

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

**PROJECT COMPLAINT MECHANISM
ELIGIBILITY ASSESSMENT REPORT**

COMPLAINT: EPS POWER II PROJECT

REQUEST NUMBER: 2013/02

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EXECUTIVE SUMMARY

On 16 August 2013 a Complaint was submitted to the Project Complaint Mechanism (PCM) by Nataša Dereg of Serbian NGO CEKOR, representing Milan Simić and Dragan Simić (father and son) of Radljevo, Serbia, and seeking a Problem Solving Initiative and a Compliance Review in respect of the EBRD's loan to Serbia's state owned electric company Public Enterprise Elektroprivreda Srbije (hereinafter EPS) for the EPS Power II Project (hereinafter Project). The Bank provided a loan of 60 million euros to EPS towards a total project cost of 150 million euros. The EBRD loan for the EPS Power II Project was approved by the EBRD Board on 15 June 2003 and was fully disbursed in April 2011.

The Complainants believe the amount of compensation they have received from EPS as a result of involuntary resettlement was not adequate because it did not cover the price of some of the plants on their plots of land that were expropriated as a result of expansion of Tamnava West mine. Milan and Dragan Simić previously brought legal proceedings against the company, requesting a review of the amount of compensation paid to them. In 2007 local municipal determining that while EPS was liable for the buildings and related property, meadow and established trees to the value of RSD 811,148.13, the Company was not liable for the additional RSD 517,530 claimed by Simić family for new rose and fruit trees. The court established that these new trees were planted with an aim of increasing the amount of compensation; the decision was largely based on the assessment of an independent agricultural assessor appointed by the court.

On 23 August 2013 the Complaint was registered pursuant to PCM Rules of Procedure (RP) 10, and was subsequently posted on the PCM website, pursuant to PCM RP 13. Independent PCM Expert Graham Cleverly was appointed as an Eligibility Assessor to conduct an Eligibility Assessment jointly with the PCM Officer in accordance with PCM RP 17. Mr Cleverly's contract with the PCM expired during the course of the Eligibility Assessment and the report was finalised solely by the PCM Officer, per requirements of the PCM RP 48.

In determining the eligibility of the present Complaint, the Eligibility Assessors examined the requirements of PCM RP 18 and 21 to determine if the Complaint is eligible for a Problem-solving Initiative, and the requirements of PCM RP 19 and 23 to determine if the Complaint is eligible for a Compliance Review. The Complaint was also assessed against the requirements of the PCM RP 24 which sets out general criteria that disqualify a Complaint for a review by the PCM.

PCM RP 18b(ii) requires that for a Complaint to be held eligible for a Problem-solving Initiative it must relate to a project where the bank maintains a financial interest, in which case, the Complaint must be filed within twelve (12) months following the last date of disbursement of ERBD funds. Eligibility Assessors established that the last disbursement of the funds for EPS Power II project was made in April 2011, two years and four months before the Complaint was filed with the PCM on 16 August 2013. Therefore, the Complaint

does not satisfy the requirement of the PCM RP 18 and is **not eligible for a Problem-solving Initiative**.

On the basis of the assessment set out in the current report, the Eligibility Assessors determine that the Complaint satisfies the requirement of the PCM RP 19, 20, 21 and 23 and that none of the provisions of the PCM RP 24 are applicable to the current Complaint. **Therefore, the Complaint is found eligible for a Compliance Review.**

The Complainants identified three interlinked elements of alleged non-compliance: 1) allegation of failure to develop a Resettlement Action Plan; 2) allegation of failure to establish a visible grievance mechanism; and 3) allegation of failure to conduct public consultation. During the eligibility assessment, PCM established that a Resettlement Action Plan had been developed and is available. Therefore, the two remaining grounds of the alleged non-compliance that will be subject to the Compliance Review are:

- Whether EBRD failed to ensure the implementation of the requirements of the 1996 Environmental Policy on public consultation in respect to the Project; and
- Whether EBRD has failed to ensure the implementation of the requirements of the 1996 Environmental Policy regarding establishment of a grievance mechanisms.

The report includes also Terms of Reference for the Compliance Review.

Project Complaint Mechanism
Eligibility Assessment Report
Complaint: EPS Power II Project, Serbia

I. Factual Background

1. On 16 August 2013 a Complaint was submitted to the Project Complaint Mechanism (PCM) by Nataša Dereg of Serbian NGO CEKOR, representing Milan Simić and Dragan Simić (father and son) of Radljevo, Serbia, and seeking a Problem-solving Initiative and a Compliance Review in respect of the EBRD's loan to Serbia's state owned electric company Public Enterprise Elektroprivreda Srbije (hereinafter EPS) for the EPS Power II Project (hereinafter Project).
2. The EBRD loan helped to fund a power system control and communications upgrades to restore links with the Western European transmission system, as well as to increase efficiency of power supply. The project also contributed to modernisation and stability of fuel supply through the restructuring of the EPS lignite mining organisation and provision of equipment to increase the production at the Tamnava West Mine and financial and customs fees and taxes. The Bank provided a loan of 60 million euros to EPS towards a total project cost of 150 million euros. The EBRD loan for the EPS Power II Project was approved by the EBRD Board on 15 June 2003 and was fully disbursed in April 2011¹.
3. The Complainants believe the amount of compensation they have received from EPS as a result of involuntary resettlement was not adequate because it did not cover the price of some of the plants on their plots of land that were expropriated as a result of expansion of Tamnava West mine. Milan and Dragan Simić previously brought legal proceedings against the company, requesting a review of the amount of compensation paid to them. Complainants provided the PCM with a copy of the decision of Municipal Court of Ud from 2007, determining that while EPS was liable for the buildings and related property, meadow and established trees to the value of RSD 811,148.13, the Company was not liable for the additional RSD 517,530 claimed by Simić family for new rose and fruit trees.

¹ See Project Summary Document at <http://www.ebrd.com/english/pages/project/psd/2002/27005.shtml> and the Management Response to the Complaint annexed to this report.

4. The court established that these new trees were planted with an aim of increasing the amount of compensation. The court based its decision on the fact that these trees were planted after it was publicly known that the plot of the land in question would be expropriated. In its decision, the court also relied on the assessment of an independent agricultural assessor appointed by the court, which concluded that the trees were planted to increase the amount of the compensation.
5. The plot of land in question was since absorbed by Tamnava West field, making it impossible for the PCM to independently examine the land or the trees and establish the facts. Under the circumstances, the PCM has to rely on the report of the independent agricultural assessor appointed by the court in 2007, as the only source of an independent assessment of the situation.
6. On 23 August 2013 the Complaint was registered pursuant to PCM Rules of Procedure (RP) 10, and was subsequently posted on the PCM website, pursuant to PCM RP 13. Independent PCM Expert Graham Cleverly was appointed as an Eligibility Assessor to conduct an Eligibility Assessment jointly with the PCM Officer in accordance with PCM RP 17.

II. Steps Taken in the Eligibility Assessment

7. The Eligibility Assessors have undertaken a general examination of the Complaint to determine whether it satisfies the applicable eligibility criteria as set down in the PCM Rules of Procedure (RP). They have also taken account of the response to the Complaint received from EBRD Management², information received from the Client and the Complainant, as well as all previous correspondence between the Complainant and the Bank Management on the matter. Eligibility Assessor Graham Cleverly visited Serbia for meetings with the Simić family and their representatives from CEKOR Radjlevo and with EPS Management and the relevant EBRD staff in Belgrade.
8. Along with the original Complaint, the Eligibility Assessors also considered further clarifications on the case provided in an e-mail from CEKOR dated 4th November 2013. In particular, that communication provided clarification regarding Complainants request for a Compliance Review, taking into consideration that the project in question has been approved under the EBRD Environmental Policy 1996, not the Environmental and Social Policy 2008, as the initial Complaint erroneously stated.

² See Bank Management Response to the PCM annexed to this report.

III. Summary of the Relevant Parties' Positions

Position of the Complainants

9. The Complaint alleges that Milan and Dragan Simić were not compensated for the loss of some of the trees on part of their land, which was acquired by EPS as part of the Tamnava West mine expansion. The Complainant alleges the Simić family, who live only 200-300 metres from the edge of the Tamnava West pit, have been subject to a non-transparent forced expropriation model that lacked a proper grievance mechanism and have suffered damages. The Complainant is seeking payment to Milan and Dragan Simić of 10,000 euros (their estimation of the value of lost plants), plus interest from 2007. As mentioned before, the Simićs brought legal proceedings against the EPS demanding increased compensation for their expropriated property. The court decision was only partially in their favour and found the Company to be liable for the constructions and the established trees on the land plots, but not for the new rose trees and fruit trees. The Complainants were not satisfied with the outcome of the mentioned court proceedings, which they believe to be illogical and unfair. According to the Complaint, they missed their opportunity to appeal against that court decision because of the illness of Mr Dragan Simić at the time and because the court process was considered by the Simić family to be an “expensive and unreachable solution”³. The letter from CEKOR to the PCM from 4 November 2013 further clarifies that an appeal was made to the Supreme Court of Serbia, which reinstated the decision of the Municipal Court of Ud. Therefore, the “missed appeal” mentioned in the original complaint refers to the appeal to the Constitutional Court of Serbia, which, according to the same letter, the family also considered.
10. The Complaint also alleges the violation of certain provisions of Performance Requirement 5 (Land Acquisition, Involuntary Resettlement and Economic Displacement) of the EBRD’s 2008 Environmental and Social Policy (ESP) concerning loss of access to natural resources (PR 5.7), inadequate consultation (PR 5.12), invisible grievance mechanism (PR 5.13) and no land-based compensation or offer of full replacement cost (PR 5.30).
11. After clarification from the PCM the Complainants accepted that the Project has been approved under the EBRD’s Environmental Policy 1996 which was in force at the time, and therefore Performance Requirement of the 2008 Environmental and Social Policy 2008 are not applicable to the mentioned project and to this case. Subsequently, in the letter dated 4 November 2013,

³ See the Complaint annexed to this report.

the Complainants claimed that, in relation to the compensation of the Simić family, the requirements of the 1996 Environmental Policy were also breached.

Position of EBRD Management

12. In its response to the Complaint, the EBRD Management acknowledges its correspondence with the Complainant prior to the Complaint being submitted to the PCM. The Management stresses that in their communications with CEKOR they repeatedly expressed readiness to “discuss the issue and review any relevant information” during a monitoring visit to Kolubara, which was planned for September 2013. According to the Management, the PCM Complaint was filed before they had an opportunity to discuss the matter with the Complainants.
13. In regards to the court decision, the management of the EBRD states that, while the Bank was not a party to the court proceedings and did not receive formal legal advice regarding to its outcome, it would appear that the Simić family has had an opportunity for legal redress through the Serbian court system.
14. In regards to the allegations of non-compliance with the requirements of the relevant policy, the Management clarifies that the 2008 EBRD Environmental and Social Policy is not applicable to the EPS II project as the project was appraised under the 1996 Environmental Policy of the EBRD. While the 1996 Policy did not contain specific requirements with respect to involuntary resettlement, a general statement on environmental standards envisaged that in the absence of specific EU requirements, the Bank would rely on national and World Bank requirements. The Management further clarifies that the 1996 policy recognised the importance of public consultation and required that, at a minimum, national requirements, as well as EBRD’s own public consultation procedure as described in the Bank’s 1996 Disclosure of Information Policy and 1996 Environmental Procedures, be met.
15. Regarding the appraisal process for the project, the Bank’s Management states that the Project was categorised “A/1” under the 1996 Environmental Policy which therefore required an Environmental Impact Assessment (EIA) of the proposed activities and an audit of existing operations. The EIA (previously) commissioned by the European Agency for Reconstruction, was extended to meet the Bank’s due diligence requirements and the Bank reviewed the issue of expropriation and resettlement associated with mine extension during and after the implementation of the Bank Project. During due diligence the Bank also commissioned an independent consultant,

specialising in the World Bank Safeguard Policy on Involuntary Resettlement to review the on-going resettlement process, and to advise the Bank on its adequacy. This report was annexed to the EIA and was subject to public consultation.

16. In its response, the Management also states that public consultation meetings were carried out by the Client, as per the requirements of the authorities, and the Bank supported the Client in these meetings and observed the consultation. The Client committed to a programme of on-going consultation with the affected public and established a unit internally with this specific remit. The Management states that the public consultation process on the EIA did not attract much local, national or international attention or concern.
17. The Management also confirms that in response to a request from CEKOR the Resettlement Action Plan (RAP) for the EPS II Project has been forwarded to the Complainant (with individuals' names and compensation amounts removed for privacy reasons).
18. Regarding the availability of a grievance mechanism, the Management of the Bank notes that the process of the review of grievances was outlined in the RAP and the responsibility for the review of grievances was placed with the government of Serbia. The Management further clarifies that the requirement for the Client to develop its own grievance mechanism did not appear in EBRD requirements until the adoption of the 2008 Environmental and Social Policy. The Management maintain that in taking the Client to court in 2007, the Complainant was using the specific grievance process outlined in the RAP, managed by the relevant authorities.
19. Further to the above, EBRD Management believes that the project, and in particular the resettlement process that was carried out for the purposes of the Project, was in compliance with the requirements of the 1996 Environmental Policy in force at that time.

Client's position

20. While the PCM does not have a written document outlining Client's position, PCM expert Graham Cleverly had an extensive meeting with relevant representatives of EPS during his visit to Serbia as part of the Eligibility Assessment, during which they expressed company's position regarding the Simic case.

21. Based on that meeting, we understand that the Client believes that the Simic family had adequate chance to address their grievances through a legal process, which they believe objectively examined all facts of the case and made a fair finding which was partially in favour of the Simic family. The Client believes that by accepting the compensation established by the court, the Simices accepted the court decision and that reopening of the case at this stage would not be productive.
22. The Client also maintains that public consultations were held according to the requirements of the Bank's policy in force at the time and that addressing grievances, as provided by the RAP, was the responsibility of local authorities.

IV. Determination of Eligibility

23. In determining the eligibility of the present Complaint, the Eligibility Assessors examined the requirements of PCM RP 18 and 21 to determine if the Complaint is eligible for a Problem-solving Initiative, and the requirements of PCM RP 19 and 23 to determine if the Complaint is eligible for a Compliance Review. The Complaint was also assessed against the requirements of the PCM RP 24 which sets out general criteria that disqualify a Complaint for a review by the PCM.

General Eligibility Criteria

Standing to Complain

24. Milan and Dragan Simić, as individuals directly affected by the Project, both enjoy standing to make the present Complaint under the PCM RP 1 and PCM RP 24. Meanwhile, CEKOR, represented by Nataša Djereg, are authorised to represent Milan and Dragan Simić, according to the requirements of the PCM RP 5.

PCM Functions Requested

⁴ According to the PCM RP 1 one or more individual(s) located in an Impacted Area, or who has or have an economic interest in an Impacted Area, may submit a Complaint seeking a Problem-solving Initiative. Meanwhile, PCM RP 2 states that one or more individual(s) or Organisations may submit a complaint seeking a Compliance Review.

25. Pursuant to paragraphs 17 and 20a of the PCM Rules of Procedure, the Eligibility Assessors must, in making their determination on the eligibility of a Complaint, take into account the PCM function(s) requested by the Complainant. In this case, Complainants are seeking both a Problem-solving Initiative and a Compliance Review.

Indication of the Outcome Sought

26. In determining the eligibility of the Complaint and in accordance with PCM RP 20b, the Eligibility Assessors also considered the outcome that the Complainants are seeking in bringing the Complaint to the PCM. As indicated in the Complaint and based on the subsequent communication with the Complainants and their representatives CEKOR, the outcome sought is settlement by EPS of the alleged damages (i.e. the value of plants and fruit trees), estimated at EUR 10 000, plus the interest from 2007.

Copies of Correspondence

27. PCM RP 20c requires that a Complaint should include, if possible, copies of all correspondence, notes, or other materials related to previous communications with the Bank or other Relevant Parties. The Complaint refers to the previous correspondence with the Bank on this matter and also includes copies of relevant correspondence.
28. Bank Management's Response to the Complaint also makes reference to communications with the Complainant's representative CEKOR on the Simić family case, but also notes that the Management did not have enough time to conduct a monitoring visit before the Complaint was submitted to the PCM.

Eligibility for a Problem-solving Initiative

29. PCM RP 18b(ii) requires that for a Complaint to be held eligible for a Problem-solving Initiative it must relate to a project where the bank maintains a financial interest, in which case, the Complaint must be filed within twelve (12) months following the last date of disbursement of ERBD funds. Eligibility Assessors established that the last disbursement of the funds for EPS Power II project was made in April 2011, two years and 4 months before the Complaint was filed with the PCM on 16 August 2013. Therefore, the Complaint does not satisfy the requirement of the PCM RP 18 and cannot be considered for a Problem-solving Initiative.
30. **Therefore, the Eligibility Assessors found the Complaint ineligible for a Problem-solving Initiative.**

Eligibility for a Compliance Review

Timing requirement

31. PCM RP 19a requires that “the Complaint must relate to a Project which had 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. As is evident from the project documentation, the EPS Power II Project was approved by the Board of Directors of the ERBD on 15 June 2003, which satisfies the requirements of the PCM RP19a.

Harm Caused or likely to be caused by the Project

32. PCM RP 19b requires that for a Complaint to be eligible for a Compliance Review, the Complaint must “describe the harm caused or likely to be caused by the Project”. In this specific case there is a clear claim of material harm in the form of the value of plants for which the Complainants believe they should have been compensated (Complainants estimate it at EUR 10,000), plus the interest since 2007. Therefore, the Complaint also satisfies the requirements of the PCM RP 19b.

Relevant EBRD Policy

33. As mentioned above, in the initial Complaint the Complainants erroneously identified the 2008 Environmental and Social Policy of the EBRD as the Relevant Policy. After clarification from the PCM and the Management⁵ however, the Complainants acknowledged that the requirements of the 2008 Environmental and Social Policy are not applicable to the project in question. However, they maintained that requirements of the 1996 Environmental Policy, as well as EU and World Bank standards applicable at the time were also breached. In particular, the Complaint claims that the requirements of the World Bank Operational Policy 4.12 on Involuntary Resettlement 2001, to which the 1996 Environmental Policy defers in case of absence of relevant specific EBRD or EU standards, were also breached during the resettlement of Simić family.

Actions or Inactions that are the Responsibility of the Bank

34. PCM RP 23a requires that for a Complaint to be eligible for a Compliance Review, the Eligibility Assessors need to consider whether the Complaint “relates to actions or inactions that are the responsibility of the Bank”. After clarifications regarding the applicable policy, in additional correspondence with the PCM the Complainants allege the Bank’s failure to comply with the

⁵ This was done in an additional letter sent to the PCM on 4 November 2013. The letter is not enclosed to the original Complaint as it did not include substantially new information, but rather clarifications on the issues covered in the Complaint.

1996 Environment Policy, in particular by failing to ensure that the Client developed a RAP and failing to involve the public in “any procedures that can be considered as integral part of resettlement planning”⁶. The Complainants identified three interlinked elements of alleged non-compliance: (1) allegation of failure to develop a RAP; (2) allegation of failure to establish a visible grievance mechanism; and (3) allegation of failure to conduct public consultation..

35. While the 1996 Environmental Policy of the Bank does not have a specific provision on involuntary resettlement, the Environmental Standards section of the policy states:

‘EBRD operations will be structured to meet national and EU environmental standards or, where EU standards do not exist, national and World Bank standards.’⁷

Thus, the World Bank Operational Policy 4.12 on Involuntary Resettlement is the relevant standard applicable to the Project.

36. World Bank OP 4.12 “Resettlement Planning, Implementation and Monitoring” issued in December 2001 and revised in April 2013, in the section on Required Measures and further in the section Resettlement Planning, Implementation and Monitoring, places the responsibility for the preparation and implementation of the RAP and for the conduct of public consultation with the borrower.

37. In particular, paragraph 6 of the OP 4.12 states:

‘...*the borrower* prepares a resettlement plan or a resettlement policy framework ... that covers the following:

(a) The resettlement plan or resettlement policy framework including measures to ensure that the displaced persons are

(i) informed about their options and rights pertaining to resettlement;

(ii) consulted on, offered choices among, and provided with technically and economically feasible resettlement alternatives...’⁸

38. Paragraph 18 of the World Bank OP 4.12 states, “*The borrower is responsible* for preparing, implementing, and monitoring a resettlement plan, a resettlement policy framework, or a process framework (the “resettlement

⁶ See the letter from CEKOR to PCM, dates 4 November 2013, annexed to this report.

⁷ 1996 Environmental Policy of EBRD, page 4

⁸ Emphasis added.

instrument”), as appropriate, that conform to this policy”. In the next paragraph OP 4.12 also states that “[t]he borrower informs potentially displaced persons at an early stage about the resettlement of the project and takes their views into account in project design”⁹.

39. In the course of the Eligibility Assessment it was conclusively established that the Client (borrower) did create a Resettlement Action Plan and this has been provided to the Claimants.
40. As regards the second allegation relating to consultation, while the World Bank OP4.12 provides standards for public consultation specifically in the context of resettlement, the EBRD’s own requirement for public consultation for projects in general are outlined in the 1996 Environmental Policy and in the Annex I on “Consultation with the Public” of the corresponding Environmental Procedures 1996. Annex 1 of the Environmental Procedures provides that:

“In addition to the involvement of government agencies and elected officials, those potentially affected by a significant new, extended, or transformation-conversion operation, which has been classified as “A” level, should be consulted, together with non-governmental organisations, so that they have the opportunity to express their concerns and views before a financial decision is made”.¹⁰

It further states that public consultation will also “afford the public the opportunity to influence operational design, including location, technological choice and timing”. Both documents stress that the information gained during public consultation will inform Bank’s own due diligence of the client and the project. The Environmental Policy states that “The EBRD believes that effective public consultation is a way of improving the quality of operations.”

41. Therefore, it is clear that the Bank had a responsibility to ensure that an adequate public consultation had been conducted. .
42. As for the allegation relating to the establishment of a grievance mechanism, the Environmental Policy 1996, including its Environmental Procedures do not have requirement for establishment of a grievance mechanism. However

⁹ See the WB OP4.12 at. Emphasis added.

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0..contentMDK:20064610~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

¹⁰At: http://www.ebrd.com/downloads/about/policies/environmental_procedure/1996-09-01_Environmental_Procedures-English_publication.pdf

the World Bank OP4.12 has such a requirement. In particular paragraph 13 of the document has the following provision:

“13. For impacts covered under para. 3(a)11 of this policy, the Bank also requires the following:

(a) Displaced persons and their communities, and any host communities receiving them, are provided timely and relevant information, consulted on resettlement options, and offered opportunities to participate in planning, implementing, and monitoring resettlement. *Appropriate and accessible grievance mechanisms are established for these groups*¹².”

43. Thus, Eligibility Assessors believe that the Complaint’s claim regarding the Bank’s alleged failure to ensure that there was adequate public consultation and that an adequate grievance mechanism was established satisfy the requirement of the PCM RP 23a, because under the 1996 Environmental Policy those are clearly actions that are the responsibility of the Bank. .

More than a Technical Violation of a Relevant EBRD Policy

44. PCM RP 23b requires that for a Complaint to be eligible for a Compliance Review, it must relate to “more than a technical violation of a relevant EBRD Policy unless such technical violation is alleged to have caused harm”. It is clear that the alleged failure to ensure that appropriate public consultation takes place and the failure ensure that an adequate grievance mechanism was established would constitute more than “a minor technical violation” of the EBRD and World Bank safeguards applicable to this project.

Failure of the Bank to Monitor Client Commitments

45. PCM RP 23c requires the Eligibility Assessors to consider whether the Complaint raises issues that relate to a failure of the Bank to monitor Client’s commitments pursuant to Relevant EBRD Policy. Both the 1996 Environmental Policy and the corresponding Environmental Procedures 1996 clearly lay down a requirement for the Bank to monitor Client’s implementation of the applicable environmental standards. In its General Principles section the 1996 Environmental Policy provides:

¹¹WB OP4.12. at

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

^{3(a)} refers to the following direct economic and social impacts resulting from Bank projects:

“(a) the involuntary⁷ taking of land⁸ resulting in

(i) relocation or loss of shelter;

(ii) lost of assets or access to assets; or

(iii) loss of income sources or means of livelihood, whether or not the affected persons must move to another location;”

¹² Emphasis added.

‘The EBRD will ensure through its environmental appraisal process that its projects are environmentally sound and that their environmental performance is also monitored.’

46. Therefore, although the Bank did not have a direct responsibility to develop and implement a RAP, it is clear that under the requirements of the applicable 1996 Environmental Policy the Bank had a direct responsibility to monitor Client’s implementation of the RAP, including the conduct of public consultation and establishment of a grievance mechanism. Consequently, the Complaint satisfies the condition of the PCM RP 23c.

Other Factors Excluding Eligibility

47. PCM RP 24 sets out a list of factors, any of which if found to apply would render a Complaint ineligible. In the present Complaint there is nothing to suggest that it “was filed fraudulently or for frivolous or malicious purpose”¹³, nor that “its primary purpose is to seek competitive advantage through the disclosure of information or through delaying the Project”¹⁴. The Complaint also does not raise allegations of fraud, related to procurement matters¹⁵, relate to “Article 1 of the Agreement Establishing the Bank, the Portfolio Ratio Policy or any other specified policy”¹⁶, or relate to “the adequacy or suitability of EBRD policies”¹⁷. Though there is nothing to suggest that the issues of non-compliance alleged in the present Complaint have been dealt with by the accountability mechanism of any parallel co-financing institution, such a review by another accountability mechanism would not in any case disqualify a Complaint seeking a Compliance Review from being processed by the PCM¹⁸.

V. Conclusions

48. On the basis of the assessment set out above, the Eligibility Assessors determine that the Complaint satisfies the requirement of the PCM RP 19, 20, 21 and 23 and that none of the provisions of the PCM RP 24 are applicable to the current Complaint. **Therefore, the Complaint is found eligible for a Compliance Review.**

¹³ PCM RP 24a.

¹⁴ PCM RP 24b.

¹⁵ PCM RP 24c.

¹⁶ PCM RP 24d.

¹⁷ PCM RP 24e.

¹⁸ PCM RP 24f.

COMPLAINT: EPS POWER II PROJECT
Request Number: 2013/02

Terms of Reference (TOR) for the Compliance Review

Compliance Review Expert

1. 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

2. 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 the EBRD Environmental Policy 1996. If in the affirmative, the Compliance Review should recommend remedial actions in accordance with PCM RP 40.
3. 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 site visits, and employ such other methods as the Expert may deem appropriate, as per PCM RP 37.
4. Upon completion of the Compliance Review, the Compliance Review Expert will prepare a Compliance Review Report setting out his/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.
5. 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.

6. The Compliance Review shall confine itself to the Compliance Review issues raised in the present Complaint¹⁹. It shall not go beyond the parameters of the Complaint to address other issues.

Time Frame

7. The Compliance Review will commence when the Eligibility Assessment Report containing these Terms of Reference is publicly released and posted on the PCM website.
8. 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, this time period may be extended by the PCM Officer 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

9. As an initial step, the Compliance Review Expert will determine the precise requirements, in the specific context of the present Project, of the provisions of the 1996 Environmental Policy, in respect of which non-compliance is alleged in each of the grounds of the Complaint. Such provisions notably include not only the 1996 Environmental Policy, but also WB OP 4.12 on "Resettlement Planning, Implementation and Monitoring" issued in December 2001 to which the 1996 Environmental Policy defers. The Compliance Review Expert should note that the WB OP 4.12 has been revised since then and it will be important to ensure that the Complaint is reviewed against the 2001 version of the OP 4.12.
10. The Compliance Review process will examine the core questions of compliance raised in the Complaint with a view to identifying the central elements of the Compliance Review, including (without limitation):
 - Whether EBRD failed to ensure the adequacy of the public consultation in accordance with the requirements of the 1996 Environmental Policy?
 - Whether the reliance on the Serbian Court system constituted an adequate grievance mechanism and therefore satisfied the requirements of the 1996 Environmental Policy?

¹⁹ Request No. 2013/02. Annexed to this report.

11. Notwithstanding Paragraph 57 above, the Compliance Review Expert retains the authority to identify and frame the precise compliance questions to be addressed in the course of the Compliance review. However, any elements which are beyond the scope of the Complaint will be excluded.

Procedure: Conduct of the Review

12. The Compliance Review Expert may conduct the Compliance Review process in such a manner as s/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:
 - a. Review the Complaint to identify the compliance issues to be included in the Compliance Review, specifically whether EBRD complied with the elements of the 1996 Environment Policy in respect of which the Complaint alleges non-compliance;
 - b. Review all documentation, including internal memos and e-mail exchanges relevant to the Complaint;
 - c. Consult extensively with EBRD staff involved in the Project, as available including personnel from the Bank's Environment and Sustainability Department, the Project Team Group, and the relevant EBRD Resident Office;
 - d. Solicit additional oral or written information from, or hold meetings with, the Complainant, any Relevant Party and any other party, such as the competent national authorities responsible for environmental protection, expropriation and for the permitting of such projects and for addressing grievances;
 - e. Conduct a visit to the Project site to ascertain 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;
 - f. Request the PCM Officer to retain additional expertise if needed;
 - g. 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;
 - h. Take any other action as may be required to complete the Compliance Review within the required time-frame.

Procedure: General

13. 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.

14. 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 the confidentiality of sensitive commercial information. 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 owns such document.
15. The Compliance Review Expert shall take care to minimise disruption to the daily operations of all parties involved in the Compliance Review process, including relevant Bank staff.
16. Generally, Bank staff 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 relating to submission of written materials, provision of information and attendance at meetings. It is expected that all Relevant Parties will make best efforts to cooperate with the Compliance Review Expert, who will report to the PCM Officer where the actions or lack of action by any Relevant Party hinders or delays the conduct of the Compliance Review.

Compliance Review Report

17. In accordance with PCM, RP 38, the Compliance Review Report shall include a summary of the facts and of the allegations in the Complaint, and the steps taken to conduct the Compliance Review.
18. 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.
19. 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

20. 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.

ANNEXES

ANNEX 1: COMPLAINT

Sample Complaint Form



European Bank
for Reconstruction and Development

In order for the PCM to address your complaint,
you must provide the following information:

<p>1. Name of the Person(s) or Organisation(s) filing the Complaint ("the Complainant").</p> <p>NGO .Cekor.....</p> <p>.....</p> <p>.....</p>
<p>2. Contact information of the Complainant (please include email address and phone number if possible).</p> <p>.CEKOR, Korzo 15/13, 24.000.Subotica, SERBIA,.....</p> <p>Fax:381 24 523 191.....</p> <p>www.cekor.org.....</p>
<p>3. Is there a representative making this Complaint on behalf of the Complainant?</p> <p>Yes <input checked="" type="checkbox"/> (if yes, please provide the Name and Contact information of the Representative):</p> <p>Milan.Simić, Radljevo, Serbia, mobile.381.62.876.8855.....</p> <p>Dragan Simić, Radljevo, Serbia.....</p> <p>.....</p> <p>Please attach proof that the Representative has been authorised by the Complainant to file the Complaint. For example, this can be in the form of a letter signed by the Complainant giving permission to the Representative to make the Complaint on his behalf.</p> <p>No <input type="checkbox"/></p>
<p>Is proof of authorisation included with the Complaint?</p> <p>Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p>
<p>4. Are you requesting that this Complaint be kept confidential?</p> <p>Yes <input type="checkbox"/> (if yes, please explain why you are requesting confidentiality)</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>No <input checked="" type="checkbox"/></p>
<p>5. Please provide the name or a description of the EBRD Project at issue.</p> <p>27005."EPS.Power.II", dated 15 July.2003.....</p> <p>.....</p> <p>.....</p>
<p>6. Please describe the harm that has been caused or might be caused by the Project (please continue on a separate sheet if needed):</p> <p><small>Please note the case of Milan and Dragan Simić, son and the father, from Radljevo. This is a case of forced expropriation. Parcels in their belongings 292, 293 and 295 were expropriated during "Barrnava West" project, which was partially-financed by EBRD. The Simićs were not-paid for their plants, so they went to court. The court refused their-right to be paid stating they know their land will be expropriated, in spite of the fact that it was proven they received a notification only 2 years after planting. The problem is they missed a chance to appeal this court decision because of illness and because that is expensive, unreachabe solution. That family still lives and affected due to the proximity to the mine, because their house lies only 200-300 meters to the edge of the pit. We seek justice for those two people who, thanks to the non-transparent forced expropriation model and the lack of proper grievance mechanism, suffered 10.000 euros damages. We are sending you the partially translated court conclusion in the attachment. We are looking for a way to settle this damage done to those people. They request is 10.000 euros plus interests from 2007. Both of them have authorised us to do so.</small></p> <p>.....</p>

Please write on a separate sheet wherever needed.

7. If you are requesting the PCM's help through a **Problem-solving Initiative**, you must have made a genuine effort to contact the EBRD or Project Sponsor regarding the issues in this complaint.

a. Have you **contacted the EBRD** to try to resolve the harm caused or expected to be caused by the Project?

Yes (if yes, please list when the contact was made, how and with whom):

Letter to Mrs Bergman, 13.06.2013.....
.....
.....

Please also describe any response you may have received.

reply from Luisa Balbi 09.07.2013 stating EBRD is not in a position to comment on the legal judgement issued by a Court.....
.....
.....

No (please go to question 8)

Is the written record of this contact with the EBRD attached to your complaint?

Yes (please list)

.....
.....
.....

No (if not, please arrange for all relevant documents to be delivered to the PCM Officer as soon as possible).

b. Have you **contacted the Project Sponsor** to try to resolve the harm caused or expected to be caused by the Project?

Yes (if yes, please list when the contact was made, how and with whom)

This issue was genuinely presented on the local court, because project sponsor (or EBRD client) did not establish effective grievance mechanism, it was invisible in the area, the sponsor failed to inform local inhabitants.....
.....
.....

Please also describe any response you may have received.

The court established facts and brought an unlogic decision. Afterward, it was too expensive to complain, and also it was not possible due to illness.....
.....
.....

No (please go to question 8)

Is the written record of this contact with the Project Sponsor attached to your complaint?

Yes (please list)

Extraction from the court decision.....
.....
.....

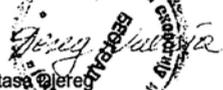
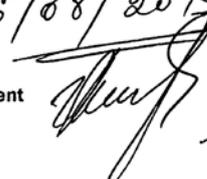
No (if not, please arrange for all relevant documents to be delivered to the PCM Officer as soon as possible).

8. If you have not contacted the EBRD and/or Project Sponsor to try to resolve the harm or expected harm, please explain why.

.....
.....
.....
.....
.....

Please write on a separate sheet wherever needed.

Although not required, it would be helpful to the PCM if you could also include the following information:

<p>9. If you believe the EBRD may have failed to comply with its own policies, please describe which EBRD policies.</p> <p>This is violation of PR.5: Land Acquisition, Involuntary Resettlement and Economic Displacement from the Environmental and Social Policy in the following points: Point 7. Loss of access to natural resources irrespective Point 12. The client did not consult with affected persons and communities, neither facilitated their early and informed participation in decision-making processes related to resettlement, in accordance with PR 10 Point 13. The grievance mechanism was totally invisible Point 30. The client did not offer displaced persons full replacement cost, neither did offer land-based compensation</p>	
<p>10. Please describe any other complaints you may have made to try to address the issue(s) at question (for example, court cases or complaints to other bodies).</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>	
<p>11. Are you seeking a Compliance Review where the PCM would determine whether the EBRD has failed to comply with its Relevant Policies? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p>	
<p>12. Are you seeking a Problem-solving Initiative where the PCM would help you to resolve a dispute or problem with the Project? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></p>	
<p>13. What results do you hope to achieve by submitting this Complaint to the PCM?</p> <p>Payment of the damage done by lack of control during utilisation of forced expropriation, and because the Bank failed its Environmental and Social Policy</p> <p>.....</p> <p>.....</p> <p>.....</p>	
<p>Required:</p> <p>Signature of Complainant *:</p> <p>Or</p> <p>Signature of Authorised Representative *: Natasa </p>	<p>Date: 17.07.2013.</p> <p><i>Signed copy received on 16/08/2013</i></p> 

Please send your Complaint to: **Project Complaint Mechanism**
Attn: PCM Officer
European Bank for Reconstruction and Development
One Exchange Square
London EC2A 2JN
Fax: +44 20 7338 7633
E-mail: pcm@ebrd.com

Alternatively, a Complaint may be delivered by post or hand, at any one of the EBRD's Resident Offices, indicating that it is for transmission to the PCM.

* Note: If you submit your complaint through email, you must submit:
 • an electronic scan of your signature; or alternatively,
 • if emailed without a scan, you may send the PCM a signed version of the complaint through post, fax, or hand delivery at the same time as sending your email.

Please write on a separate sheet wherever needed.

ANNEX 2: MANAGEMENT'S RESPONSE

Serbia: EPS Power II (27005) PCM –Management Response

Background

EPS is the largest company in Serbia, with around 35,000 employees. It forms the bulk of Serbia's electricity and lignite mining sector and, as such, contributes 5%-10% of the country's GDP. The activities are extensive, encompassing mining, thermal and hydro power generation and electricity distribution and supply.

EBRD has financed several projects with EPS and its subsidiaries since 1996. Initially these projects focused on the need to rehabilitate an economically vital industrial sector after the conflicts in the Balkans, with loans to finance the rehabilitation of thermal power plants and to introduce new mining equipment. More recently, EBRD has made targeted investments aimed at improving the environmental performance and long term sustainability of the industry. These investments have involved the rehabilitation and expansion of small scale hydro power, advanced electricity metering to improve demand-side management, and the Kolubara Environmental Improvement Project.

The EPS II Project

On June 15th 2003, the EBRD Board approved a loan of 60 million Euros to EPS towards a total Project Cost of 150 million Euros. The Project was signed on 21st September 2003. This was EBRD's second loan to the company and the proceeds were to be used as for a) a power system control and communication upgrades to restore links with the Western European transmission system as well as to increase efficiency of power supply, b) modernisation and stabilisation of fuel supply through the restructuring of the EPS lignite mining organisation and provision of equipment to increase the production at the Tamnava West Mine and c) financial and customs fees and taxes. The EBRD project EPSII was fully disbursed in April 2010.

The Complaint

The complaint is made by the NGO Cekor on behalf of Messrs Milan Simić and Dragan Simić who claim that the Company has not given the correct amount of compensation with respect to the value of some trees on their land which was expropriated. In 2007 a court decided that while the company was liable for the buildings, and related property, meadow and established fruit trees to the value of RSD 811,148.13, the Company was not liable for an additional RSD 517,530 claimed for new rose trees and fruit trees as these were deemed to have been planted with the sole purpose of increasing the amount of compensation as they were planted when it was already publicly known that expropriation was planned to take place. The valuation was undertaken by a court appointed independent agricultural assessor.

The complainants are now alleging that EBRD did not comply with its 2008 Environment and Social Policy, and specifically Performance Requirement 5 on Land Acquisition, Involuntary resettlement and Economic Displacement, and claims there was a loss of access to natural resources, lack of consultation, the grievance mechanism was 'invisible', and the full replacement cost or replacement land was not provided or offered.

Policy Context

The 2008 EBRD Environmental and Social Policy is not applicable to the EPS II Project. The applicable policy at the time the Project was approved by the Board of Directors was the 1996 Environmental Policy of the EBRD.

While the 1996 Policy did not contain specific requirements with respect to involuntary resettlement, there was a general statement on standards that in the absence of EBRD or EU requirements, the Bank would default to World Bank requirements. There is recognition of the importance of public consultation and a requirement at a minimum that national requirements were adhered to and that EBRD's own public consultation procedures as described in the Bank's Disclosure of information Policy and Environmental Procedures be met.

The Appraisal Process

The Project was categorised as a A/1 under the 1996 Environmental Policy, and this required an Environmental Impact Assessment (EIA) of the proposed project and an audit of existing operations.

The EIA, commissioned by the European Agency for Reconstruction (EAR), was extended to meet the Bank's environmental due diligence requirements. EBRD reviewed the issue of expropriation and resettlement associated with the mine extension during and after the implementation of the Bank project. During due diligence, the Bank commissioned an independent specialist, who was knowledgeable about World Bank Safeguard Policy on Involuntary Resettlement to review the on-going resettlement process, and to advise the Bank on its adequacy. This report was annexed to the EIA and subject to public review.

During the consultation period, public consultation meetings were held locally (announced in the national and local press), with support from the Bank and with Bank representation. The Company committed to a programme of on-going consultation with the affected public and established a unit in the Company with this specific remit. The public consultation process on the EIA did not attract much local, national or international interest or concern.

Correspondence with Cekor

On 8 May 2013, EBRD received a letter by email from Cekor (Nikola Perusic) requesting, amongst other things, a copy of the Resettlement Action Plan (RAP) for the EPS Power II project. This was provided, with individuals' names and compensation amounts removed for privacy reasons. The Bank repeated an offer made by EBRD's Chief Social Counsellor at the AGM for EBRD to visit the Kolubara region again, and asked that Cekor provide details of any issues or complaints that they would like the Bank to review.

On 17 June, EBRD received an email from Cekor raising the Simić case (which is the subject of the PCM complaint), along with a partial translation of the 2007 court decision and authorisations from Milan and Dragan Simić for Cekor to represent them. The Bank sent an acknowledgement and asked for a copy of the full court judgement – this was provided on 21 June.

On 9 July, EBRD sent another reply to Nikola Perusic stating that the Bank is not in a position to comment on the legal judgement issued by a Court but that it was happy to discuss the issue and review any additional relevant information during the monitoring visit planned for mid-September.

On 15 July Mr Perusic replied: *“Thank you for your reply, it seems we are missing means to help those affected people. We are looking forward very much your monitoring visit to Kolubara in mid-September, hoping to get the opportunity to point out very problematic issues concerning this project and its consequences”*.

Prior to the monitoring trip being undertaken and a few weeks after this correspondence, a PCM complaint was filed. The EBRD monitoring visit is scheduled for 16 and 17 September 2013 but given the subsequent filing of the complaint we will await the PCM Office advising on whether the meeting should proceed.

EBRD’s Response

1. The relevant policy with regard to the Project is the 1996 Environmental Policy.
2. At the time that this Project was appraised, the Bank did due diligence on the adequacy of the resettlement plan with an independent expert to international standards.
3. As per the EIA requirements there was public consultation although it attracted little response and the company committed to a programme of engagement.
4. The Resettlement Action Plan articulates that processing grievances is the responsibility of the government and outlines the process.
5. Although EBRD was not a party to the court case, and has not taken formal legal advice with regard to the outcome, it would appear that the Simić family has had an opportunity for legal redress through the Serbian court system. The court documents state that the required valuation of the orchards was done by an independent specialist assessor. It appears that the court found partially in the Simić family's favour with regard to compensation of existing orchards, but not with regard to the new planting done prior to expropriation which is the subject of the PCM grievance. The Simić family did not appeal the court's decision in 2007.
6. In correspondence with Cekor, EBRD staff have remained open minded on the details of the Simić case and prior to the initiation of this PCM complaint, were intending to discuss the issue in a meeting with the complainant.

EBRD management therefore believe that the Project met the requirements of the 1996 Environmental Policy and therefore was in compliance with the requirements in force at that time.