

Ms Erica Bach
PCM Officer
Project Complaint Mechanism
European Bank for Reconstruction and Development
1 Exchange Square
London, UK

25th April 2017

Dear Ms Bach,

CEE Bankwatch Network and CEKOR are hereby requesting a compliance review for the EPS Restructuring project (#47318). Although the investment is on corporate level and not directed at specific physical assets, the project has caused harm and has the potential to cause further harm due to *“freeing up resources to allow the Company to focus on and boost the implementation of its long term capital expenditure program”*¹ which includes lignite mine expansion and construction of several thermal power plants, the most advanced one being the Kostolac B3 TPP.

The EBRD has provided technical cooperation to EPS and has put great effort into monitoring and helping EPS develop a strategic approach to managing environmental and social issues. It has requested its client to do regular corporate audits of each of its subsidiary companies and develop costed action plans. However, these improvements have not achieved full implementation by EPS of the EBRD’s E&S standards, which has resulted in continued negative impacts on air quality and harm to communities in mining basins living in unacceptable environmental conditions and bearing significant health and safety risks. Moreover, in the absence of EPS’s plans to decarbonise in the foreseeable future, the climate impact of EPS’s capital expenditure programme is questionable. The EBRD has failed to ensure the resettlement of mining-impacted communities and to assess the strategic impact of its investments on Serbia’s energy sector, and how it could impact the sector’s reliance on lignite, the most polluting of fossil fuels.

The complaint alleges non-compliance of the EBRD with its Environmental and Social Policy of 2014 (ESP2014, the Policy) in the case of the EPS Restructuring project and seeks clarity on the application of the bank’s environmental and social standards in corporate level finance projects. In this regard, we anticipate that the PCM will review the implementation of a number of provisions of the policy, which is particularly timely in view of the ongoing revision of the ESP2014. Specifically on policy level we hope that the PCM review will result in:

→ clarification on project E&S categorisation;

¹ EBRD Board Document on the EPS Restructuring project, disclosed in redacted form by the EBRD upon Bankwatch request on 29.02.2016

- clarification on the EBRD's commitment to rule of law, to apply its Policy and promote EU law to all projects, particularly questionable in cases when its client circumvents the national requirements derived from those;
- development of guidance on the implementation of ESP in corporate level finance projects in line with Article 53 of the Policy.

With regards to the project and the activities of the bank's client, Serbia's energy utility Elektroprivreda Srbije (EPS), we allege non-compliance with regards to several PRs. We acknowledge the improvements in the corporate governance of EPS due to the EBRD's investment and TC support. However, we believe that the bank has not used its leverage to ensure that EPS will conduct its business in accordance with the ESP2014, EU law, UNECE Aarhus and Espoo Conventions, national regulations and Serbia's Energy Community Treaty obligations and other obligations under international law. Furthermore, we find that the EBRD Management's implementation of the PCM CRR's recommendations from the Vreoci and CEKOR's complaints on the Kolubara Environmental Improvement project have been limited and flawed. For all of these reasons, we are submitting this compliance review complaint.

On the project level, in line with Article 44 of the Policy, as specific outcomes we expect closer monitoring and the following remedial measures that the EBRD should agree with EPS:

- EPS decarbonisation plan by 2050;
- a revision of the EIAs (ESIAs) for all the new or expanding mining fields, such as the Radljevo field and E field in the Kolubara basin, and auxiliary mining operations, for example traffic routes or river diversions etc.;
- ESIA and cumulative impact assessment for the Drmno mine expansion, including on living conditions in the Drmno mine area and the need for resettlement;
- stakeholder engagement on the Drmno mine expansion, consultations on resettlement, RAP development in a participatory manner;
- revision of the EIA for Kostolac B3: alternative solutions other than coal, 2017 LCP BREF standards including emissions to air, water, and soil; social impact assessment, health impact assessment;
- quarterly environmental monitoring in all areas of operation, with regards to air, water and soil factors and proactive public disclosure of monitoring results, for example on a dedicated section of EPS's website.

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1. Factual background

As a long-term institutional partner of EPS since its first investment in the early 2000s, the EBRD had invested roughly EUR 315 in different projects by 2011, including:

- The EPS Emergency Power Sector Reconstruction loan (2001, EUR 100 million, completed)² for emergency rehabilitation and upgrades to thermal and hydro-generation plants, rehabilitation and upgrade of the transmission system, transforming Cirikovac old mine into an ash dump and introducing new ash transport equipment for the Kostolac mining region;
- EPS Power II (2003, EUR 50 million, unclear status)³ for modernisation of mine management at the existing Tamnava West mining field to increase lignite production and upgrading of the power system control and internal communications in order to increase efficiency of power supply. Co-financing from the EIB of EUR 25 million loan, and State Secretariat for Economic Affairs (SECO) EUR 10 million grant;
- EPS Metering project (2010, EUR 40 million, signed)⁴, the purchase and installation of modern electricity meters and the associated infrastructure and software in the Serbian electricity distribution system, co-financed with EUR 40 million from the EIB;
- Kolubara Environmental Improvement project (2011, EUR 80 million, repaying)⁵ for coal excavator, conveyor and spreader system for Field C of the Kolubara mining basin, a spreader system for the Tamnava West field and a coal management system for the whole of the Kolubara mining operations, co-financed with a parallel loan of EUR 60 million to be provided by KfW;
- EPS hydropower project (2011, EUR 45 million, repaying)⁶ for reconstruction of fifteen hydropower plants and adding electricity generation capability to another seven existing dams.

In 2015 the EBRD approved a EUR 200 million loan⁷ in an attempt to finally restructure EPS and prepare it for partial or complete privatisation. Alongside this latest EPS Restructuring loan there were two associated grants for Corporate Environmental and Social Due Diligence and Corporate Governance of EUR 65,000⁸ and EUR 200-300,000⁹ respectively.

The Board Document on the EPS Restructuring project states: “*The financing package proposed will help alleviate these issues [liquidity crisis after the May 2014 floods], freeing up resources to allow the Company to focus on and boost the implementation of its long term capital expenditure program, while also supporting the critical reform agenda. The long term nature of the Bank’s*

² PSD: <http://www.ebrd.com/work-with-us/projects/psd/eps-emergency-power-sector-reconstruction-loan.html>

³ PSD says status is ‘signed’, while the board documents for the EPS Restructuring project says it is repaying: <http://www.ebrd.com/work-with-us/projects/psd/eps-power-ii.html>

⁴ PSD: <http://www.ebrd.com/work-with-us/projects/psd/eps-metering.html>

⁵ PSD: <http://www.ebrd.com/work-with-us/projects/psd/eps-kolubara-environmental-improvement.html>

⁶ PSD: <http://www.ebrd.com/work-with-us/projects/psd/eps-hydropower-plants.html>

⁷ PSD: <http://www.ebrd.com/work-with-us/projects/psd/eps-restructuring.html>

⁸ *Ibid.*

⁹ EBRD Board Document for the EPS Restructuring loan.

operation will provide terms better matched to the underlying assets and the Company's operations." This suggests that the loan, although not directed to specific EPS assets, is enabling EPS to carry out "its long term capital expenditure" plans, including those for expanding coal mining and new coal power plants like the Kostolac B3 TPP.

EPS assets

According to the EPS website¹⁰ as of July 1, 2015, EPS operates with three legal entities: the parent company Elektroprivreda Srbije, the dependent distribution system operator EPS Distribution and the subsidiary EPS Supply.

EPS' portfolio is dominated by coal, with nine lignite thermal power plants and CHPs generating 70% of the company's electricity. The remaining 30% is covered by hydropower generated electricity, with only one planned 66 MW wind park and two planned solar PV farms.

- 9 TPPs and CHPs - Capacity – 4,368 MW, Annual generation – 25,062 GWh, which makes up a 70 percent share of EPS' electricity generation.
- 16 HPPs - Capacity – 2,936 MW, Annual generation – 10,599 GWh, which makes up a 30 percent share in EPS' electricity generation

EPS' plans

According to the 2016 Energy Strategy of Serbia¹¹, in addition to prolonging the life of existing plants, EPS is planning several new lignite power plants: Kostolac B3, Nikola Tesla B3, Kolubara B, Kovin¹² and Stavalj. While it is unlikely that all of these can go ahead in the future, EPS clearly prioritises Kostolac B3 in the implementation programme for the energy strategy¹³ and has not publicly announced any cancellations. In fact construction of new coal generation capacities is proposed as a *GHG emission reduction measure* in Serbia's Second Report to the UNFCCC!¹⁴

The most advanced coal plant is the Kostolac B3 thermal power plant whose annual production is estimated at 2200 GWh and encompasses the expansion of the Drmno opencast mine, increasing lignite production from 9 to 12 million tonnes per year. The new unit is expected to

¹⁰ EPS web site: <http://www.eps.rs/en/Pages/Main-information.aspx>

¹¹ Energy sector development strategy of the Republic of Serbia for the period by 2025 with projections by 2030, Page 41, Table 5.1. Potential projects for the new production capacities in electric energy sector:

<http://www.mre.gov.rs/doc/efikasnost-izvori/23.06.02016%20ENERGY%20SECTOR%20DEVELOPMENT%20STRATEGY%20OF%20THE%20REPUBLIC%20OF%20SERBIA.pdf>

¹² Media on Kovin, 2017 https://www.ekapija.com/news/1975323/kovin-ipak-dobija-podvodni-rudnik-uglja-i-termoelektranu-kinezi-i-dalje-zainteresovani&sa=D&ust=1524466938440000&usg=AFQjCNG2fzZFX8hHI3XMRJwzikt0_NVh8A

¹³ <http://www.mre.gov.rs/doc/efikasnost-izvori/PROGRAM%20FOR%20THE%20IMPLEMENTATION%20ENERGY%20STRATEGY%20for%20the%20period%20from%202017%20until%202023.pdf>

¹⁴ Serbia's Second Report to the UNFCCC, page 15 with detailed list what they consider as climate mitigation measures: http://www.klimatskepromene.rs/wp-content/uploads/2017/12/Drugi-izvestaj-o-promeni-klime-SNC_Srbija.pdf

generate 2 231 250 tonnes of CO₂ per year, with an emissions factor of 870 gCO₂/kWh of produced electric power.¹⁵

The company's latest annual report quotes that "*in order to secure sufficient quantities of coal, revitalization projects on existing equipment are being implemented, replacement mines are being opened and preparatory activities for the opening of new mines are being performed.*"¹⁶ In addition to expanding the Drmno mine's capacity, opening of new mining fields in the Kolubara basin is actively carried out in the area of Zeoke-Medosevac villages where the new Field E is currently being opened. Equally advanced appears to be the Radljevo field, expected to start production in early 2019, for which EPS will spend EUR 100 million on equipment in 2018 alone, according to media reports.¹⁷ In addition, Field G at Kolubara was opened in December 2017, which, together with the Radljevo field, is considered by EPS to ensure production of coal and coal-based electricity for "*the next few decades*"¹⁸ - a timeframe which the rest of Europe is taking to decarbonise energy systems.

2. Summary of previous PCM complaints

The following PCM complaints on EPS projects were submitted between 2011 and 2016¹⁹:

- Barosevac request for problem-solving of July 2011 by the Society for the Protection of Healthy Environment and Private Property Barosevac and 21 citizen of Barosevac on the Kolubara Environmental Improvement project of 2011;
- 2012/04 Vreoci complaint by the Vreoci Ecological Society & Council of Local Community on the Kolubara Environmental Improvement project of 2011;
- 2013/02 Simic complaint represented by CEKOR on the EPS Power II project of 2003;
- 2013/03 CEKOR complaint on the EPS Emergency Power Sector Reconstruction loan (2001), the EPS Power II (2003), EPS Kolubara Environmental Improvement loan (2011);
- 2016/01 EPS Restructuring loan complaint by CEE Bankwatch Network;
- 2017/04 complaint by CEKOR and Vreoci residents on emergency resettlement related to the EPS Kolubara Environmental Improvement project of 2011.

The first request for problem-solving on EPS project by the Barosevac community was rejected and not registered by the PCM, as EBRD Management argued that the community was not impacted by an EBRD investment and the PCM failed to confirm this by a proper eligibility assessment process. The Simic and Bankwatch complaints were narrowly focused on specific issues, a compensation dispute and the disclosure of the board document for the EPS

¹⁵ http://mmediu.ro/app/webroot/uploads/files/2017-02-22_EIA_Study_Project%20TPP%20Kostolac_New_Unit_B3.pdf, page 185

¹⁶ <http://eps.rs/En/Documents/yearreports/Godisnji%20izvestaj%202015%20english%20final.pdf>, page 39

¹⁷ <http://www.poslovnih.hr/svijet-i-regija/srbija-ulaze-stotine-milijuna-eura-u-rudnik-ugljenja-i-novu-te-336016>

¹⁸ <http://www.rbkolubara.rs/>

¹⁹ Complaints, PCM Eligibility Assessments and Compliance Reviews reports, Management Action Plan and PCM Monitoring Reports can be seen on the PCM register: <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>

Restructuring project respectively. Of more relevance to this compliance review request are the Vreoci and CEKOR complaints that raised questions about the strategic involvement of the EBRD in resettlement in the Kolubara mining basin and Serbia's energy sector through its investments in EPS. Due to the relevance of the Vreoci and CEKOR complaints for the most recent EPS Restructuring project of 2015, the results of these two compliance reviews are summarised here.

The PCM eligibility criteria include the condition that “14. *The PCM Officer will not register a Complaint if it: d) relates to matters in regards to which a Complaint has already been processed by the PCM or its predecessor IRM, unless there is new evidence or circumstances not known at the time of the previous complaint.*” In this regard we need to point out that there are both:

- a new project - the EPS Restructuring project of 2015, and
- new evidence that Management action resulting from previous PCM complaints has not been sufficient to ensure EPS Restructuring project's compliance with ESP2014.

The Vreoci complaint requested both problem-solving and a compliance review. Problem-solving was rejected by EPS as it claimed that “*it is working and communicating effectively with the newly elected Council of MZ Vreoci [and] there is no breakdown in communication that requires third-party assistance and the PSI is not needed.*”²⁰ The complaint was found eligible for compliance review as it acknowledged that “*a detailed review of the defined Project scope and area of influence is clearly beyond the scope of an Eligibility Assessment, these questions are implicated by the Complaint and deserve further attention through a Compliance Review.*”²¹

The CEKOR complaint was wider than the Vreoci one, e.g. by covering more EBRD loans to EPS, but the two overlapped about the following alleged failures of the EBRD: to properly define the “area of influence” of the Kolubara project, to consider cumulative impacts associated with the EPS projects, to consider the impacts on the community of Vreoci, and the alleged promotion of a climate-damaging approach to energy investments in Serbia. In the interests of procedural and administrative efficiency, the Eligibility Assessment Reports recommended that the compliance review processes for complaints 2012/04 and 2013/03 should be combined into a single process, so in April 2014 the Vreoci and CEKOR complaints were joined.

The PCM compliance review report (CRR)²² found that the EBRD was non-compliant in its application of the 2008 Environmental and Social Policy's general requirements and the Performance Requirements (PRs), namely:

- PR1 in determining the scope of the bank's Environmental and Social due diligence on the Project, as the whole Kolubara basin should have been identified as the project area of influence;
- PR1, 3, 5 and 10 with respect to the exclusion of Vreoci from the bank's due diligence and the failure to address the pollution issues from EPS facilities affecting Vreoci as a

²⁰ Complaint Eligibility Report: http://www.ebrd.com/downloads/integrity/ear_kolubara_final.pdf

²¹ *Ibid.*

²² CRR can be found on the PCM register: <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>

core conditionality of the Kolubara project.

- PR3 and the general requirements of the EBRD's ESP with respect to the assessment of greenhouse gas emissions on the Project.

Furthermore, the CRR concluded the EBRD should have been more strategic in how it applied available strategic information to its due diligence, and to the conditionality on EPS investments (reinforcing non-compliance with PR1). The CRR said that the EBRD could have played "*a more formal strategic role in facilitating the timely and fair completion of the resettlement and have provided support in the validation of outcomes in accordance with Serbian law and good international practice.*"

With regards to the development of Serbia's energy sector the CRR concluded: "*That a specific strategic assessment under the ESP was not required for the Project but that because of the position of the client and its relevance to the Serbian energy sector, this single investment was in itself 'strategic' and the due diligence should have been framed to assess all of the relevant factors.*"

Following the CRR recommendations, the EBRD Management developed a Management Action Plan (MAP) that was implemented by August 2017. Some of the actions were related to policy improvements, so these were implemented with the ESP revision in 2014. The remainder of the recommendations related to the strategic approach of the EBRD towards EPS, however, these were mostly limited to the Kolubara basin. Among the CRR recommendations were the following:

- Review of future environmental, social and energy investment strategy for the Kolubara basin addressing EBRD priorities based upon its revised energy strategy and Serbia Country strategy, GHG Emissions baseline and future emissions projections based upon projected future mining, transportation and power plant developments.
- Analysis of cumulative environmental and social impacts based upon future strategic development of the Kolubara basin.
- Updates to the action plan relating to implementation of environmental audit findings.
- Review of environmental and social conditions affecting the mining communities within the Kolubara basin, including Vreoci, and action plans relating to the management of public services and timely completion of the resettlement process.
- Assessment and disclosure of information and objectives relating to effects on Serbian carbon intensity.

To cut a long story short, the results of these recommendations can be seen in the updated PSD for the Kolubara Environmental Improvement project. In spite of the CRR conclusion that the whole Kolubara basin should have been treated as the project area of influence, the updated PSD (as of 18 April 2018) continues to claim that "*EPS and the Kolubara mining basin have extensive ongoing operations that are beyond the scope of this project.*" The updated PSD included links to the Green Book of 2009 and White Book of the Energy Sector of Serbia, the Impact Assessment of the Kolubara Basin, an SEA for the Spatial Plan of the Kolubara Mining Basin & a paragraph on GHG emissions of EPS power plants for 2014 (the year of the floods at the Tamnava West field, when EPS generation dropped by almost 6 TWh compared to the

previous year). However, most of these links are not functional and, at any rate, in the case of the Green and White Books, no updated versions are yet available.

The PSD update claims also that *“Land acquisition and resettlement was substantially completed in 2008 in line with EBRD policy and Serbian legal requirements”* and includes a summary of the social consultant’s report on Vreoci, including the following insinuation: *“It is difficult to determine whether the representatives who submitted complaints ... actually represent the residents in the affected communities or their own personal interests.”* If it is judged by the never-ending resettlement saga in both Vreoci and the wider Kolubara area, and by the last PCM complaint of 2017 on the emergency resettlement problem-solving requested by Vreoci households, this information is misleading to say the least. Calling into question complainants' motives in public without any evidence is extremely unprofessional and contributes to the increasing pressure on those who try to assert their human rights.

During the time of the preparation of the MAP on the Vreoci and CEKOR complaints the EBRD was preparing the EUR 200 million loan for EPS Restructuring. In response to CRR recommendation B3: *“Upgrading of the EPS Environmental and Social Governance capacity and management systems implementation”*, the MAP stated: *“The proposed corporate restructuring of EPS will include the adoption of new, company-wide environmental and social management systems. EBRD commissioned a corporate environmental and social audit in 2015 and developed an action plan (ESAP) that commits EPS to implementing best practice management systems for the restructured company.”* Bankwatch and CEKOR’s joint analysis of the ESAP’s (in)adequacy was shared with the EBRD and is summarised in the Evidence section below.

With regards to the wider transparency and accountability of EPS, it is true that, as result of the PCM complaints, EPS transparency has improved somewhat and the company has increased the number of documents it discloses. EPS has also developed a Resettlement Framework and several Resettlement Action Plans, although this was not done in a fully consultative and participative manner. With the help of EBRD technical cooperation grants EPS has also carried out a number of audits and action plans, and developed a corporate Stakeholder Engagement Plan.

It is also important that EPS has started considering more seriously the development of so called new renewable (non-hydro) capacities. Most noticeably EPS has stepped up efforts to develop wind and solar capacities in the Kostolac mining region a step towards a more sustainable energy mix. During 2017 EPS developed an EIA and SEA for two solar photovoltaic plants and a project for twenty wind turbines (about 66 MW) planned on the ash deposits that are due to be recultivated and on the overburden dumping sites in the Kostolac region. Meanwhile the EBRD provided financing for two major wind farms in Serbia, Kovacica (105 MW) and Dolovo (158 MW) - examples of the work that EBRD is doing to make the energy sector in Serbia more sustainable and less reliant on fossil fuels.

In conclusion, the PCM complaints have resulted in increased attention by the EBRD to implementing its environmental and social standards in EPS projects and there have been

incremental improvements in EPS' corporate governance and stakeholder engagement. However, the latest corporate level loan by the EBRD raises new questions: first, whether the EBRD has used its leverage strategically to influence EPS's lignite expansion plans; and second, how the Environmental and Social Policy is applied in corporate-level investments that are not directed at physical assets, especially if they free up a client's resources and enable projects, such as new coal generation capacities, that the EBRD's Energy Strategy does not allow the bank to support, except in rare and limited cases?

3. EPS restructuring loan

The EUR 200 million loan of 2015 from the EBRD to EPS followed the catastrophic floods in Serbia in 2014 that flooded EPS's mines and interrupted domestic power supply, necessitating import of electricity from neighbouring countries and causing a deteriorating financial situation within EPS. According to the project summary document of the EPS Restructuring project, the loan was used to restructure and refinance EPS' expensive short to medium-term financial debt accumulated from commercial banks, as the EBRD expected to lengthen the tenors and provide terms more consistent with EPS' operations. The objective was that *"EBRD investment will be conditioned upon an agreed plan for a comprehensive program of reforms of the Company and of the sector which will have a significant impact on the development, management and operational efficiency of the power infrastructure in Serbia."*

The Board Document on the EPS Restructuring project stated: *"The financing package proposed will help alleviate these issues [liquidity crisis after the May 2014 floods], freeing up resources to allow the Company to focus on and boost the implementation of its long term capital expenditure program, while also supporting the critical reform agenda. The long term nature of the Bank's operation will provide terms better matched to the underlying assets and the Company's operations."* This means that when making its investment decision the EBRD was aware that the loan, although not directed to specific EPS assets, is enabling EPS to carry out *"its long term capital expenditure"* plans, including those for expanding coal mining and new coal power plants like the Kostolac B3 TPP.

In view of the commitment in its Energy Strategy of 2013 that the EBRD will finance coal fired power generation capacities only in rare and exceptional circumstances, as well as the enabling impact of the latest EBRD investment in EPS, it needs to be assessed to what extent the Restructuring projects allows *"the Company to focus and boost on the implementation"* of the Kostolac B3 TPP project?

Bankwatch and CEKOR have raised a number of questions on the project since 2015. **Annex 1** presents the past communication of the complainants with the EBRD on this issue and here we present a summary of points raised in the correspondence. The first set of issues relate to non-compliance of EPS investments in coal infrastructure with national and EU legislation:

- Serbia increasing its public debt in order to support lignite, rather than supporting an energy transition, e.g. taking a loan from the China Exim Bank for the Kostolac B3 power

plant;²³

- Serbia selecting a Chinese company to build Kostolac B3 without a tender procedure, just by signing an interstate agreement;²⁴
- Kostolac B3 thermal power project failure to satisfy the requirements of Serbia's EIA law, the UNECE's Espoo Convention, the EU's Industrial Emissions Directive and Large Combustion Plants Directive, obligations under the Energy Community Treaty with regards to the State Aid Directive;²⁵
- non-feasibility of Kostolac B3 project with CO2 emissions costs of USD 13.1/tonne (or expected EUR 30/tonne), as the envisaged electricity price increase of 10 percent could only cover a price of USD 6/tCO2: the Serbian government would be expected to pay for CO2 allowances fully, which would not be in line with the EU-ETS Directive²⁶;
- Kostolac B desulphurisation: EPS began to construct the de-SOx chimney in summer 2015 before the EIA procedure was concluded and a construction permit granted.²⁷ Later on, the Construction Inspectorate issued a permit, without any public consultation, in an attempt to legalise the already half-constructed chimney;²⁸
- the project ESAP's failure to set a clear implementation schedule for bringing Serbia's thermal power capacities in line with the EU's standards, such as the Industrial Emissions Directive and the Large Combustion Plant Directive, as they are either adopted under the Energy Community Treaty or transposed into Serbian law;²⁹
- the ESAP's failure to clarify how the project will address antiquated and non-compliant facilities and the decommissioning of the least efficient plants, in accordance with the commitments made in the Board document for the project;³⁰
- Serbia's continued reliance on coal long after 2050, in spite of climate change, Serbia's EU Accession, the EBRD's own commitments to low-carbon transition, with forecasted increase of EPS lignite production up to 48 million metric tonnes, expected to be achieved in 2018 to 2020 and continued until at least 2035: Kolubara basin production of no less than 24mt of coal by 2050 or 2060 and Kostolac basin production of about 12mt of coal up to 2060.³¹

With regards to living conditions in mining areas, the need and continued demands for resettlement from local communities, as well as harassment of local activists, the complainants communicated to the EBRD the following:

- Lack of adequate consultations on the corporate Resettlement Framework,^{32,33}
- Junkovac village landslide: criminal charges were filed against EPS in 2014, however the

²³ Issue Paper presented to EBRD Management and at the CSO-Board meeting in London, January 2016:

<https://bankwatch.org/wp-content/uploads/2016/02/briefing-EBRD-EPSerbia-01Feb2016.pdf>

²⁴ CEKOR and Bankwatch letter to the EBRD, 10 March 2016.

²⁵ *Ibid.*

²⁶ <https://bankwatch.org/wp-content/uploads/2017/03/briefing-Balkans-CO2-29Mar2017.pdf>, page 11

²⁷ January 2016 Issue Paper, *Op.cit.*

²⁸ March 2016 letter, *Op.cit.*

²⁹ March 2016 letter, *Op.cit.*

³⁰ March 2016 letter, *Op.cit.*

³¹ CEKOR and Bankwatch Issue Paper, May 2017

³² May 2016 Issue Paper, *Op.cit.*

³³ CEKOR letter, 14 June 2016

- court has not initiated official procedures investigating the company;³⁴
- Drmno village requesting resettlement and resulting intimidation of activists;³⁵
 - violation of property and participation rights in villages Junkovac, Barosevac, Drmno, Old Kostolac;³⁶
 - EPS did not develop protective zones and comply with the obligation to provide a distance of 300 metres in any of its mining operations;³⁷
 - EPS use of informal methods of harassment against CSOs and local communities that are demanding protection belts;
 - Environmental monitoring missing in communities living less than one kilometres from mining operations, while CEKOR and Bankwatch measurements of air quality (particulate matter) in Drmno showed drastic violations of air quality standards;³⁸
 - A number of villages are exposed to irreversible geological changes that are leading to cracks in soil and houses (Drmno, Junkovac, Veliki Crljeni, Baroševac)³⁹ - this problem eventually resulted in the 2017 request to the PCM for problem-solving on emergency resettlement of households in Vreoci.

In the correspondence the complainants raised the question how the EBRD can assist its client in preparing a corporate environmental and social strategy, and how the bank can contribute to the sustainable development of Serbia's energy sector, if its ESDD turns a blind eye to major new coal power capacity such as the Kostolac B3 project? We also pointed out that, according to the EBRD's Energy Strategy of 2013 the bank "*is committed to supporting the low-carbon transition in its countries of operations; this entails promoting alternatives to carbon-intensive coal-fired generation*", so the new EPS project should be seen as a major opportunity for a more detailed assessment of its client's strategy.

A reply from the EBRD from 7 April 2016 said that "*EPS has assured the EBRD that [permitting issues] have been resolved and that both [Kostolac B desulphurisation and Kostolac B3] projects will be built and operated in line with Serbian legislation and EnCom obligations.*" However, this claim did not withstand the test of time concerning the Kostolac B3 project, as explained in the next section below.

Following complainants' correspondence⁴⁰ in July 2017 updating the bank on developments with the Kostolac B3 project, the reply from the EBRD was a lot less reassuring: "*We will review it and will raise any relevant issues with EPS as part of our on-going discussions with the company on its environmental performance. You will be aware that EBRD does not finance coal-fired power plants, except in very limited and specific circumstances, and we have not been involved in the financing of the Kostolac B3 project. We are not therefore able to comment on the details of its*

³⁴ January 2016 Issue Paper, *Op.cit.*

³⁵ January 2016 Issue Paper, *Op.cit.*

³⁶ January 2016 Issue Paper, *Op.cit.*

³⁷ May 2017 Issue Paper, *Op.cit.*

³⁸ May 2017 Issue Paper, *Op.cit.*

³⁹ May 2017 Issue Paper, *Op.cit.*

⁴⁰ Letter from Bankwatch on 4 July 2017.

*technical performance or its compliance with relevant legislation.*⁴¹”

With regards to the audits that the EBRD requested from EPS, CEKOR and Bankwatch commented that *“the identified corrective measures are extremely vague, which perhaps results from the audit's conclusion that ‘a large number of non-conformities is of organisational nature’ and can be fixed with internal reorganisation, rather than by a participatory process of consultation with impacted communities and by a costly process of decarbonisation of Serbia's energy sector. With regards to the lack of long-term vision of the development of the sector and of EPS, the 2-3 year horizon of auditing and mitigation measures are not in any way strategic and thus unlikely to prompt the transformation of Serbia's energy sector and a transition to green economy.*⁴²”

4. EPS non-compliance with EBRD ESP2014 and PRs

Below we are presenting evidence of several examples of EPS investment that breach national regulations and Serbia's obligations under international law. Before that we summarise relevant EU law and national regulation that result from Serbia's obligations under the Energy Community.

While we point at alleged non-compliance with the Performance Requirements of ESP2014, detailed analysis of specific non-compliance is hard to provide, because the PRs' application to corporate finance is only clarified in few places (for example in PR 1 Article 14), while for most PRs it is unclear how relevant they are to the client's specific operations. Meanwhile it is impossible to find confirmation that the corporate level E&S management system of EPS has resulted in GIP, as it has made little difference to the modus operandi of the company.

Summary of Serbia's current legal obligations regarding environmental protection under the Energy Community Treaty,⁴³ relevant for the scope of this complaint:

- Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, to be replaced at the latest 1 January 2019 by Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (the “EIA Directive”);
- Directive 2001/80/EC of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants (The LCP Directive, applicable as of 1 January 2018 for existing plants);
- Directive 2010/75/EU of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (the IED Directive, applicable for new plants entering operation from 1 January 2019);
- Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive);

⁴¹ E-mail reply from the EBRD from 7 July 2017.

⁴² CEKOR and Bankwatch letter to EBRD regarding EPS audits, 25 July 2016.

⁴³ <https://www.energy-community.org/legal/acquis.htm>

In the latest implementation report⁴⁴ published by the Energy Community Secretariat in September 2017 we read: “*Environmental impact assessment in Serbia is governed by the Law on Environmental Impact Assessment of 2004, as amended in 2009. The list of activities requiring an environmental impact assessment is transposed by the Decree on the Lists of Projects Subject to an Environmental Impact Assessment of 2008. Furthermore, Serbia adopted a Law on the Ratification of Amendments to the Espoo Convention governing transboundary environmental assessments in 2016. Following the entry into force of the new **Environmental Impact Assessment Directive (2011/92/EU)** and its amendments by Directive 2014/52/EU in the Energy Community,*⁽⁴⁵⁾ *Serbia started revising the Decree.*”

“*Domestic law effectively transposes the emission limit values of the **Large Combustion Plants Directive (for existing plants)** and the **Industrial Emissions Directive (for new plants)** and enables Serbia to implement the provisions of these Directives by the deadlines, namely 1 of January 2018.*”

“*Serbia has nine thermal power plants falling under the scope of the Large Combustion Plants Directive operated by Elektroprivreda Srbije (EPS), with a total of 21 units and a total rated thermal input of 15.049 MW (including Toplana Vreoci Kolubara Prerada and an auxiliary boiler at TPP Nikola Tesla B). Seventeen units are fired by lignite while four are running on natural gas. Furthermore, a total of 26 combustion plant units are operated in different industrial sectors.*

Serbia has adopted legislation regulating the emissions of large combustion plants, namely the Regulation on Emission Limit Values of Pollutants into Air from Combustion Plants and the Regulation on the Measurements of Emissions of Pollutants into Air from Stationary Sources of Pollution.”

In addition to the environmental acquis, Serbia, as an Energy Community contracting party has an obligation to abide by most EU state aid legislation except that concerning notification of state aid measures.⁴⁶

Evidence of EPS investment that breach national regulations and Serbia’s obligations under the Energy Community are presented below in the following order:

- 4.1. Kostolac B1-2 desulphurisation
- 4.2. Protective belts around mines
- 4.3. Drmno mine expansion from 9 to 12 million tonnes a year
- 4.4. Kostolac B3 EIA
- 4.5. Investigations of the Espoo Convention Implementation Committee related to Kostolac B3
- 4.6. Air quality and on-site emission monitoring at Kostolac

⁴⁴ https://www.energy-community.org/dam/jcr:b03950a0-9367-4618-961b-efad53b79fd/EnC_IR2017.pdf

⁴⁵ September 2017 was the implementation for Georgia but for the rest of the countries it is 1 January 2019
<https://www.energy-community.org/legal/acquis.html>

⁴⁶ Annex III of the Energy Community Treaty: <https://www.energy-community.org/legal/treaty.html> and
https://www.energy-community.org/dam/jcr:da2996d4-188f-478d-8773-3e593589effd/PG_04_2015_ECS_State_aid.pdf

4.7. State aid for Kostolac B3

4.8. Viminacium archaeological site by the Drmno mine

4.1. Kostolac B1-2 desulphurisation stack permits⁴⁷

EPS began to construct desulphurisation facilities at Kostolac B in the summer of 2015 before the EIA procedure was concluded. In a letter⁴⁸ dated July 10th 2015 from the Ministry of Construction Transport and Infrastructure it is stated that neither EPS nor its subsidiary Kostolac TPP and Mines have applied for a construction permit. By mid-July the new chimney was already under construction⁴⁹, for which CEKOR alerted the Construction Inspectorate. The public debate for the environmental impact assessment took place on August 18 2015, when half of the chimney was already erected. The construction permit for the chimney was issued in document 351-03-01606/2015-07 dated 31.8.2015 – in record time after the public debate for the environmental impact assessment!

In this case the spirit and principles of the Aarhus Convention were not respected, because public consultations were not effectively part of decision-making on the B1-2 desulphurisation project. In addition such a decision-making process clearly demonstrates the deficiencies in ESP's ESMS, which according the PR1 Article 1 should involve *“meaningful communication between the client, its workers and the local communities affected by the project and/or the client's other activities, and where appropriate, other stakeholders.”* The consultation also falls short of PR10 requirements on Information Disclosure and Stakeholder Engagement.

4.2. Protective belts around the mines

The 2008 Spatial Plan⁵⁰ for the Kolubara mine basin sets an obligation to establish protection zones / safety belts PRIOR to development or extension of mining fields and along traffic routes. Breach of these requirements on protective zones can be witnessed in the villages of Baroševac, Zeoke, Medoševac, Veliki Crljeni, Vreoci, and Radljevo. For example, in Junkovac a landslide from the overburden deposit destroyed several houses and, as a result, criminal charges were filed against EPS in 2014, however the court has not initiated official procedures investigating the company.⁵¹ Due to lack of proper protection zones around mine infrastructure, the opencast mine approaching Vreoci is jeopardising the local church by coming within 100m of it, despite the fact that this church is of historical value and is not envisaged for resettlement. Another consequence for Vreoci is the rupture of the coal layer and emergency resettlement of households in Vreoci in 2017 that the PCM mediation process helped resolve.

EPS violates the human rights and freedoms of people living in proximity to its expanding lignite

⁴⁷ <http://www.ckor.org/index/page/lq/sr/id/602>

⁴⁸ http://www.ckor.org/documents/pages/602_2.pdf

⁴⁹ See photo “Annex 7 - Kostolac 16 July 2015”, showing a half-built de-SOx chimney, to the right of the main chimney

⁵⁰ <http://www.slistbeograd.rs/pdf/2008/58-2008.pdf#view=Fit&page=35> , page 133, section 4.11

⁵¹ January 2016 Issue Paper, *Op.cit.*

mines, as guaranteed by the Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights. For example EPS violates the right to life, the right to adequate housing and continuous improvement of living conditions, the right to enjoyment of one's property, the right to clean and healthy environment. In all of its mining operations EPS is failing to protect the lives and health of the local communities. The company is enabling more mining and reducing the price of the mined coal by failing to implement protective zones and resettle people who live less than 300 metres from its mines. EPS is also avoiding addressing systemic cracks in houses and landslides both directly caused by mining and also by dumping of the overburden. This is happening in Veliki Crljeni, Drmno, Barosevac, Zeoke, and Junkovac.

EPS has repeatedly refused to even acknowledge the requests for resettlement of communities in the Kostolac mining basin, specifically the village of Drmno, let alone act on them. The community is not being considered for resettlement even though many people have explicitly requested it through a petition signed by the vast majority of villagers. In an answer to CEKOR, EPS said the local parish council ("mesna zajednica") rejects the petition as illegitimate so EPS will not respond to it either. We see this as a limitation to people's Constitutional right to petitioning and very poor stakeholder engagement practice by EPS.

EPS mine expansions breach not only the spatial plans of the mining basins, but also EBRD's Performance Requirements, namely PR1 on Assessment and Management of E&S Impacts and Issues, PR3 on Resource Efficiency and Pollution Prevention and Control, PR4 on Health and Safety, PR5 on Land Acquisition, Involuntary Resettlement and Economic Displacement, PR8 on Cultural Heritage and PR10 on Information Disclosure and Stakeholder Engagement.

4.3. Breach of EIA Directive and subsequent Serbia EIA law for Drmno mine expansion from 9 to 12 million tonnes - no EIA.

This topic is not subject to any national court complaints, as it was discovered only after all deadlines for legal challenges had passed. However, a complaint before the Energy Community is under preparation. Based on the documents we were able to obtain, we conclude that the Ministry of Energy, Development and Environmental Protection of the Republic of Serbia' Decision no. 353-02-901/2013-05 of 26.07.2013, which concludes that no EIA is needed for the expansion of the Drmno mine from 9 to 12 million tonnes/year, infringes both Serbian law and Directive 85/337/EEC by failing to assess whether the mine expansion would cover a larger surface area than the threshold set for an obligatory EIA.

On 06.06.2013, PD TE-KO KOSTOLAC d.o.o., then a subsidiary of Serbian state-owned energy company EPS, addressed the then Ministry of Energy, Development and Environmental Protection with a Request for a decision on whether an environmental impact assessment procedure was needed for the expansion of the existing Drmno mine, which feeds the Kostolac A and B power plants, filed under no. 353-02-901/2013-05. (p.29 of the enclosed Annex 3 -

Predmet Drmno document).⁵²

The text on p.12 of the *Predmet Drmno* file states that a capacity increase is planned from 9 million tonnes per year to 12 million tonnes per year but nowhere in the letters from TE-KO Kostolac disclosed by the Ministry for Environmental Protection (as it is now called), nor in the extracts from the study on the preliminary project, are any figures on the size of the expansion in hectares mentioned.

On 26.07.2013, the then Ministry of Energy, Development and Environmental Protection issued Decision no. 353-02-901/2013-05 in which it stated that no environmental impact assessment procedure was needed. It justified this decision by stating that (our unofficial translation):

“The project in question is not on the list of projects for which an impact assessment is obligatory, but is on list (II), ie. the list of projects for which an environmental impact assessment may be required, which is established in line with the Decree on establishing lists of projects for which an impact assessment is obligatory and lists of projects for which an impact assessment may be required. (Official Journal of the Republic of Serbia no. 114/08), under point 2, sub-point 1.

Upon review of the documentation delivered with the request, and carrying out the process of considering the request, the competent organ established that for the aforementioned project, with respect for the conditions set by all competent organs and institutions, it is not necessary to carry out an environmental impact assessment procedure.

The new project documentation does not introduce any new elements on the question of the extraction technology and type of main excavation, transportation and landfilling machinery, nor new elements regarding auxiliary machinery and other accompanying mining works, so there are no new identified sources of pollution. The aforementioned sources of environmental pollution have already been analysed through the already adopted Study for the Assessment of the Environmental Impact of the Drmno Opencast Mine for the Exploitation of Coal in Kostolac, for the capacity of 9 million tonnes annually, with the Decision on approval of the same, no. 353-02-360/08-02 of 10.04.2009, in which environmental protection measures are given with the aim of preventing and reducing any kind of significant harmful impact.”

Indeed, on 10.04.2009, the then Ministry of Environment and Spatial Planning had issued

⁵² The disclosed request is rather brief and appears to be incomplete. It is not clear whether this was how it was delivered to the Ministry of Energy, Development and Environmental Protection or whether the Ministry has failed to disclose the whole request.

Decision 353-02-00360/08-02 (p.30-31 of the Annex 3 - Predmet Drmno), responding to request 353-02-00360/2008-02 of 11.03.2008 by TE-KO Kostolac. The Decision gives the Ministry's approval of the EIA Study for the Drmno mine's expansion up to 9 million tonnes per year capacity. According to the Decision, the project promoter is obliged to implement measures with the aim of preventing, reducing and removing any significant harmful impact on the environment foreseen in Chapter 8 of the EIA Study and the monitoring measures described in Chapter 9 of the Study.

In June 2017 CEKOR requested from the Ministry of Environment the disclosure of the EIA Study from 2008 on the Drmno mine expansion of up to 9 million tonnes per year capacity. However, no reply was received within the legally prescribed deadline of 30 days maximum. So CEKOR filed a complaint before the Commission responsible for access to public information (<http://www.poverenik.rs>), whose response dated September 2017 quotes lack of capacity and busy schedule to deal with the complaint, and commitment to work on it at a later stage (relevant correspondence enclosed - "Annex 4 - Reply Poverenik").

In its June 2016 correspondence with the Romanian Ministry of Environment regarding potential transboundary environmental impact of Kostolac B3 unit and Drmno mine operation, the Serbian counterpart explains that there was no law on EIA in 1987, when the Drmno mine first started its operations, only quoting the procedure to decide on the EIA from 2013 which then lead to the decision that no EIA would be necessary (detailed above). It has therefore been impossible to ascertain whether an EIA was really carried out in 2008/2009 and if so, of what quality it was. It is also unclear what conditions were set as the Decision refers to the study for the conditions and the public is now not able to access them.

With regards to the expansion from 9 to 12 million tonnes, in both the Serbian Decree 114/2008 of 16.12.2008 and the Council Directive 85/337/EEC, the crucial deciding factor for whether a project falls into the category of projects for which an environmental impact assessment is obligatory (or the category of projects for which an environmental impact assessment may be required) is the surface area in hectares of the open-cast mine, or in this case, the surface area in hectares of the mine expansion. If the planned mine expansion is larger than 10 hectares (Serbian law) or 25 hectares (Directive 85/337/EEC), it follows that an EIA must be done. For mine expansions, there are no separate provisions in Serbian Decree 114/2008 of 16.12.2008. However, Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, amending Directive 85/337/EEC, and which is also

binding in the Energy Community Contracting Parties⁵³, clearly states that, regarding projects under Annex 1, "22. Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex."

However, in its Decision no. 353-02-901/2013-05 of 26.07.2013, the then Ministry of Energy, Development and Environmental Protection of the Republic of Serbia did not at all address the surface area of the mine expansion. We thus conclude that Decision no. 353-02-901/2013-05 of 26.07.2013 infringes both Serbian law and Directive 85/337/EEC and its amendment in Directive 2003/35/EC by failing to assess whether the mine expansion would cover a larger surface area than the threshold set for an obligatory EIA.

As discussed above, the failure of EPS to assess properly and mitigate (e.g. through resettlement) the environmental and social impacts of its mines has resulted in violation of the human rights of thousands of people, like the right to life, adequate housing and continuous improvement of living conditions, the right to enjoy one's property, and the right to a clean and healthy environment. With regards to Drmno mine expansion EPS has also violated the right to know of stakeholders, as well as their right to participate in decision-making guaranteed by Serbian law, the Aarhus and the Espoo Conventions. These rights are also guaranteed by the EBRD Policy, so with regards to EBRD ESP2014 PRs the lack of ESIA for the Drmno mine expansion constitutes non-compliance with PR1 on Assessment and Management of E&S Impacts and Issues, PR3 on Resource Efficiency and Pollution Prevention and Control, PR4 on Health and Safety, PR5 on Land Acquisition, Involuntary Resettlement and Economic Displacement, PR8 on Cultural Heritage and PR10 on Information Disclosure and Stakeholder Engagement.

4.4. Kostolac B3 EIA process⁵⁴ violations and start of construction works before the process was completed

The planned new unit at Kostolac B thermal power plant received an EIA decision in December 2013, initially. Following a complaint in front of the Administrative Court of Serbia by CEKOR⁵⁵, as well as a complaint at the Espoo Implementation Committee filed by Bankwatch Romania⁵⁶ for failure to assess the transboundary impacts, a new EIA approval process was started in 2017.

An updated version of the EIA report was submitted for public consultation in February 2017, both to the Serbian and Romanian interested public. Two rounds of comments were submitted by

⁵³ [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22006A0720\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22006A0720(01)&from=EN)

⁵⁴ http://www.ekologija.gov.rs/wp-content/uploads/procena_uticaja/Decision%20-%20Environmental%20Impact%20Assesment%20Study%20for%20the%20project%20for%20construction%20of%200a%20new%20block%20B3%20at%20the%20site%20of%20TPP%20Kostolac-vazece.pdf?lang=lat

⁵⁵ https://bankwatch.org/press_release/first-court-case-against-coal-power-plant-construction-in-serbia

⁵⁶ <https://bankwatch.org/blog/cross-border-coal-pollution-for-the-first-time-under-scrutiny-by-un-body>

CEKOR and Bankwatch Romania in March, and June 2017 and two public debates were organised in Pozarevac, SRB (March 2017) and Oravita, RO (August 2017).

There is confusion around what is the final version of the EIA study as a version of June 2017 was made available to those who had commented on previous versions, but on the Ministry's website alongside the Decision approving an EIA study, only an English version is published, and that from December 2016. This version differs from the June 2017 Serbian version and so we assume that the June 2017 version is final. EPS, as far as we can see, has not made available any versions of the EIA on its website www.eps.rs. It is a worrying sign for EPS and the Serbian state's transparency that such basic environmental information as a final EIA is not available to the public in both Serbian and English (due to transboundary consultations having taken place).

The main comments supplied by NGOs during the consultation process and which were not addressed satisfactorily in the final version of the report adopted on 28 September, 2017 were related to:

1. **Failure to ensure that the plant complies with the new EU Best Available Techniques reference document for large combustion plants (LCP BREF).** The limit values for emissions to air currently in force in Serbia are based on the EU's 2006 LCP BREF document, which forms the basis for the current Energy Community obligations for new plants. However, in the EU, this document has been superseded by the 2017 LCP BREF⁵⁷. Although the 2017 LCP BREF is not yet binding in Serbia, considering that Serbia is an EU candidate country, it would be extremely unwise to construct a new power plant which is not in line with current EU technical standards. Once Serbia joins the EU it will have to bring the plant into line with the LCP BREF, thus entailing additional costs and endangering the already shaky economics of the plant.⁵⁸

The approved EIA study references the 2006 BREF, which has less strict maximum values than the 2017 one. For emissions to air, it cites the following limit values:

- NO_x (dry gas, 6% O₂) - 200 mg/Nm₃
- SO₂ (dry gas, 6% O₂) - 150 mg/Nm₃
- Dust – 10 mg/Nm₃
- HF - 30 mg/m³
- HCl - 3 mg/m³
- Mercury - 0.05 mg/m³. (pages 3-84 and following, 3-137 and following, 9-6)

The 2017 BREF however stipulates the following limit values for emissions to air for a

⁵⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1503383091262&uri=CELEX:32017D1442>

⁵⁸ For more details see: <https://bankwatch.org/wp-content/uploads/2017/06/BREF-Balkan-coal-14Jun2017.pdf>

new plant of the capacity and technology of Kostolac B3:

Pulverised lignite, 350 MWe, 825 MWth¹	Yearly average – new unit	Daily average or average for sampling period - new unit
NO_x	50-85 mg/Nm ₃	80-125 mg/Nm ₃
SO₂	10-75 mg/Nm ₃	25-110 mg/Nm ₃
HCl	1-3 mg/Nm ₃	-
HF	1-2 mg/Nm ₃	-
Dust >300 MWth	2-5 mg/Nm ₃	3-10 mg/Nm ₃
Mercury	<1-4 µg/Nm ₃	-

The EIA authors did make some changes in the text to refer to the EU's 2017 LCP BREF, but played down their importance for Serbia and did not demonstrate that the plant can and will comply with them. They also persisted in referring to the LCP BREF as a working document, even though by the time the last version of the EIA was completed in June 2017, the BREF had already been approved in the EU and NGOs had pointed this out in their comments. The Decision approving the EIA study does not stipulate limit values (presumably this will be done in the later IPPC permit), and also refers to the *draft* LCP BREF⁵⁹ even though the LCP BREF had entered force in the EU for new plants in August 2017. The Decision also copies false argumentation from the study⁶⁰ and claims that *“According to the previous practice, following the adoption of new BREF documents, the process of negotiations is started with EU Member States on the revision of the legislation in line with the new proposals of conclusions given in the BREF, i.e. the emission limit values from large combustion plants, as well as the deadlines for their achievement. Based on the final agreements, new EU directives are issued and adopted in order to define the emission limit values that will apply to “new” and “existing” facilities. In doing so, time boundaries that define the status of the facilities (new–existing) are changed (moved).”* This may be what happened with the 2006 LCP BREF being enshrined in the 2010 Industrial Emissions Directive, but it is a completely false interpretation of the situation with the new LCP BREF, and this had already been pointed out by NGOs in previous rounds of commenting on the EIA. The new LCP BREF is binding in and of itself, as was stipulated already in the 2010 Industrial Emissions Directive. It also clearly states which plants are considered “new” and which are “existing”. Any plant receiving its first IPPC permit after the BREF entered force in August 2017 is considered a “new” plant in the EU, and thus it is clear that Kostolac B3, if in the EU, would be considered a new plant, and has to comply with the stricter emissions limit values shown above. It is true

⁵⁹ http://www.ekologija.gov.rs/wp-content/uploads/procena_uticaja/Decision%20-%20Environmental%20Impact%20Assesment%20Study%20for%20the%20project%20for%20construction%20of%200a%20new%20block%20B3%20at%20the%20site%20of%20TPP%20Kostolac-vazece.pdf

⁶⁰ Idem p.3-88

that during EU accession negotiations Serbia may in theory be able to negotiate a few more years for compliance, but this would not make a big difference in the overall lifetime of the project of 40 years. The EIA approval decision also follows the line of the EIA study in saying that in case changes need to be made, they can be done later. But no justification is given in either the study nor the Decision on why the higher standards that would better protect human health cannot be applied from the beginning, nor is it demonstrated what would be the additional impacts that applications of the 2017 LCP BREF would have or not have.

2. In its decision to approve the Kostolac B3 EIA study, the Serbian Ministry of Environmental Protection notes the concerns raised by the Drmno village locals during the consultation procedure in Pozarevac. Grouped in an NGO called “Zdravo Drmno”, the locals appealed⁶¹ to the competent authority to address their problems related to exposure of the population to cumulative pollution; need for resettlement; health problems the locals are facing due to prolonged exposure to ash pollution; and stability of the ground. However, in the EIA study approval Decision, the Serbian Ministry of Environmental protection dismisses these concerns in one sentence: “The displacement of the village of Drmno is not the subject of the Environmental Impact Assessment Study of the Project for construction of a new block B3 at the site TPP Kostolac B”. For this reason and considering the numerous occasions in which the local community of Drmno has made requests to be resettled, an ESIA and cumulative impact assessment for Drmno mine expansion should be conducted, including on living conditions in Drmno mine area and the need for resettlement, as remedial measure.

Serbia has an obligation under the Energy Community Treaty to implement the 2003 amendments of the EIA Directive including the following: “4. *The results of the consultations held pursuant to this Annex must be taken into due account in the taking of a decision.*” Thus taking into account the results of the consultation is a legal obligation, which in this case has not been properly fulfilled. However as well as a legal obligation, EPS’s responses to public comments on the new unit are a good indicator of its willingness to take measures to protect human health and to engage with stakeholders. While it is positive that stakeholders commenting on the EIA were also provided with the opportunity to comment on an amended version, EPS’ and the Ministry’s failure to adequately address the comments is cause for concern.

Construction permit for chimney issued before EIA process finished

⁶¹ http://www.ekologija.gov.rs/wp-content/uploads/procena_uticaja/Decision%20-%20Environmental%20Impact%20Assesment%20Study%20for%20the%20project%20for%20construction%20of%20a%20new%20block%20B3%20at%20the%20site%20of%20TPP%20Kostolac-vazece.pdf?lang=lat, page 3

The environmental impact assessment process for the new unit at Kostolac (B3) had to be repeated after the initial approval expired and the Espoo Convention Implementation Committee investigated Serbia for failure to assess the transboundary environmental effects of the plant. A new EIA process was carried out in 2017 and the study was approved on 28 September 2017. Just weeks later on 20 November it was suddenly announced⁶² that construction of Kostolac B3 was starting. In response to CEKOR's request for the construction permit of the B3 unit - which we assumed EPS must have at the time of the ceremony for beginning of construction works - the Ministry of Construction provided [evidence enclosed "Annex 5 - Resenje Kostolac B3 Chimney"] only the construction permit of the chimney and the construction permit of the water treatment plant. Both permits were issued on 14.07.2017, thus prior to the B3 EIA study approval, in spite of them being an integral part in the functioning of the new unit. In both permits it is mentioned that they were issued in accordance with the EIA study of Kostolac B3, however, at the time these two permits were issued the EIA study had not yet been approved.

The EIA decision to approve the study⁶³ is currently being challenged in front of the Administrative Court of Serbia by CEKOR for failure to comply with the legally required procedures for issuing such a decision.

See also Annex 2 - Kostolac Chronology

In addition to the non-compliance with EU law, Espoo Convention and Energy Community Treaty detailed above, the development of the Kostolac B3 thermal power plant demonstrates EPS' non-compliance primarily with PR3 on Resource Efficiency and Pollution Prevention and Control, but also non-compliance with PR1 on Assessment and Management of E&S Impacts and Issues, PR10 on Information Disclosure and Stakeholder Engagement.

4.5. Investigations by the Espoo Convention Implementation Committee

A complaint ("information form") regarding the lack of transboundary impact assessment for the planned construction of Kostolac B3 and expansion of the Drmno mine was submitted by Bankwatch Romania in June 2014 to the the Espoo Convention Implementation Committee. Amid the information exchanges between the Implementation Committee, the Serbian and Romanian ministries of environment, the Committee also initiated its own investigation into the lack of transboundary strategic environmental assessment of Serbia's Energy Strategy and Spatial plan, which had been referred to as the basis for approval of the Kostolac B3 initial EIA study.

⁶² <http://eps.rs/tpp-kostolac>

⁶³ <http://www.ekologija.gov.rs/saglasnost-na-studiju-o-proceni-uticaja-na-zivotnu-sredinu-za-projekat-izgradnje-novog-bloka-b3-na-lokaciji-te-kostolac-na-kp-303-ko-kostolac-selo/?lang=lat>

While the investigation into the potential breach of the Espoo Convention was closed in September 2016, after Serbia restarted the Kostolac B3 EIA process and notified Romania⁶⁴, at the Committee's last session of 2017⁶⁵, the body reported its intention to continue its deliberations concerning Serbia's compliance with the provisions of the Protocol on Strategic Environmental Assessment (Kiev Protocol) with regards to the Serbian Energy Development Strategy and its Spatial Plan.

Failure to implement the Espoo Convention translates into a violation of PR1, PR10 of the ESP2014.

4.6. Air quality and on-site emissions monitoring:

The Kostolac B3 EIA claims that: *"Summarized, we may say that on the entire observed area, forecasted air quality level for the observed reference scenario of operation of thermal capacity, is within the limits of allowed, with concentrations of pollutants under the legally prescribed values."*⁶⁶ However, this claim cannot be substantiated due to lack of publicly available monitoring results, on the one hand, and due to actual perceived pollution by the local population partially confirmed by Bankwatch independent monitoring (details below), on the other.

The official air quality monitoring stations located closest to the two mining basins provide neither sufficient nor continuous data for imissions (total sediment substances (mg/m²/day).

In Pozarevac, the closest air quality monitoring station to the Drmno mining field and Kostolac A and B power plants record only CO and SO₂ values, even though the national law on air quality sets the limits for three pollutants: SO₂, PM₁₀ and NO_x. CO emissions monitoring falls into the responsibility of the operator, alongside with CO₂, O₂, HF and HCl emissions.

The monitoring station in Lazarevac, in the Kolubara mining basin, does not appear to be sending any data to the Environmental Protection Agency's website⁶⁷.

From the data provided in the Kostolac B3 EIA study, we found long series of recordings missing, such as:

- In 2013 no records for 4 consecutive months: September to December
- In 2015 no data recorded for January, February, March and December

⁶⁴ https://www.unece.org/fileadmin/DAM/env/documents/2016/EIA/WG/ece_cp_teia_2016-9_report_of_36th_session_of_IC_e.pdf, page 10

⁶⁵

https://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/2017/IC_40/ece.mp.eia.ic.2017.6_advance_copy.pdf, page 11

⁶⁶ Page 262 of EIA study available for download here: http://www.ekologija.gov.rs/wp-content/uploads/procena_uticaja/EIA_Study_Project_TPP_Kostolac_New_Unit_B3.rar?lang=lat

⁶⁷ <http://www.amskv.sepa.gov.rs/pregledpodataka.php?stanica=1>

We find that the absence of these measurements leads to a false result as far as the annual mean of PM10 is concerned – making the average value look lower than in reality, especially considering that during winter the particulate matter values tend to be much higher, as a result of the temperature inversion phenomenon.

Starting in January 2018 power plant operators (i.e. EPS) are obliged to perform continuous monitoring at the power plants of PM10, SO2 and NOx and make the data available to the competent authority, in line with the Large Combustion Plants Directive entering force in the Energy Community countries⁶⁸. For the first trimester of 2018 no such power plant level monitoring data for has been made available either on EPS's website or on the Environmental Protection Agency's website.

Independent measurements of PM10 and PM2.5 immisions undertaken by CEE Bankwatch Network with certified equipment (GRIMM EDM 164) for a month between November 17 and December 16, 2016, right in the village of Drmno where the lignite open-pit mine is located and in the close vicinity to Kostolac B power plant, have shown that the legal daily limit for PM10 values appears to have been breached on 16 days in the observed period. The PM2.5 daily values were constantly above the 20 µg/m³ limit recommended by the World Health Organisation, on 26 out of 30 days of measurements. More information about Bankwatch's independent monitoring can be found here: <http://bankwatch.org/campaign/coal/airpollution> Bankwatch does not purport to replace official monitoring, but believes that in cases where official monitoring is absent, poorly functioning, or measuring stations are sited in irrelevant locations, such independent monitoring can help to indicate that an issue exists.

The lack of proper monitoring of environmental conditions for communities and the lack of publicly disclosed objective and verified data prevents informed decision-making and public participation. Moreover, the lack of continuous monitoring at EPS power plants of PM10, SO2 and NOx and the failure to provide monitoring data to the competent authority would constitute a breach of Serbia's obligations under the Energy Community (Large Combustion Plants Directive entered into force in January 2018). This constitutes a non-compliance of EPS with PR3 on Resource Efficiency and Pollution Prevention and Control with regards to application of EU requirements to EBRD clients.

4.7. State support to Kostolac B3 project - subject to potential breach of State Aid legislation⁶⁹

Serbia, as a signatory to the Energy Community Treaty, must follow EU legislation on state aid. The Serbian Government has agreed to provide loan guarantees for commercial loans for the Kostolac B3 unit. As well as the financial difficulties in doing this, sovereign or sub-sovereign loan guarantees have to comply with certain conditions, such as not exceeding 80% of the value of the loan and being paid for by the project promoter at market rates. It is not clear whether this is

⁶⁸ <https://energy-community.org/news/Energy-Community-News/2018/03/20.html>

⁶⁹ <https://bankwatch.org/sites/default/files/CRTAreport-Kostolac-subsidies-30Jun2014.pdf>

the case with Kostolac. In addition, in 2011 a contract was signed between the Government of Serbia and the China Exim Bank, for USD 293 000 000 – 85% of the cost of the full project Phase 1 - envisaged for reconstruction of blocks B1 and B2 of Kostolac TPP, construction of a de-SOx system, building of a landing dock on the Danube and construction of railway infrastructure. In this contract, the Republic of Serbia is the borrower, responsible for paying back the loan amount, while TE-KO Kostolac, part of the state-owned electricity company EPS is named as the end-user of the funds. Thus the state takes on all the responsibilities connected with paying back the loan and gives EPS an advantage over potential competitors.

This scheme was continued in December 2014 when the Serbian state signed the USD 608 million loan with China ExIm Bank for the new plant, B3. The quoted research⁷⁰ also finds that there are possible exemption from VAT and customs duties for the import and supply of goods and services for the implementation of transport infrastructure projects in the first phase of the Kostolac B project. The total value of the two infrastructure projects is USD 37.82 million (construction of the landing dock on the Danube worth USD 15.86 million and construction of railway infrastructure worth USD 21.96 million).

The Energy Community has not published any information about its investigation into the Kostolac B3 state aid claims, however the state aid case for Kolubara⁷¹ mines and power plant has reached already the second in a three-step infringement process, and the similarities of the two cases are strong.

We are also concerned that in the feasibility study for the plant, EPS has assumed that CO₂ costs would be paid by the state. In the sensitivity analysis it becomes clear that even a relatively low CO₂ price would tip the plant into non-feasibility⁷².

While state aid for Kostolac B3 does not directly constitute a non-compliance with the EBRD's ESP2014, it raises questions about the impact of Kostolac B3 project on EPS finances and on the need for the EBRD to consider wider strategic issues at sectoral level. Since Serbia's integration in the regional and EU electricity markets, the need for implementing EU standards to the country's energy sector is not just an environmental or climate issue, but also a competition issue.

4.8. Viminacium archaeological site by the Drmno mine

The Kostolac B3 EIA study gives ample space to the Viminacium cultural heritage site. *“In the immediate vicinity of the boundaries of TPP Kostolac B and area foreseen for construction of plant for flue-gas desulfurization (FGD), there is an enclosed area of the archaeological site Viminacium. The eastern boundary of TPP Kostolac B is the southwestern boundary of the site. Viminacium is one of the most important archaeological sites in Serbia under the protection of the*

⁷⁰ Ibid.

⁷¹ <https://www.energy-community.org/legal/cases/2014/case1114RS.html>

⁷² http://www.cekor.org/documents/pages/649_2.pdf

state since 1949, as a monument of culture - archaeological site. In 1979, the Serbian Assembly declared Viminacium as a cultural heritage of great importance (Official Gazette of SRS 14/79) [...] the site has become endangered with further extension of open cut mine Drmno which further caused displacement of excavations (aqueducts).”

The site was also added to UNESCO’s tentative list in 2015⁷³, but no progress seems to have been made by the Serbian authorities towards declaring the site one of world cultural heritage importance.

The EIA study later goes on to acknowledge the threat that the site may be damaged or even destroyed by the Kostolac B3 unit construction works and encourages EPS to coordinate its works with those of the authority responsible for cultural heritage. *“During the process of ground clearing and earthworks for the preparation for construction site, new archaeological findings that belong to Viminacium may be found. The works of construction machinery could destroy or damage archaeological objects and it is essential that Electric Power Industry of Serbia, Institute for Protection of Cultural Heritage in Smederevo and archaeological institutions coordinate their construction works and archaeological research.”*

Even less reassuring is the paragraph in the EIA study which points to the possibility that cultural tourism and lignite production and burning may actually go hand in hand: *“Given the proximity of the archeological finding Viminacium that borders the location of power plant and that in future will have a growing tourist and cultural and historical importance, attention has to be paid on entire area within power plant regarding biodiversity protection measures and construction of protective green belt around TPP location”*

It is worth highlighting again that these impacts are only related to the construction of the Kostolac B3 unit, and not to the operation and expansion of the Drmno mine, which, as outlined in section 6.3., is progressing without an EIA, therefore the potential damage to this culturally and historically important site from mining operation remains unaddressed. A satellite image of the site location [“Annex 6 - Viminacium satellite view location’] shows its proximity of less than 200m from the conveyor belts at the edge of the Drmno mine, and a Bankwatch team traveling to the site in April 2018 observed the construction of what looks like workers’ compounds even nearer to Viminacium than that. Meanwhile, media reports of new historically groundbreaking findings at the site appear every other year, with the latest piece of news presenting the remains of a 3rd century mausoleum being identified⁷⁴.

The failure to study the impact on cultural heritage of EPS operations and implement the mitigation measures required to protect the Viminacium site constitute non-compliance of the EBRD client with PR 8 on Cultural Heritage. It is unclear if the EBRD has helped or encouraged its client to address this issue, which requires urgent attention.

⁷³ <https://whc.unesco.org/en/tentativelists/6060/>

⁷⁴ <http://www.novimagazin.rs/opusteno/u-viminacijumu-otkriven-mauzolej-iz-treceg-veka>

5. EBRD Policy violations

In addition to the client's alleged non-compliance with the PRs, we allege non-compliance by the EBRD with its Environmental and Social Policy of 2014 and/or seek clarification on the implementation of a number of provisions in the Policy, elaborated below.

a) Application of the ESP2014 to all projects

We believe that the ESP2014 should apply to the EPS Restructuring project regardless of the nature of the investment. This is supported by:

- Article 1 of the Policy, which commits the bank to "*promoting 'environmentally sound and sustainable development' in the full range of its investment and technical cooperation activities*";
- Article 4 stating that: "*All projects financed by the EBRD shall be structured to meet the requirements of this Policy*";
- Article 3 stating that: "*This Policy outlines how the Bank will address the environmental and social impacts of its projects by [...] mainstreaming environmental and social sustainability considerations into all its activities.*"

To our knowledge, a derogation from applying the policy, or parts of it, was not requested or granted for the EPS Restructuring project.

Furthermore, according to Article 12: "*Through the implementation of this Policy the EBRD will build partnerships with clients to assist them in adding value to their activities, improve long-term sustainability and strengthen their environmental and social management capacity.*" In spite of the EBRD's effort, results speak louder than intentions in the case of EPS investments. It is unacceptable that after all the EBRD investments EPS can still get away with a sub-standard EIA (Kostolac B3), lack of EIA (Drmno mine expansion), lack of social impact assessments for the Kostolac B3 project, and lack of health impact assessments, as repeatedly requested by local communities neighbouring mining fields currently being expanded. It is also telling that EPS was capable of producing high standard EIAs for its wind and solar projects, while in comparison the impacts on communities by parallel developments in the Kostolac complex have not been studied and mitigated properly. In October 2017 at the public hearing on the wind and solar assessments in Pozarevac, local people were extremely puzzled that impacts on birds were so well assessed, but the concerns about their living environment continue to fall on deaf ears.

b) EBRD commitments to the rule of law, compliance with national regulation, good international practice, EU and international law

The EBRD has not faithfully and sufficiently implemented Article 6 of the Policy in the EPS Restructuring project, as the bank has not sought "*within its mandate to ensure through its environmental and social appraisal and monitoring processes that projects are designed, implemented and operated in compliance with applicable regulatory requirements and good*

international practice (GIP)”, as pointed out in the section above.

Furthermore, the EBRD has failed to structure the EPS Restructuring project to ensure respect for, and promotion of, the principles and substantive requirements of EU and international law, in line with Article 7 and 8 of the Policy:

Article 7. *“The EBRD, as a signatory to the European Principles for the Environment, is committed to promoting the adoption of EU environmental principles, practices and substantive standards by EBRD-financed projects, where these can be applied at the project level, regardless of their geographical location. When host country regulations differ from EU substantive environmental standards, projects will be expected to meet whichever is more stringent.”*

Article 8. *“The EBRD recognises the ratification of international environmental and social agreements, treaties and conventions by its countries of operations. Within its mandate, the EBRD will seek to structure the projects it finances so that they are guided by the relevant principles and substantive requirements of international law. The EBRD will not knowingly finance projects that would contravene country obligations under relevant international treaties and agreements, as identified during project appraisal.”*

Although the bank has devoted considerable effort to improving EPS corporate governance, complainants have on several occasions raised with the bank their concerns of insufficient ambition and its lack of strategic approach with regards to Serbia’s and EPS’ improper implementation of EU Directives and Energy Community obligations on EIA, industrial emissions, state aid. Specifically the complainants have questioned the adequacy of the project’s ESAP, which lacks attention to non-compliance of EPS’ investment projects, such as the Kostolac B1-2 desulphurisation project, the Drmno mine expansion and Kostolac B3 lignite power plant, with the legislation in force, as well as the adequacy of the project’s ESAP against the Bank’s E&S Policy. (see in Annex 1 on Correspondence the table providing comments on the ESAP)

We have also provided comments to the audits that the EBRD required from EPS, as we find these biased, short-sighted and lacking focus on social impact (see in Annex 1). As a result of the weak conditionality of the EBRD’s EUR 200 million investment, the client does not apply good international practice and still operates several of its facilities in breach of applicable regulatory requirements, as detailed in Section 4.

c) EBRD’s commitment to low-carbon transition

Article 13 of the Policy states: *“The EBRD recognises the importance of addressing both the causes and the consequences of climate change in its countries of operations. The EBRD will engage, whenever appropriate, in innovative investments and technical assistance to support no/low-carbon investments and climate-change mitigation and adaptation opportunities, as well as identify opportunities to reduce emissions in EBRD-supported projects. The EBRD will also support its clients in developing adaptation measures that promote climate-resilient investments.”*

Since the EPS Restructuring project is a corporate level investment, was it not appropriate for the EBRD to assess its client's emissions footprint and look for opportunities to reduce these emissions on corporate level? Such an assessment would allow to put the efficiency gains from the Kolubara Environmental Improvement project² and of EPS's wind and solar projects into perspective, against the background of Drmno mine expansion and the Kostolac B3 power plant. Since EPS is in essence the energy sector of Serbia, the EBRD had a great opportunity to deliver on its commitment to the low-carbon transition of its countries of operation by, for example, agreeing with its client a climate audit and/or a decarbonisation plan. The question is if EBRD's appraisal and loan conditionality took this commitment into account, and if this was done to a sufficient degree? If not, why not?

Serbia's dependence on coal and EPS's exposure to coal pose significant risks for the economy and society – risks that were exposed by the crisis resulting from the catastrophic floods of 2014, when the client's operations were blocked and Serbia was forced to import power, causing financial difficulties that the EUR 200 million loan was supposed to alleviate. Therefore phasing out coal in EPS's portfolio and Serbia's energy sector would have been an appropriate climate adaptation measure.

The client portfolio is heavily reliant on lignite electricity production capacities: its thermal power plants and combined heat and power plants have an installed capacity of 4,368 MW, which results in an annual generation – 25,062 GWh. This represents 70 percent share of EPS electricity generation⁷⁵. As a tribute to climate change, it should be remembered that the Drmno mine flooded twice in 2014. As well as having to mount a huge effort to save the mine during the May floods, between July and September 2014 more than 2 million cubic metres of water spilled into the mine⁷⁶, bringing with it around 800 000 cubic metres of sludge and mud, and engulfed mining machinery in mud. The flooding at Tamnava West in May 2014, when 187 million cubic meters of water inundated the pit, and sank nine excavators, were only resumed after more than one year and cost the state budget at least 200 million EUR - the cost of the mines' dewatering, but estimations referred to in the EBRD board document for the EPS restructuring project exceed 500 mil EUR. However opposite extremes are also possible. The client has not published an analysis of whether its hydropower electricity production capacities - 30% - are vulnerable to drought conditions and whether there could be conflicts over use of drinking water between the plant and other users in dry periods.

In January 2016 at a meeting between CEKOR, Bankwatch and EBRD staff in London, the EBRD did state that the EPS Restructuring project would involve EPS updating its 2009 Green Book.⁷⁷ This document laid out EPS' investment priorities regarding environmental issues and adaptation to climate change. However no such commitment is mentioned in either the project PSD not the Board Document, and no such update appears to have been undertaken. It is therefore unclear whether this opportunity “*to support its clients in developing adaptation*

⁷⁵ <http://eps.rs/en/poslovanje-ee/Pages/Kapaciteti-EIEn.aspx>

⁷⁶ <http://www.balkanmagazin.net/struja/cid189-100744/izgradnja-bloka-b3-u-kostolcu-ceka-zeleno-svetlo-iz-kine>

⁷⁷ <http://www.eps.rs/En/Documents/energyEfficiency/EPS%20-%20The%20Green%20Book.pdf>

measures that promote climate-resilient investments” was missed by the EBRD, in omission of the commitment made in Article 13.

In the Management Action Plan for the Kolubara PCM Compliance Review (MAP) the EBRD commented that *“In order to give more context for [Kolubara project’s] benefits, Management will disclose additional information on the GHG emissions of the TENT thermal power plants and the overall emissions for EPS. Management is not able to commit at this time to providing projections of future GHG emissions, as this is best done at the country level. As part of its Sustainable Resource Initiative, EBRD has developed selected country-level GHG studies and EBRD will review whether it is appropriate to include Serbia in this programme.”*

In this regard, we believe that Article 39 of the Policy is relevant to the complaint, as it states: *“At times, the project’s ability to meet the PRs will be dependent on third party activities. The EBRD seeks to ensure that the projects it finances achieve outcomes consistent with the PRs even if the outcomes are dependent upon the performance of third parties. When the third party risk is high and the client has control or influence over the actions and behaviour of the third party, the EBRD will require the client to collaborate with the third party to achieve outcomes consistent with the PRs. Specific requirements and actions will be determined on a case-by-case basis. Certain third party risks may result in the Bank deciding to refrain from financing the project.”*

The EBRD’s Board Document for the EPS Restructuring projects states that: *“EBRD investment will be conditioned upon an agreed plan for a comprehensive program of reforms of the Company and of the sector which will have a significant impact on the development, management and operational efficiency of the power infrastructure in Serbia.”* It is unclear if this reform considers decreasing Serbia’s reliance on coal and decreasing of EPS climate footprint?

We are concerned that through the EPS Restructuring project the EBRD appears to have failed to deliver on its climate commitments by requiring EPS to identify climate-change mitigation and adaptation opportunities, as well as identifying opportunities to reduce emissions in the EBRD-supported project. In addition, there is no indication that Management has taken the necessary steps to support climate objectives on project level, for example through the necessary policy dialogue and support to Serbia in GHG emission reduction or resource efficiency studies. It is inconceivable how EPS could be restructured and Serbia’s energy sector reformed without paying due respect to EU climate policy requirements and the country’s obligations under the Energy Community.

d) Incorrect categorisation

The EBRD has incorrectly categorised the EPS Restructuring project. We believe that, in view of the clear expectation that the EUR 200 million project will *“free up resources”*³ for EPS to implement capital investments, such as the Kostolac B3 power plant and investment in new or extension of existing fields, the EBRD has underestimated the *“the significance of its potential adverse future environmental and social impacts”* and *“the nature and level of environmental and social investigations, information disclosure and stakeholder engagement required”* as provided

in Article 23 of ESP2014.

In addition, the category B of the EPS Restructuring project does not satisfy the requirements of Article 24: “A project is categorised A when it could result in potentially significant adverse future environmental and/or social impacts which, at the time of categorisation, cannot readily be identified or assessed, and which, therefore, require a formalised and participatory environmental and social impact assessment process.” EBRD Management anticipated that the project will “free up” client’s resources, for example for building new coal generation capacities and/or other investments, whose impacts could not be readily identified and assessed in 2015. However, it appears that EBRD Management decided that such significant developments, which are enabled by the bank’s own investment, did not require setting loan conditions for formalised and participatory environmental and social impact assessment of individual EPS investments.

We disagree that a EUR 200 million corporate level investment’s “potential adverse future environmental and/or social impacts are typically site-specific, and/or readily identified and addressed through mitigation measures” as stated in Article 25 on B categorisation, especially given the numerous environmental and social issues which have arisen from previous EBRD-supported EPS projects, and which continue to arise on a regular basis.

In fact Article 32 clearly states that in cases of corporate level finance “the environmental and social footprint are largely indeterminate” and “[t]he Bank will therefore (i) assess the investment based on the risks and impacts inherent to the particular sector and the context of the business activity.” Therefore we believe that A should be the correct categorisation of corporate level investments, due to the fact that the E&S impacts and risks are “indeterminate” (in other words “cannot readily be identified or assessed”, Art24), especially where it is well known that the client plans greenfield facilities and the EBRD finance is indirectly enabling these. In line with Article 24 discussed above “therefore, [these E&S impacts] require a formalised and participatory environmental and social impact assessment process.”

e) Limited E&S appraisal

It is unclear to what extent the EBRD satisfied the provisions of Article 30 of the policy, particularly in the part on associated facilities not financed by the EBRD. We allege non-compliance and expect that the PCM compliance review will clarify how Article 30 provisions apply to corporate level investments:

Article 30: “The EBRD’s environmental and social appraisal includes consideration of three key elements: (i) the environmental and social impacts and issues associated with the project; (ii) the capacity and commitment of the client to implement the project in accordance with the relevant PRs; and (iii) to the extent appropriate, the facilities and activities that are associated with the project, but are not financed by the EBRD. The scope of the EBRD’s environmental and social appraisal will be defined on a case-by-case basis, and may also review potential risks and liabilities associated with assets pledged as security.” (emphasis added)

Moreover, with regards to problematic permitting cases that the complainants raised with the bank – for example the construction permit for the desulphurisation chimney at Kostolac B1-2, it is unclear if the EBRD's legal services examined the issues, as is stipulated by Article 31 of the Policy, according to which the EBRD is supposed to review independently assurances from its client that environmental and other permitting issues are resolved. Article 31: *"It is the responsibility of the client to ensure that adequate information is provided so that the Bank can undertake an environmental and social appraisal in accordance with this Policy. The Bank's role is to: (i) review the clients' information; (ii) provide guidance to assist clients in developing appropriate measures consistent with the mitigation hierarchy to address environmental and social impacts to meet the relevant PRs; and (iii) help identify opportunities for additional environmental or social benefits."*

Article 32 of the Policy is particularly relevant to corporate level investments and we believe that in the case of the EPS Restructuring project the EBRD did not *"(i) assess the investment based on the risks and impacts inherent to the particular sector and the context of the business activity"*. It is needless to say that the energy sector is one with severe environmental and social impacts. EPS is practically Serbia's electricity sector. In spite of the corporate level assessments, the EBRD has not assessed EPS' plans to increase coal production and build new coal power plants, as well as the risks and impacts these plans have on the financial stability of the company, as well as their impacts on society and communities in the short, medium and long-term.

In addition, in the Management Action Plan for the Kolubara: PCM Compliance Review (MAP) we read: *"Management agrees that investments with clients which operate across a sector or a region can benefit from proactive engagement on wider environmental and social issues and that this can help achieve systemic improvements in performance. Consistent with the 2014 Environmental and Social Policy, EBRD, within its mandate, will work with these clients to help them manage environmental and social risks in their other operations that are not part of the project."* Although the EPS Restructuring project was under preparation at the time, Management action did not include specific points on how this would be done through the new loan. Solely updating the Kolubara environmental improvement PSD, the EPS Restructuring ESAP and EPS audits did not go far enough to deliver systemic achievements, as was argued by the complainants in correspondence to the bank.

f) Limited improvements in EPS corporate culture with regards to transparency and stakeholder engagement, failure of client to comply with PR10

Article 34 of the Policy states: *"The EBRD's appraisal requires the clients to identify stakeholders potentially affected by and/or interested in the projects, disclose sufficient information about the impacts and issues arising from the projects and consult with stakeholders in a meaningful and culturally appropriate manner. In particular, the EBRD requires its clients to engage with relevant stakeholders, in proportion to the potential impacts associated with the project and level of concern. Such stakeholder engagement should be carried out bearing in mind the spirit and principles of the [Aarhus and Espoo Conventions ...]."*

In spite of EBRD's efforts to support a transparent and accountable corporate culture, for example through technical cooperation for the development by EPS of a Stakeholder Engagement Plan, the bank's appraisal for the ESP Restructuring failed to ensure that EPS will disclose sufficient information and consult meaningfully with affected and interested stakeholders, in accordance with the spirit and principles of the Aarhus and Espoo Conventions. As evidence for this:

- the start of construction of Kostolac B1-2 desulphurisation project before the EIA procedure was concluded,
- the EIA Study from 2008 on the Drmno mine's expansion up to 9 million tonnes per year was never disclosed to the public in spite of CEKOR's request and complaint to the Commission responsible for access to public information;
- lack of EIA on Drmno mine's expansion from 9 up to 12 million tonnes per year;
- inadequate consultations on transboundary impact of Kostolac B3 power plant with Romania and related Espoo Convention Implementation Committee investigation of Serbia's compliance with the provisions of the Protocol on Strategic Environmental Assessment (Kiev Protocol) with regards to the Serbian Energy Development Strategy and its Spatial Plan - elaborated in the previous section.

g) Application of the PRs

In Article 36 of the Policy the EBRD commits to help clients and/or their projects to meet the Performance Requirements (PRs), specifying that “[d]irect investment projects must meet PRs 1 to 8 and 10; [... as] compliance with relevant national law is an integral part of all PRs.” We understand this as a commitment that the EBRD through its direct investment in EPS will help the company bring its business in line with the PRs. In the previous section we provided evidence that this is not the case for some of the client's facilities and planned investments.

This policy provision must be understood in conjunction with the following two articles:

Article 37: “Projects involving new facilities or business activities will be designed to meet the PRs from the outset. If a project involves existing facilities or activities that do not meet the PRs at the time of Board approval, the client will be required to adopt measures satisfactory to the EBRD, that are technically and financially feasible and cost-effective to achieve compliance of these facilities or activities with the PRs within a time frame acceptable to the EBRD. In addition, the EBRD will work with its clients to manage environmental and social risks consistent with the PRs in their other operations that are associated with but not part of the project.”

Article 38 “Where the project involves general corporate finance, working capital or equity financing for a multi-site company, the client will be required to develop measures at the corporate level (as opposed to the project-specific level) to meet the PRs over a reasonable time period.”

CEKOR and Bankwatch have provided comments to the EBRD why we consider the Environmental and Social Action Plan (ESAP) for the EPS Restructuring project inadequate, which can be seen in Annex 1. To reiterate, it is unclear to us how the EBRD applies the Policy to

corporate level investments and we hope that the compliance review will clarify on this question. Our concern is that in such cases, the safeguards provided in the Policy may become irrelevant. We understand that each project is unique and the Policy must provide flexibility for various kinds of projects' structure and clients' needs. However, it would be very worrying, if clients can pick and choose ways of structuring a project that can avoid full application of the EBRD standards. Therefore a clearer approach must be outlined either in the revised ESP or in a separate guidance note.

Article 42 of the Policy states: *"The EBRD's financing agreements with clients in respect of a project will include specific provisions reflecting the EBRD's environmental and social requirements. These include compliance with all applicable PRs, as well as provisions for environmental and social reporting, stakeholder engagement and monitoring. [...]"* It is unclear if this is the case and how specific these covenants are. For example:

The EBRD's Board Document for the EPS Restructuring projects states that: *"EBRD investment will be conditioned upon an agreed plan for a comprehensive program of reforms of the Company and of the sector which will have a significant impact on the development, management and operational efficiency of the power infrastructure in Serbia."* While this sounds good, it is unclear if these reforms consider lignite mine expansions and new coal generation capacities, and moreover, it is not explicit if compliance with the ESP2014 and the PRs is a condition, too?

In conclusion, we are available to provide further information and to answer questions from the PCM.

Sincere regards,

Zvezdan Kalmar
CEKOR

and

Ioana Ciută
CEE Bankwatch Network

Outline of Annex 1 - Correspondence

1) Issue Paper on resettlement, 01.02.2016

<https://bankwatch.org/wp-content/uploads/2016/02/briefing-EBRD-EPSerbia-01Feb2016.pdf>

2) 10 March 2016 Letter from CEKOR and Bankwatch to Managing Directors of EBRD ESD and Energy & Natural Resources

3) Reply on 7 April 2016 from Alistair Clark

4) 14 June 2016 CEKOR letter on RAP

5) 25 July 2016 Questions on the Audit

6) 3 August 2016 reply from Alistair Clark on Audits

7) 12 December 2016 request for the second Audit by Bankwatch Alistair Clark

8) 01.02.2017 reply from Alistair Clark regarding second Audit, with links to NTS and SEP from on the updated PSD

9) May 2017 Nicosia AGM IP

<https://bankwatch.org/publication/eps-what-does-restructuring-mean>

10) 04.07. 2017 letter from Bankwatch to EBRD regarding new BREF decision

11) 07.07.2017 Reply from Martin McKee