

EPS RESTRUCTURING

REQUEST NUMBER: 2016/01

COMPLIANCE REVIEW REPORT – March 2017

The Project Complaint Mechanism (PCM) is the independent accountability mechanism of the EBRD. PCM provides an opportunity for an independent review of complaints from one or more individual(s) or organisation(s) concerning an EBRD project, which allegedly has caused, or is likely to cause harm. PCM may address Complaints through two functions: Compliance Review, which seeks to determine whether or not the EBRD has complied with its Environmental and Social Policy and/or the project-specific provisions of the Public Information Policy; and Problem-solving, which has the objective of restoring a dialogue between the Complainant and the Client to resolve the issue(s) underlying a Complaint without attributing blame or fault. Affected parties can request one or both of these functions.

For more information about PCM, contact us or visit www.ebrd.com.

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How to submit a complaint to the PCM

Complaints about the environmental and social performance of the EBRD can be submitted by email, telephone or in writing at the above address, or via the online form at:

 <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/submit-a-complaint.html>

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NOTE: Unless otherwise defined, capitalised terms used in this Compliance Review Report refer to terms as defined in the PCM Rules of Procedure.

Executive Summary

The Project Complaint Mechanism (PCM) received a complaint from CEE Bankwatch Network (the Complainant) relating to EBRD's financing of the restructuring plan for Elektroprivreda Srbije (EPS) in Serbia (the Project). The Complaint was registered by the PCM Officer on 23 February 2016 in accordance with paragraphs 11-13 of the PCM Rules of Procedure (PCM RPs), and was subsequently posted in the PCM Register, pursuant to paragraph 20 of the PCM RPs. The Complainant has requested a Compliance Review. On 23 March 2016, the Eligibility Assessor was appointed to conduct an Eligibility Assessment jointly with the PCM Officer, in accordance with paragraph 22 of the PCM RPs. The Bank formally responded to the Complaint on 23 March 2016. The Eligibility Assessment Report for Compliance Review (EAR), which was released on 31 May 2016, concluded that the Complaint was eligible for a Compliance Review.

The Complaint alleges that the Bank has "*directly*" failed to comply with its Public Information Policy (PIP), in particular Section D, paragraph 3.2. It further alleges that "*indirectly*", the Complaint concerns paragraph 15 of the Environmental and Social Policy as well as the Bank's commitment to the spirit, principles and ultimate goals on public disclosure and stakeholder engagement as provided for in the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

First, the Complaint alleges that the Bank Management failed to make available the Board report for the Project as by the time the Complaint was filed, the Board Report had not been disclosed by the Bank. As the Bank Management later disclosed the Board Report, the Complainant argued that the delay in disclosing the document failed to comply with the PIP procedural provisions for information requests. The Compliance Review Expert has determined that by disclosing the Board Report some 84 days after the request for information was filed, the Bank Management has failed to comply with the implementing provisions of the 2014 PIP, in particular Annex, section 2 (vi)) concerning response timeline.

Second, the Complainant alleges that the delay in disclosing the Board Report prevented her organisation from engaging in meaningful dialogue with the Bank Management, EBRD's decision makers and the PCM regarding the Project. The Compliance Review Expert has determined that given the close relationship between the substantive commitments of the Bank and their realisation through the procedural provisions of the 2014 PIP, the inobservance of the implementing provisions of the 2014 PIP resulted – in this specific instance – in the non-compliance of the Bank with paragraph 15 of the 2014 ESP with respect to its commitment to stakeholder engagement, in particular by failing to ensure meaningful dialogue with stakeholders.

Therefore, the Compliance Review Expert has made a finding of non-compliance in respect of the grounds set out in the Complaint. This Compliance Review has determined that the Bank has failed to comply with the implementing provisions of the 2014 PIP, in particular Annex, section 2 (vi) as well as with its obligation under article 15 of the 2014 ESP with respect to its commitment to stakeholder engagement, in particular by failing to ensure meaningful dialogue with stakeholders.

Part I: The Facts

1. Factual background

Elektroprivreda Srbije (EPS) is the state-owned electric utility power company in Serbia. The Bank has an established relationship with EPS, having participated in five previous projects since 2001. In 2002 and 2003, the PCM reviewed two closely related complaints about the Bank's loan (Emergency Power Sector Reconstruction Loan) to EPS (EPS Power II and EPS Kolubara Environmental Improvement Projects). The Compliance Review Report that was published on 29 October 2015 made a finding that the Bank had failed to comply with its obligations under the 2008 Environmental and Social Policy.¹

On 26 October 2015, the Bank's Board of Directors approved a €200 million loan to EPS, guaranteed by the Republic of Serbia, and subject to the Bank's policy requirements for public sector projects. The loan is a part of the EPS restructuring plan to address a key transition challenge in Serbia, that of improving the operations and commercialisation of EPS. Under the restructuring plan, EPS will be converted into a joint stock company and will also undertake a general corporate governance review to improve its policies in particular for compensation, recruitment, nominations, planning and procurement.

The loan proceeds will be used to restructure EPS's balance sheet, replacing short and medium term financial debt incurred to alleviate a critical cash situation created by the unprecedented and catastrophic floods in Serbia in 2014. For the purpose of this Compliance Review Report, the restructuring plan will be referred to as "the EPS Restructuring Project" or the "Project".

According to the Bank Management response, *"the refinancing will free up resources to allow EPS to focus on the implementation of its long capital expenditure program, which involves substantial modernisation of Serbia's power sector infrastructure. This Project will also allow EBRD to continue its engagement with EPS on environmental and social issues."*²

As the Project is for corporate restructuring without any specified investment plan, the environmental and social due diligence of the Project was focused on identifying opportunities to improve environmental, safety, social and labour governance and capacity and to help EPS develop a more strategic approach to managing these issues.³ A revised company-wide Environmental and Social Action Plan (ESAP) was agreed upon based on due diligence carried out with the assistance of an independent consultant. The ESAP provided a comprehensive response to environmental and social issues associated with EPS' operations, including a new resettlement framework.⁴

¹ In 2002 and 2003, the PCM reviewed two closely related Complaints about EBRD's EPS Emergency Power Sector Reconstruction Loan, EPS Power II and EPS Kolubara Environmental Improvement Projects. The Compliance Review process was completed in mid-2015. The PCM Compliance Review Expert found that the Bank had not complied with its obligations under the 2008 Environmental and Social Policy, namely in relation to Performance Requirements 1, 3, 5 and 10. The Compliance Review Report included recommendations to address the findings of non-compliance, in response to which EBRD Management prepared a Management Action Plan (available on the PCM Register on the EBRD website). The first Compliance Review Monitoring Report of the Project Complaint Mechanism regarding these Complaints was published in July 2016 on the PCM register.

² Bank Management response, at section 2, p.15.

³ As per the EPS Project Summary Document, available at <http://www.ebrd.com/work-with-us/projects/psd/eps-restructuring.html>.

⁴ Bank Management response, at section 2, p. 15.

On 16 February 2016, the PCM received a Complaint regarding the EPS Restructuring Project. The Complainant, CEE Bankwatch Network requested a Compliance Review, raising concerns about access to information regarding the Project. The Complaint was registered by the PCM Officer on 23 February 2016 in accordance with paragraphs 11-13 of the PCM Rules of Procedure (PCM RPs), and was subsequently posted in the PCM Register, pursuant to paragraph 20 of the PCM RPs.

On 23 February 2016 Ms Susan T. Wildau was appointed as Eligibility Assessor to conduct an Eligibility Assessment jointly with the PCM Officer, in accordance with paragraph 22 of the PCM RPs. The Bank responded formally to the Complaint on 23 March 2016. The EAR was submitted on 31 May 2016.⁵ The PCM Eligibility Assessor determined that the Complaint was eligible for a compliance review and terms of reference (ToRs) for that review were included in the EAR. The PCM Officer appointed PCM Expert Andrea Saldarriaga as the Compliance Review Expert.

2. The Parties

- **The Complainant:** Fidanka McGrath, CEE Bankwatch Network.
- **The Bank:** European Bank for Reconstruction and Development.
- **The Client:** Elektroprivreda Srbije (EPS).

3. The Project

The EPS Restructuring Project, relating to a €200 million loan to restructure EPS's balance sheet.

4. The Complaint

The Complaint relates to the delay incurred by the Bank in disclosing the Board document on EPS restructuring requested by the Complainant (Board Report). According to the Complaint, the Complainant sent an email on 29 October addressed to the EBRD Civil Society Engagement Unit (CSE Unit) requesting the disclosure of the Board Report. Two additional emails were sent by the Complainant to the Bank to follow up on the request on 30 November 2015 and 8 January 2016.

The Complaint indicates that the CSE Unit's email on 4 November confirmed receipt of the request. A second email from the CSE Unit on 26 November 2015 informed that additional 20 days were required to deal with the request. Thereafter an email on 8 January 2016 apologised for the delay in dealing with the request and stated that the requested document would be sent "next week". The Board Report was finally disclosed on 29 February 2016, after the Complainant had filed the Complaint.

According to the Complaint, the Bank has failed to comply with its policies in two ways:

Directly the EBRD has failed to comply with its Public Information Policy, in particular Section D paragraph 3.2. Indirectly the complaint concerns paragraph 15 of the Environmental and Social Policy, as well as the EBRD commitment to the spirit, principles and ultimate goals on public disclosure and stakeholder engagement comprised in the UNECE Convention on

⁵ The EAR can be accessed at <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>.

Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.⁶

The Complainant indicates that previous EBRD investments in EPS were subject to several PCM complaints that found that the Bank was not compliant with its own policies. The Complainant is concerned whether the current EPS Restructuring Project “*can help remedy harm done by EPS operations.*”⁷ In this context, the Complainant considers that access to information is “*crucial for meaningful engagement with the Bank and its client.*”⁸

Finally, the Complainant seeks to achieve the following results:

... 1) generally improve the transparency and disclosure practices of EBRD, namely to prevent future delays on requests for information; 2) receive the Board Document on the EPS Restructuring project in order to 3) engage more meaningfully in dialogue with EBRD Management, the PCM and EBRD’s decision makers (with regards to the implementation of the current project and the PCM MAP on the 2013/03 on the EPS Energy Power Sector Reconstruction Loan, EPS Power II and EPS Kolubara Environmental Improvement).⁹

At the request of the PCM, the Complainant provided further details about her understanding of the application of article 15 of the 2014 ESP as well as the Aarhus Convention.¹⁰ These arguments will be further explained below in the analysis of compliance.

Part II: Steps Taken to Conduct the Compliance Review

- 1. Document review:** given the nature of the Complaint, the Compliance Review Expert conducted a limited document review. Documents are referenced throughout the Compliance Review Report. The nature of the document or source of communication is also mentioned for the benefit of the readers indicating that the documents or communications referenced are not available for public review.
- 2. Meetings with the Parties:** the Compliance Review Expert met via conference call with the Bank’s Environmental and Sustainability Department (ESD), the Office of the Secretary General, Civil Society Engagement Unit and the PCM Office on 11 July 2016 and via conference call with the Complainant on 12 July 2016.
- 3. Site visit:** the Compliance Review Expert did not find it necessary to conduct a site visit as it was not relevant to the issues alleged in the Complaint.
- 4. Opportunity to comment on the Draft Compliance Review Report:** in accordance with 2014 PCM RP 42, the Compliance Review Expert gave the parties the opportunity to provide comments on the Draft Compliance Review Report.
- 5. Submission and opportunity to comment on the Management Action Plan (MAP):** in accordance with 2014 PCM RP 45, the Bank Management submitted the MAP addressing the recommendations contained in the Compliance Review Report on 9 February 2017. The MAP was sent to the Complainant for comments on 13 February 2017. Comments from the Complainant were received on 10 March 2017.

⁶ Complaint, Annex 1 to the EAR, p.13. The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is also known as the Aarhus Convention. The Compliance Report uses the terms UNECE Convention and Aarhus Convention interchangeably.

⁷ Complaint, Annex 1 to the EAR, p.12.

⁸ Ibid.

⁹ Complaint, Annex 1 to the EAR, p.13.

¹⁰ See letter from the Complainant dated 20 May 2015. Not publicly available.

The Compliance Review Expert is of the opinion that she has had access to sufficient information to consider the Bank's alleged non-compliance with the requirements of the 2014 PIP and 2014 ESP.

According to 2014 PCM RP 41, the objective of this Compliance Review will be to determine (and if so, determine how and why), the Bank's conduct with respect to the Project has resulted in non-compliance with a Relevant Bank Policy, as defined in the 2014 PCM RPs. If non-compliance is found, the Compliance Review will recommend remedial changes in accordance with 2014 PCM RP 44.

The next part of this Compliance Review report will address each of the allegations identified in the EAR and detailed in the ToRs of the EAR.

Part III: Discussion of the Issues and Analysis of Compliance

The ToRs identified the main question for the Compliance Review as follows:

Did EBRD satisfy its obligations in relation to information disclosure and stakeholder engagement as set forth in the applicable policy framework?

1. Information disclosure

1.1 Parties' positions

1.1.1 The Complainant's position

The Complaint indicates that the Bank "*directly*" failed to comply with its Public Information Policy, in particular Section D, paragraph 3.2 that provides for accessibility upon request of Board Reports for public sector projects. At the time the Complaint was filed on 16 February 2016, the Bank had not yet disclosed the Board Report requested by the Complainant in her communication of 29 October 2015.

As the Bank finally disclosed the requested Board Report on 29 February 2016, the Complainant indicated to the PCM Officer by her letter dated 20 May that this delay in disclosing the Board Report by over 40 working days was a breach of the PIP Implementing Procedural Provisions for Information Requests and Appeals. The Complainant also requested information regarding the practical reasons for the delays in disclosure; the Bank's approach to ensure compliance with disclosure timelines; and whether this approach can be improved.¹¹

1.1.2. The Bank's response

In its response submitted to the PCM Officer on 23 March 2016, the Bank Management indicates that the request for disclosure of the Board Report was received on 29 October 2015. The Bank Management acknowledged receipt of the requests through a formal response on 4 November 2015, in accordance with PIP requirements to acknowledge requests for information within 5 working days. The Bank Management also noted that on 26 November 2015 the Bank staff informed the Complainant that an additional 20 working days were required to disclose the Board Report. The Bank staff explained that additional time was required "*due to the complexity of the*

¹¹ Ibid.

*Board document and the need to separate confidential information.*¹² The Bank Management further indicates that on 8 January it received an email from the Complainant enquiring about the status of the request. The Bank staff responded promptly assuring the Complainant that the Board Report would be disclosed but that it was not yet ready for release.¹³

Moreover, the Bank Management notes that during the period prior to disclosing the document, the Bank staff maintained continuous informal communication with the Complainant and facilitated meetings between the Complainant and the EBRD Board of Directors and Senior Management on 26 January 2016. According to the Bank Management, “[t]hroughout the process, the Complainant and the Bank continued to be in regular communication and maintain an open and constructive dialogue about any issues concerning EBRD projects.”¹⁴

The Board Report was finally disclosed on 29 February 2015, that is, 84 working days after the initial request submitted by the Complainant.¹⁵ The Bank Management admits that its response fell outside the requirement of the 40 working days timeline of the implementing provisions of the 2014 PIP (Annex, section 2 (vi)).

According to the Bank Management, the main reason for the delay was the time taken to redact and exclude confidential information from the requested Board Report. The Bank Management indicates that under section 3.2 of the 2014 PIP, information considered confidential pursuant to section E of the 2014 PIP will be removed from the Board Reports prior to release. The Bank provided further explanation on the removal of confidential information and indicated that “the process of clarification included several iterations and took longer than initially expected.”¹⁶

Moreover, the Bank Management accepts that currently, it does not have a defined process for handling requests for Board Reports for public sector projects. As the Bank receives relatively few of these types of requests, the Bank has so far adopted a “*case by case approach*”.¹⁷ Consequently, the Bank’s Management points to actions foreseen to address this gap and in particular:

To avoid delays in processing future requests to disclose public sector project Board Reports, the Secretary General’s Office will begin work on a guidance note for staff who may receive an information request for a Board document. This guidance note will clarify the appropriate timing requirements for responding to a request from the public in line with the PIP obligations, and will be included in the existing PIP Implementation Guidelines.

The Bank Management also welcomes the recommendations from this current PCM case so that these recommendations can be reflected in the guidance.

1.2. The Bank’s policy obligations

As identified by both the Complainant and the Bank Management, the relevant provision to start the analysis of the Bank’s obligations to disclose information in this particular instance is paragraph 3.2 Section 2 of the 2014 PIP. This provision states:

¹² Bank Management Response, Annex 2 to the EAR, p. 16.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ This calculation counts 25, 28 December 2015 and 1 January 2016 as bank holidays.

¹⁶ Ibid.

¹⁷ The Bank indicates that an average of 50 public sector projects are approved per year and that only six requests for Board reports have been received in total, including the request referred to in the Complaint. See Bank Management Response, Annex 2 to the EAR, p. 15.

Public sector projects – Board Reports for public sector projects will be made available to the public on request, once the project has been approved by the Board of Directors. Information considered confidential, as set out in Section E of the Policy, will be removed from the documents prior to release.

It is important to note that when making available Board Reports, the Bank Management should ensure that confidential information is removed from the documents. Ensuring the confidentiality of information is an obligation of the Bank provided for in provision 3 of the 2014 PIP:

[...] project sponsors and clients entrust confidential information to the Bank, which the Bank, as a financial institution promoting the development of the private sector, has an obligation to respect.¹⁸

The 2014 PIP also provides the procedural requirements for the disclosure of documents, including Board Reports for public sector projects, in its Annex “Implementing procedural provisions for information requests and appeals”. According to section 2 of the Annex, the Bank Management has a maximum of 10 working days to acknowledge receipt of the request and a maximum of 40 working days to respond to the request. Provisions 2(iv) and 2 (vi) indicate:

2(iv) Acknowledgment of request: the Bank will acknowledge receipt of a request and another correspondence covered by the PIP generally within 5 working days, but in any case not more than 10 working days. [...]

2(vi) Decision: the Bank will normally respond within 20 working days after receiving the request or clarification or, if a timely explanation for a further delay is provided (within 10 working days following receipt), no later than 40 working days. The Bank’s response shall either provide the requested information or a denial of the request in whole or in part [...]¹⁹

It is against these obligations under the 2014 PIP that the compliance of the Bank as regards the current issue will be evaluated in this Compliance Review

1.3. Analysis of compliance

The Bank Management’s acknowledgment of receipt of the Complainant’s request was sent to the Complainant on 4 November 2015, that is, within 5 working days of receiving the request as per the mandated timelines. Thereafter the Bank’s CSE Unit informed the Complainant that it required an additional 20 working days to provide the information requested. This notification was made in an email sent by the CSE Unit on 26 November 2015, that is outside the time period of 10 working days following receipt of the request (as provided by provision 2(iv) of the 2014 PIP). In this email, the CSE Unit explained that the additional time was required “*due to the complexity of the issue and the fact that some of the concerned staff [we]re currently travelling [...]*”.²⁰

The Board Report was finally released on 29 February 2016. As noted above, the Bank Management acknowledged that this response “*fell outside the 40 working day requirement of the implementing provisions of the PIP (Annex, section 2(vi))*.”²¹ According to the Bank “[t]his was

¹⁸ 2014 PIP, p.7.

¹⁹ 2014 PIP, p. 17

²⁰ Email dated 26 November 2016 from the CSE Unit to the Complainant. Not publicly available.

²¹ Bank Management Response, Annex 2 to the EAR, p. 16.

an unfortunate delay, resulting in the Complainant receiving the Board Report some 84 working days after the initial request." In its response, the Bank Management indicated that

[t]he main reason for the delays was the separation of confidential information from that which could be disclosed [...] In order to assess potential confidentiality issues among others, EBRD had to consult with Banking, Counsel, and the project proponents on commercial, proprietary and other information in the possession of EBRD which was not created by EBRD and could have been identified by its originator as being sensitive and confidential. This process of clarification included several iterations and took longer than initially expected.

Ensuring the confidentiality of the information contained in the Board Reports is the Bank's obligation under the 2014 PIP; and thus constitutes a legitimate reason for the delay in providing the documentation. However, in order to simultaneously fulfil its commitments for information disclosure under the 2014 PIP the Bank also has to ensure that (i) the Complainant is timely and duly informed of the reasons for the delay and (ii) it has in place an efficient and expedited process to identify and remove confidential information from the Board Reports.

The Bank acknowledges that at present *"it does not have a defined process for dealing with these requests"*²² and that there is a need for *"a documented approach to include notification of the Secretary General's Office, involvement by counsel and the relevant banking team."*²³ The absence of such a process has resulted in the inobservance of the timelines established in the 2014 PIP for the disclosure of the Board Report requested by the Complainant.

The Compliance Review Expert concludes that by disclosing the Board Report some 84 days after the request for information was filed, the Bank Management has failed to comply with the implementing provisions of the 2014 PIP, in particular Annex, section 2 (vi)).

2. Stakeholder engagement

2.1. Parties' positions

2.1.1. The Complainant's position

The Complainant argues that the Complaint *"indirectly"* concerns *"paragraph 15 of the Environmental and Social Policy as well as the EBRD commitment to the spirit, principles and ultimate goals on public disclosure and stakeholder engagement comprised in the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters."*²⁴ The Complainant clarified its position with respect to this ground of complaint in her letter dated 20 May 2016 and during the conference call with the Compliance Review Expert on 12 July 2016.

The Complainant contends that EBRD policy on transparency – both in the PIP as well as the ESP – is *"often weak and vague."*²⁵ Consequently, the Complainant alleges that the Bank practices on information disclosure and transparency are far from good practice and do not assist in facilitating meaningful dialogue and stakeholder engagement. For the Complainant, the failure to respect the timelines provided in the 2014 PIP for disclosing the Board Report triggers the non-compliance with the Bank's commitments to transparency, accountability and stakeholder

²² Ibid.

²³ Ibid.

²⁴ Complaint, Annex 1 to the EAR, p.13.

²⁵ Complainant's letter dated 20 May 2016. Not publicly available.

engagement contained in article 15 of the 2014 ESP. For the Complainant, the board reports are one of the few available options for civil society to obtain information on environmental and social issues.

In particular, the Complainant indicates how the late disclosure of the Board Report prevented Bankwatch to effectively engage with Bank staff and the Board:

[...] Bankwatch had meetings with EBRD staff, separate EDs and the whole Board at the end of January, nearly three months after the EPS Restructuring Board Doc was first requested. At this time Bankwatch and CEKOR did not have an idea of what information was presented to the Board before the approval of the new loan in October. This information was necessary for us, in order to more effectively prepare our issue paper, questions and presentations for the January meetings. Specifically we expected that most Board members were well aware of issues surrounding Kolubara, but we were not clear on the level of understanding within the Board about other major EPS operations, such as the Kostolac mining and power generation complex. We were expecting until the last minute the disclosure of the Board Doc to inform our participation better.²⁶

The Complainant further requires to understand how the Bank “*regard[s] its commitment to implementing the Aarhus Convention*” with respect to the disclosure of environmental and social information contained in Board documents (Article 2) and the collection and dissemination of environmental information during its due diligence process (Article 5).²⁷

Finally, while acknowledging improvements in transparency on environmental and social matters in both the Bank and its client EPS, the Complainant indicates that “*a lot more can be desired*” and that the Complaint is looking to achieve this:

[...] further improvements in EBRD's transparency, which can enable meaningful and informed public participation in decision-making with regards to resettlement of households in mining communities and bringing Serbia's mining and power sector in line with Serbia's obligations under the Energy Community Treaty and with EU climate policy.²⁸

The Complainant then indicates its expectation that as an outcome of the PCM process, the Bank receives recommendations as to

1) how to avoid delays in information disclosure and 2) how to practically implement its commitment to the Aarhus Convention, in order to effectively enable informed stakeholder participation in dialogue with the bank and in decision-making related to the bank's investments.²⁹

2.1.2. The Bank's response

The Bank Management noted in its response to the Complaint that:

The Bank Management believe[s] that Paragraph 15 of the Environmental and Social Policy has not been breached and is not the central issue in the Complaint, which related to a commitment in the Public Information Policy to respond to requests in a timely manner. Due to the volume and the complexity of the information requested, albeit with a delay, information was made available as soon as possible in the spirit of the principles of the

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

UNECE Aarhus Convention. The Commitment to the Aarhus Convention with regard to the disclosure of Institutional Information is within section B of the Public Information Policy, not the Environmental and Social Policy.³⁰

The Bank Management further explained its position in a letter dated 24 June 2016 that provided comments on the Complainant's letter of 20 May 2016; during the conference call with the Compliance Review Expert on 11 July 2016; and in an email sent to the PCM Officer on 26 July 2016.

In its letter of 24 June 2016, the Bank Management clarified that in their view "*inclusion of the ESP is not relevant to this particular Complaint about the timeliness of the provision on a public sector Board report.*"³¹ For the Bank Management, the Complaint is only about institutional information disclosure – which is found in the 2014 PIP; and the reference to paragraph 15 of the 2014 ESP referring back to the PIP "*does not add to either the review or compliance issue.*"³² The Bank further noted that Paragraph 15 of the 2014 ESP does not include an automatic cross reference to the 2014 PIP.³³

With respect to the Aarhus Convention, the Bank Management indicated that the Convention sets requirements on the governments or inter-governmental bodies that are parties to it. The Bank is not a government or intergovernmental organisation.³⁴ It further noted that

EBRD has not committed to implement the Aarhus Convention directly and is not a signatory to it. The EBRD has committed to the spirit and principles of the Convention, which is has built into the PIP and ESP PR10, and into the Project Complaint Mechanism, with regard to access to justice on environmental matters.³⁵

2.2. The Bank's policy obligations

The parties diverge over the application of article 15 of the 2014 ESP and the Aarhus Convention. Paragraph 15 of the ESP provides that

The EBRD is committed to the principles of transparency, accountability and stakeholder engagement. It will disclose, on an ongoing basis, summary information about the Bank's performance on environmental and social issues and will engage in meaningful dialogue with the Bank's stakeholders, in accordance with the EBRD Public Information Policy (PIP). The Bank will promote similar good practices amongst its clients.

This provision is contained in section B of the 2014 ESP that defines EBRD's commitments with respect to the environmental and social impacts of its projects. This provision is substantive in nature as it defines the responsibilities of the Bank. In particular, this provision commits the Bank to the **principles of transparency and stakeholder engagement**, explaining that these principles cover the disclosure of information and the engagement in meaningful dialogue with stakeholders. These principles are further referenced in the 2014 PIP and the performance requirements, that all Bank's projects are expected to meet. An analysis of these references,

³⁰ Bank Management Response, Annex 2 to the EAR, p. 17.

³¹ Bank's letter dated 24 June 2016. Not publicly available.

³² Ibid.

³³ Email of 26 July 2016. Not publicly available.

³⁴ Bank's letter dated 24 June 2016. Not publicly available.

³⁵ Bank's letter dated 24 June 2016. Not publicly available.

provides useful guidance to understand the content and scope of the principles of transparency and stakeholder engagement.

In fact, the relationship between these two principles is elucidated in the 2014 ESP performance requirement 10 when it refers to Good International Practice (GIP) relating to stakeholder engagement. GIP defines stakeholder engagement as “[a]n ongoing process which involves: (i) public disclosure of appropriate information; (ii) meaningful consultation with stakeholders; and (iii) an effective procedure or mechanism by which people can make comments or raise grievances.” While this GIP is referenced in a performance requirement applicable to the Bank’s clients, it reflects a growing international trend on the understanding of the content and scope of the principle of stakeholder engagement that applies to companies, governments and international organisations alike.³⁶ The 2014 PIP further clarifies the content and implementation of the principles of transparency and stakeholder engagement. Section C of the 2014 PIP, reiterates the link between transparency and availability and accessibility of information in the following terms:

Transparency: The EBRD is guided by the underlying presumption that, whenever possible, information concerning the Bank’s operational and institutional activities will be made available to the public in the absence of a compelling reason for confidentiality [...] In order to support the principle of transparency the Bank seeks to provide accurate and timely information regarding its operational activities.

Thus the Bank’s commitment to providing “*accurate and timely information*” is integral to the principle of transparency. Further, timely access to information is also an essential element of the other important principle of stakeholder engagement. This is because accurate and timely information enable stakeholders to engage in meaningful dialogue with the Bank and benefit from the institutional avenues made available by the Bank for such interaction. Information should not only be accurate but it should also be provided as and when needed to allow for substantial and purposeful interaction with the Bank. Without timely access to information, both the principle of stakeholder engagement and transparency are at risk of being devoid of content.

Timely access to information is ensured through the procedural provisions of the 2014 PIP. Specifically, the Annex to the 2014 PIP contains the “*Implementing procedural provisions for information requests and appeals*” detailing the steps and timelines for making a request for information and for the Bank to respond to these requests. These requirements are not merely procedural formalities; they are essential tools for the fulfilment of substantive obligations of the Bank and the realisation of substantive rights of the stakeholders. The important role of

³⁶ See for example UNEP 2015 Handbook for Stakeholder Engagement, available at http://www.unep.org/civil-society/Portals/24105/documents/Handbook/HANDBOOK%20FOR%20STAKEHOLDER%20ENGAGEMENT.%20UNEP%202015_interactive%20final.pdf; World Bank Guidance Notes on Tools for Pollution Management, available at <http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/UpdatedStakeholderEngagementandGrievanceMechanisms.pdf>; IFC Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets, available at https://www.ifc.org/wps/wcm/connect/938f1a0048855805beacfe6a6515bb18/IFC_StakeholderEngagement.pdf?MOD=AJPERES; European Commission Guidelines for Stakeholder Consultation, available at http://ec.europa.eu/smart-regulation/guidelines/ug_chap7_en.htm.

procedural requirements for the fulfilment of substantive obligations is widely acknowledged³⁷ and it is also the underlying rationale for the Aarhus Convention:

The Convention links the substantive right to a clean environment with a procedural one, guaranteeing all three limbs of the right: the right to information, the right to participate in environmental decision-making, and the right to access justice.³⁸

The Aarhus Convention gives expression to Principle 10 of the Rio Declaration that emphasised the relevance of procedural rights in an environmental context.³⁹

While the Bank is not a signatory to the Aarhus Convention and its provisions do not create legal obligations for the Bank, Section B of the 2014 PIP recognises the “*importance of the principles, purpose and ultimate goals of the UNECE Aarhus Convention.*” Thus, the Aarhus Convention becomes an important reference for the interpretation of the Bank’s policies and for guiding the Bank’s actions with respect to its environmental commitments.

Finally, although procedural requirements are essential tools for the fulfilment of substantive commitments, the inobservance of such requirements do not necessarily lead to the breach of substantive commitments. The concomitant breach of substantive commitments would need to be determined according to the specific circumstances, in a case-by-case analysis.

The Compliance Review concludes that article 15 of the 2014 ESP is relevant for assessing the Bank’s compliance in this specific instance, given the close relationship between the substantive commitments of the Bank and their realisation through the procedural provisions of the 2014 PIP. In addition, the Aarhus Convention while not creating legal obligations for the Bank, provides a relevant reference for the interpretation of the Bank’s policies and for guiding the Bank’s actions with respect to its environmental commitments.

It is against these obligations under the 2014 ESP and 2014 PIP that the compliance of the Bank as regards the current issue will be evaluated in this Compliance Review.

2.3. Analysis of compliance

While the Bank considers that the Complaint refers only to the late disclosure of a Board Report that is unrelated to environmental information, the Complainant sees the Board Report as an important part of the environmental and social information that can be made available by the Bank and that plays a role in enabling civil society to formulate its advocacy and strategy with the Bank. Timely disclosure of the Board Report is therefore closely linked to the capacity of the Complainant to engage with the Bank on environmental and social issues and a means for the implementation of the principle of stakeholder engagement.

³⁷ See for example the decision of the European Court of Human Rights (ECHR) in the cases *Guerra and other v. Italy*, *Taskin v. Turkey* and *Tatar v. Romania*, in D. Moeckli, S. Shah & S. Sivakumaran (Ed), “International Human Rights Law”, Oxford University Press, Second Edition 2010, at p. 607; see also chapter IV on information and communication on environmental matters, in Council of Europe “Manual on Human Rights and the Environment”, Second Edition 2012, available at http://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf.

³⁸ D. Moeckli, S. Shah & S. Sivakumaran (Ed), “International Human Rights Law”, Oxford University Press, Second Edition 2010, at p. 604.

³⁹ UNEP Compendium on Human Rights and the Environment: Selected International Legal Materials and Cases, available at http://www.unep.org/environmentalgovernance/Portals/8/publications/UNEP_Compndium_HRE.pdf, at p. 4.

The Complainant indicated how the delay in providing the Board Report prevented her organisation from participating in meaningful dialogue with the Bank as they could not properly prepare for the meeting with the Board and other interactions with the Bank Management. In her letter dated 20 May 2016, the Complainant explained:

[...] Bankwatch had meetings with EBRD staff, separate EDs and the whole Board at the end of January, nearly three months after the EPS Restructuring Board Doc was first requested. At this time Bankwatch and CEKOR did not have an idea of what information was presented to the Board before the approval of the new loan in October. This information was necessary for us, in order to more effectively prepare our issue paper, questions and presentations for the January meetings. Specifically we expected that most Board members were well aware of issues surrounding Kolubara, but we were not clear on the level of understanding within the Board about other major EPS operations, such as the Kostolac mining and power generation complex. We were expecting until the last minute the disclosure of the Board Doc to inform our participation better.

While the Bank Management provided the opportunities and institutional instances for interacting with the Complainant, her capacity and that of her organisation to engage in meaningful dialogue with the Bank Management was hindered by the delay in disclosing the Board Report which was in turn the result of the inobservance of the procedural provisions of the 2014 PIP.

Given the role of the procedural requirements of the 2014 PIP in the adequate implementation of the substantial commitments of the Bank under the 2014 ESP, it is therefore important that the Secretary General's Office and the Bank staff in charge of the implementation of the PIP work closely with the Environmental and Sustainability Department (ESD) to improve their understanding of the interaction between the procedural provisions and the Bank's commitments under the 2014 ESP. This will also ensure that ESD is empowered to effectively carry out the 2014 ESP.

The Compliance Review Expert therefore concludes that the Bank has failed to comply with article 15 of the 2014 ESP with respect to its commitment to stakeholder engagement, in particular by failing to ensure meaningful dialogue with the Complainant.

Part IV: Recommendations

Since the Compliance Review Expert concludes that the Bank is in non-compliance with a Relevant EBRD Policy, the PCM RP 44 requires the Compliance Review Report to provide recommendations to:

- a. address the findings of non-compliance at the level of EBRD systems or procedures in relation to a Relevant EBRD Policy, to avoid a recurrence of such or similar occurrences; and/or
- b. address the findings of non-compliance in the scope or implementation of the Project, taking account of prior commitments by the Bank or the Client in relation to the Project; and
- c. monitor and report on the implementation of any recommended changes.

1. Recommendations to address the findings of non-compliance at the level of EBRD systems or procedures

The recommendations will address both the need to establish a defined process for dealing with the request for disclosure of public sector Board Reports and the need for this process to ensure

that ESD is enabled to effectively implement the 2014 ESP, in particular the commitment to stakeholder engagement and meaningful dialogue.

In its response, the Bank indicates that it had identified a gap in consistency with respect to the process for dealing with the request for disclosure of public sector Board Reports and that it had already started to address this gap. In particular, the Bank Management indicates that the Secretary General's Office will begin work on a 'guidance note' to clarify the appropriate timelines for responding to a request for information in accordance with the PIP obligations and that this proposed 'guidance note' will form a part of the existing PIP Implementation Guidelines.⁴⁰

The Compliance Review Expert welcomes these efforts and calls on the Bank Management to submit a Management Action Plan (MAP) to ensure that the preparation of this 'guidance note':

- (a) is inclusive and participatory, specially that the Secretary General's Office (i) liaises with ESD to guarantee that the timelines and procedures enable ESD to effectively implement the 2014 ESP; and (ii) engages with relevant stakeholders, in particular with civil society organisations to ensure a comprehensive understanding of their needs and concerns when it comes to timely access to information relating to public sector Board Reports.
- (b) takes into account relevant good international practice. In this respect, the Compliance Review Expert suggests considering the recommendations of the "Task Force on Access to Information"⁴¹ as well as whether a proactive disclosure of public sectors Board Reports would be convenient in light of the number of such requests received over the previous year.⁴²
- (c) includes a mechanism to review periodically the effectiveness of the guidance.

In addition, the Bank Management should take note of the issues raised and addressed in this complaint for future revisions of the 2014 PIP in order to reinforce its procedures and make of them useful tools for implementing its commitments under the ESP.

2. Monitoring and reporting on the implementation of any recommended changes

The Bank Management should report on the progress and development of the 'guidance note' and on the outcome of this process.

⁴⁰ Bank Management Response, Annex 2 to the EAR, p. 16.

⁴¹ Among others, the Task Force on Access to Information purports to "Continue[s] strengthening implementation of the Convention's provisions on access to information, including through promoting exchange of information, experiences, challenges and good practices concerning public access to information on the matter." See <http://www.unece.org/env/pp/tfai.html>.

⁴² While the Bank Management indicates that an average of 50 public sector projects are approved per year and that only six requests for Board reports have been received in total, including the request referred to in the Complaint, it is important to highlight that all of these requests have been in the past year alone. This might signal an increase in interest and consequent number of requests.

List of Abbreviations

2014 ESP: 2014 Environmental and Social Policy

2014 PCM RPs: 2014 PCM Rules of Procedure

2014 PIP: 2014 Public Information Policy

CSE Unit: EBRD Civil Society Engagement Unit

EAR: Eligibility Assessment Report

EPS: Elektroprivreda Srbije

ESD: EBRD Environment & Sustainability Department

MAP: Management Action Plan

PCM: Project Complaint Mechanism

ToRs: Terms of reference