future installation of CO<sub>2</sub> capture systems.

Therefore, the Bank believes that TES undertook an assessment of the new unit's CCS readiness in accordance with the criteria set out in Article 33 of the CCS Directive. This assessment determined that it is reasonable to expect that the proposed power unit will be able to be fitted with Carbon Capture and Storage (CCS) when this technology is commercially available in the future and required by legislation. The plant, from the technical and availability of space perspective, will be able to accommodate the necessary post-combustion carbon capture equipment, making the proposed plant in effect "carbon capture ready" (CCR). The Bank's independent due diligence also confirmed that the plant is in effect "carbon capture ready".

TES will continue to update the CCSR Assessment of the Project. Such updates will need to take account of changes in the CCS technology, laws and regulations and price of carbon certificates, which would affect the economic and technical viability of the Project. In this spirit TES has undertaken the following studies:

- Possibilities of capture and storage of CO<sub>2</sub> from Unit 6 of Sostanj Thermal Power Plant Milan Vidmar Electric Power Research Institute, May 2010;
- Capture ready – possibilities of capturing carbon from the coal combustion plants in connection with the project solutions at Unit 6 of TES, Elek Svetovanje, May 2011;
- Implementation of the ETS and CSS legislation into Slovenian legal order, Milan Vidmar Electric Power Research Institute 2011;
- Development of CO<sub>2</sub> capture technologies, Elek Svetovanje, October 2010;
- Possibilities for geological storage of CO<sub>2</sub> in Slovenian and out of Slovenia, Geological Survey of Slovenia, University of Ljubljana- Faculty of Natural Sciences and Engineering Department of Geo-technology and Mining Engineering, HGEM, Nafta-Geoterm Lendava, ERICo.

The approach taken by TES fully meets the requirements of the Directive. It should be noted that to date, such assessments have not been widely undertaken on existing plants and there is no official EU endorsed guidance on how to undertake CCS Assessment for existing plants and their life extension. Moreover, CCS is not yet commercially

available, and therefore a full assessment of economic impacts cannot yet be made on an existing power plant.

In conclusion, as part of due diligence of the Project, the Bank requested that feasibility studies with regard to CCS readiness of the Project be performed by independent consultant and operator of the plant. The Bank has been satisfied with the results of the independent consultant's study confirming, *inter alia*, that unit is technically prepared for the future installation of CO2 capture systems.

***Complaint 2: Insubstantial assessment by the EBRD of whether Slovenia can fulfil its obligations in meeting long term EU climate goals if it undertake the Project'*** (citing PR 3.5)

### **Management Response**

The Project was approved by the Board following a full review of the project and is consistent with the Bank approved Strategy for Slovenia (<http://www.ebrd.com/downloads/country/strategy/slovenia.pdf> ) and the Bank's Energy Operations Policy (<http://www.ebrd.com/english/pages/project/eia/40417.shtml> ).

Currently TES produces around third of the electricity generated in Slovenia and is therefore an important electricity producer. In addition, given the specific generation conditions in Slovenia, TES is an important source of secondary (regulating) reserve. The proposed power unit will replace four old units and a fifth one in the longer term<sup>67</sup>, which need to be replaced on efficiency and environmental grounds. For the expected reference net electricity generation of 3,500 GWh, the new unit will lead to a carbon emission reduction of around 1.2 million ton CO2 per year, thus contributing significantly towards the achievement of Slovenia's carbon emission reduction targets. Furthermore, given that the role of the TES in the Slovenian power system is to be the main base load providing plant, the new unit 6 represents the lowest possible carbon solution among the feasible alternatives, because there is not any appropriate gas supply pipeline in the area

The Complaint does not provide any evidence that Slovenia will not meet Slovenia's 2050 climate targets, and this is a matter reserved for the Slovenian Government.

It should be noted that the Bank is not mandated to verify or change the energy policy of a sovereign state, and that the Bank provides financing only to projects approved by Competent Authorities. EBRD's Country Strategy for a particular country will incorporate proposed work in the energy sector, and this will be agreed with the relevant government.

### **Other**

Pursuant to Para 19.6 of the PCM Rules of Procedure, it is required that in order to be held eligible, a Complaint must "describe the harm caused, or likely to be caused by the Project". We note that the Complaint does not include any description of harm caused or likely to be caused by the Project.

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<sup>67</sup> Unit 4 will close by 2015 and Unit 5 will be phased out by 2026

We also note that the Complaint refers to the EBRD Environmental and Social Policy as being insufficient on the question of CCS assessment. In accordance with Paragraph 24e. of the Rules of Procedures, these kinds of complaints are not dealt with under the PCM, but may be best brought to the Bank's attention in the 2013 review of the Environmental and Social Policy. We would welcome specific comments and recommendations on improving the ESP at that time.

## Annex 3: Client's Response to the Complaint



Project Complaint Mechanism  
Ms Anoush Begoyan, Project Complaint Mechanism Officer  
European Bank for Reconstruction and Development  
One Exchange Square  
London EC2A 2JN  
United Kingdom

17 February 2012

Dear Sirs

We refer to the letter of complaint on Šoštanj Thermal Plant Project dated 17 January 2012 (the "**Complaint**") submitted to the EBRD's Project Complaint Mechanism by Focus Association for Sustainable Development, Environmental Legal Service and CEE Bankwatch Network ("**Complainant/s**") and your request (e-mail of 31 January 2012) that we as a client/project sponsor prepare an official response to the Complaint.

Although the Complaint is aimed primarily at the European Bank for Reconstruction and Development ("**EBRD**") below we present our views and comments on the Complainant from the investor's perspective.

### General observations

The construction of a new replacement Unit 6 in Šoštanj, Slovenia (the "**Project**") represents the modernisation of the existing coal power plant operated by Termoelektrarna Šoštanj d.o.o. ("**TEŠ**"). The investment programme provides that new 600 MW Unit 6 will replace five existing low efficient and high carbon intensity units in TEŠ. It should be pointed out that the Project will introduce the most advanced technology available today (BAT standard technology) and consequently, the emissions will be much lower than in the existing units and much lower than those set in the EU legislation for 2016 and subsequent years. The production of CO<sub>2</sub> from replacement Unit 6 is estimated to be approximately 3.1 million tons in the first 15 years of operations (until 2030). By 2050 the production of CO<sub>2</sub> is expected to fall under 2.0 million tons as the production of electricity is expected to decrease.

As the Project is at present the largest investment in Slovenia and considering its high sensitivity from the environmental point of view, it was no surprise that the Project has attracted vast media attention as well as the attention of civil initiatives and non-government organisations from the very beginning and this continues during its implementation phase. TEŠ and its holding company Holding Slovenske elektrarne d.o.o. ("**HSE**") have always given appropriate attention to all this and it is (and has always been) their policy to respond wherever possible to complaints and allegations in respect of the Project, in form of written responses, other communication, participations in expert discussions, presentation of the Project to the public, disclosure of important information to the public (also via its web pages) and similar.

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The majority of funding for this Project is (or will be) contributed by the European Investment Bank ("EIB") by way of a loan, in the aggregate amount of EUR 550 million and the EBRD by way of a loan in the amount of EUR 200 million. The remaining project costs will be covered by TEŠ and its holding company HSE.

In the appraisal process, the Project was thoroughly evaluated and assessed, firstly by EIB in 2007 and 2010 and by EBRD in 2010. It is well known that EIB and EBRD has adopted high objectives and standards for defining their environmental and social responsibility which are taken into the consideration through due diligence processes with the aim to ensure that all projects which are to be financed by these banks are compliant with EU environmental principles and standards. Both banks-institutions have performed numerous extensive due diligence reviews of the Project, with particular emphasis on environmental aspects. During these processes it was established that the Project does not carry any significant environmental risk and respectively, that this risk is, in the circumstances, manageable and in compliance with all applicable guidelines and regulations. One of important findings was that with the erection of Unit 6 the present environmental condition in TEŠ will be much improved. As a result TEŠ, together with HSE, successfully secured the financing by signing the respective loan agreements with EIB and EBRD. In accordance with standard practice of EIB and EBRD, the financing of the Project by those financial institutions was supported by the Slovenian government, through the No objection letter issued to EIB and a Letter of Support issued to EBRD.

### Comments on the Complaint

Further to the above brief information on the Project and its implementation we would like to comment, in addition to what was already said above, on some specific issues raised by the Complainants.

Claims and allegations found in the Complaint, which in general is not very clear and consistent, can generally be classified into two main parts. Firstly, the Complainants allege that EBRD has not complied with its Environmental and Social Policy 2008 and secondly, they claim that EBRD failed to assess whether Slovenia can fulfil its obligations in meeting long-term EU climate goals if it undertakes the Project.

In principle, we are not in a position to comment on EBRD's compliance with its Environmental and Social Policy 2008 in the evaluation of the Project as this is the EBRD's document. But, we have no reason to believe that EBRD has not complied with its own policy. In the evaluation of the Project during 2010 EBRD performed several due diligence reviews, with particular emphasis on the environment, and numerous clauses related to the environmental issues were included in the loan agreement. All these due diligence reviews were found satisfactory to EBRD and as a result, the financing of the Project by EBRD was formally approved and the Loan Agreement signed in January 2011. However, we feel necessary to comment on the argument expressed in the Complaint stating *"the TEŠ project does not meet 'relevant EU environmental*

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requirements' ad that the EBRD assessment of the project was insufficient to confirm this". As already mentioned above, the Project has undergone rigorous due diligence reviews performed by EIB and EBRD as well as by independent consultants and experts. It should be pointed out that TEŠ has received all necessary environmental and other consents, permits and approvals for the start and implementation of the Project as required under the laws of the Republic of Slovenia (which include, considering that Slovenia is an EU member, respective EU legislation). In this context, the environmental aspects of the Project were assessed and reviewed by the competent authorities in the Republic of Slovenia as well, including the review whether the Project complies with the applicable laws and regulations. In connection with this, numerous studies were made, including the Environmental Impact Assessment, as required under the Slovenian Environment Protection Act ("ZVO-1", published in the Official Gazette of the Republic of Slovenia No. 41/2004, as amended). In the process of the issue of the environmental permit, the assessment of cross-border impact of the Project was also performed as the neighbouring country Austria has exercised its rights under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991). The official complaint received from Austrian competent body was satisfactorily resolved in January 2011 and their comments incorporated in the environmental permit accordingly. It may be worth mentioning also that in the process of issuing the environmental permit the comments of by-participant and the general public on non-compliance with CCS Directive (as defined below) were rejected by the issuing authority, the Slovenian Ministry of the Environment and Spatial Planning, the Environmental Agency of the Republic of Slovenia. Based on that, we are confident that the Project has complied and complies with the applicable Slovenian laws and regulations as well as with the relevant EU environmental requirements being a part of the Slovenian law.

On the other hand, allegations that EBRD has failed to assess whether or not the completion of the Project will prevent Slovenia to fulfil its obligations in meeting long-term EU climate goals seem rather absurd and show that the Complainants do not fully understand the role and competences of EBRD. In our opinion it is clear that this is not an EBRD's obligation (or TEŠ's) and moreover, we doubt that EBRD has any competence in this respect. This issue which goes well beyond the Project should be raised with the competent authorities in the Republic of Slovenia. In any case, this should in no way affect or limit Slovenia's responsibilities to comply with such long-term goals. In relation to this we would only add that formally this is not the project of the Republic of Slovenia as claimed in the Complaint, but of TEŠ, with the support of HSE. Although those companies are under the indirect and respectively direct control of the Republic of Slovenia, both companies are independent commercial companies and the Project complies with their own investment objectives. Moreover, the Project was included in the Government's Resolution on national development projects until 2023 and is included in the Slovenian National Energy Programme (which is still subject of public discussion). In the context of the alleged non-compliance with 'EU environmental requirements', the Complaint extensively elaborates on 'CCS readiness' and claims that EBRD did not properly assess the Project from the standpoint of its compliance with the CCS Directive (as defined below) and in particular with Article 33. It is the fact that at the time of EBRD's assessment Slovenia has not yet transposed into its national laws the Directive 2009/31/EC on the

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geological storage of CO<sub>2</sub> (the “**CCS Directive**”). Notwithstanding some uncertainties regarding the transposition deadlines, in 2010 and 2011 TEŠ commissioned several studies on CCS readiness of the Project: “Possibilities of capture and storage of CO<sub>2</sub> from Unit 6 of Šoštanj Thermal Power Plant” (Milan Vidmar Electric Power Research Institute, May 2010 and September 2010), “Development of CO<sub>2</sub> capture technologies” (ELEK Consulting, October 2010), “Implementation of the ETS and CCS legislation into Slovenian legal order” (Milan Vidmar Electric Power Research Institute, February 2011), “Capture Ready – possibilities of capturing carbon from the coal combustion plants in connection with the project solutions at Unit 6 of TEŠ (ELEK Consulting, September 2011). Following the conditions laid down in the said Article 33, the goal of studies was to assess whether suitable storage sites are available, if transport facilities are technically and economically feasible and if it is technically and economically feasible to retrofit for CO<sub>2</sub> capture. In the preparation of some of these studies experts from EIB and EBRD were also consulted. In this way TEŠ, as the operator of combustion plant, performed what was required under the Article 33 of the CCS Directive. The studies showed that the Project is CCS ready and if the law will require the introduction of such technology, TEŠ will be able to comply with such requirements. In our opinion, in the absence of more specific guidelines and instructions or practice and the fact that CCS Directive has not yet been fully transposed into Slovenian law, studies adequately discuss and evaluate what is required in Article 33 of the CCS Directive. It was said the study of Possibilities of capture and storage of CO<sub>2</sub> from Unit 6 in Šoštanj Thermal Power Plant of Milan Vidmar Electric Power Research Institute could use as a model for similar future projects as there were, to our understanding, no comparable studies or any guidelines and instructions in this respect available at that time in Europe. It is also known that the issue of carbon storage has not yet been finally resolved within EU (what was also recognised by the Complainants) so it was impossible to predict and foresee every aspect of this issue. Nevertheless, TEŠ, as a prudent project sponsor, continues to monitor new developments regarding CCS and constantly assesses CCS readiness of the Project. In relation to this new studies on evaluation of economics of the investment and costs of facilities for CO<sub>2</sub> capture at Unit 6 of TEŠ have been ordered and are currently under preparation.

In relation to this, we would like to inform you that Slovenia transposed CCS Directive (though still not entirely), into its national legislation couple of days ago, by passing the Act on the Amendments to the Energy Act (“EZ-E”, published in the Official Gazette of the Republic of Slovenia No. 10/2012). In this case this does not really matter much as TEŠ has nevertheless complied with the requirements of Article 33 of CCS Directive, complying with Article 33 directly.

From the procedural standpoint, we have also noted the following:

- The Complaint was signed, among others, by Ms Lidija Živčič, representing Focus Association for Sustainable Development, one of three Complainants. We have no knowledge whether or not the letter of Complaint was accompanied by an authorisation letter from Focus Association for Sustainable Development, and if this was not the case, it seems that the Complaint was not signed by an Authorised Person (as defined in the PCM Rules of

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Procedure) of Focus Association for Sustainable Development. Namely, according to the by-laws of Focus Association for Sustainable Development (available on Focus's web pages: [http://www.focus.si/files/Fokus/fokus\\_statutes.pdf](http://www.focus.si/files/Fokus/fokus_statutes.pdf)), this organisation, established in the form of an association, is represented by the chair of association, which is currently Ms Živa Gobbo. We have not checked this in respect of the other two Complainants.

- According to the PCM Rules of Procedure, the complainant submitting the complaint "*must be able to describe the harm cause or likely to be caused by the project financed or to be financed by the EBRD*". Apart from some general statements on greenhouse emissions and an assessment that Slovenia may not be able to comply with its EU climate obligations EU, the Complaint does not describe any specific harm caused or likely to be caused by the Project, therefore, the Complaint seems to be ineligible for further process.

### Conclusions

We believe that the Project complies with the applicable Slovenian laws and regulations as well as with EU environmental requirements. In this context, we, as the project sponsor, have in particular complied with Article 33 of the CCS Directive and based on studies made in respect of CCS readiness, in our opinion the Project is CCS ready. It should be considered that any judgement concerning the interpretation of the CCS Directive can only be made by the European Court of Justice. In respect of the claim of insubstantial assessment by EBRD on whether the Project will have an impact on Slovenia's obligations in meeting long-term EU climate goals, we are of the opinion that such assessment may and has to be made by Slovenia only and this is a matter of its policy.

Furthermore, allegations and claims contained in the Complaint are not substantiated and the Complaint does not provide evidence for its claims. Also, the Complaint, in our opinion, does not satisfy the criteria of eligibility under PCM Rules of Procedures.

Yours sincerely,



**Simon Tot**  
Director  
Termoelektrarna Šoštanj d.o.o.



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