

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

**PROJECT COMPLAINT MECHANISM
COMPLIANCE REVIEW REPORT**

COMPLAINT: OMBLA HYDROPOWER PROJECT

REQUEST NUMBER: 2011/06

Executive Summary

On 17th November 2011 the Project Complaint Mechanism (PCM) Officer received a complaint regarding the Ombla HPP hydroelectric Project in Croatia. The Complainant claims that the Project is likely to cause harm and that EBRD has failed to comply with the relevant EBRD Policy on a total of five grounds. The complaint was registered according to PCM Rules of Procedure on 24 November 2011 and on 12 July 2012 the Eligibility Assessment Report was publicly released, declaring the Complaint eligible and warranting a Compliance Review. PCM Expert Mr. Graham Cleverly was appointed as the Compliance Review Expert for the Complaint.

The Complaint alleges that the Project has failed to comply with the EBRD's 2008 Environmental and Social Policy (ESP) on a total of five grounds. First of all, it contends that the Bank, in its appraisal of the Project's environmental risks, has relied upon an outdated EIA from 1999 which is no longer valid under the applicable Croatian law, thus amounting to a breach of PR 1.5, PR 1.9 and PR 6.15 of the ESP. Setting aside the issue of the lack of a conclusive biodiversity assessment of the Project's likely impacts and questions concerning the adequacy of public disclosure based upon the Bank's ESIA, the Compliance Review Expert has determined that EBRD did take reasonable steps to determine the legality of the 1999 EIA and of permits based thereon, and that the aspects of the ESIA reviewed for the purposes of this Complaint can be deemed to have met the general requirements of the ESP. Therefore, there is no finding of non-compliance in respect of this ground of complaint.

Secondly, the Complaint alleges that the Bank failed to ensure that meaningful public consultation took place, as required under the Aarhus Convention, Croatian law and the ESP. The Compliance Review Expert has determined that meaningful disclosure and public consultation was undertaken in the course of the Bank's Project appraisal process and that all options remained open to the Bank, at least in principle, whilst such disclosure and public consultation was ongoing. The Compliance Review Expert is satisfied that, had an appropriate biodiversity study been conducted in advance of approval of the Project, it would have been disclosed in accordance with the requirements under the ESP. Therefore, any failure to conduct such biodiversity study could only amount to an automatic and technical non-compliance with the obligation to disclose under PR 10. Once again, setting aside issues arising from the requirement for disclosure of a full ESIA in the absence of a biodiversity assessment, there is no finding of non-compliance in respect of this ground of complaint.

Thirdly, the Complaint alleges that the Bank has violated the requirements of the ESP by approving the Project without first having carried out a biodiversity assessment concluding that it will not adversely affect the integrity of those areas proposed for designation as Natura 2000 sites, despite the agreement of contractual conditions requiring satisfactory completion of such an assessment before distribution of funds would take place. The Compliance Review Expert has determined that, in the quite different circumstances of the present Project, the Bank ought not to have relied upon the flexibility permitted in the case of the *DI Motorway* Project in respect of the requirement for a biodiversity assessment. The Compliance Review Expert also doubted whether all options could in reality remain open during the course of a deferred biodiversity assessment to be conducted after approval of the Project by the Board. Of course, such a deficiency in Project appraisal must also amount, automatically, to technical non-compliance with the public disclosure requirements under PR 10.18 of the ESP. Therefore, the deferral of the biodiversity assessment until after the

approval of the Project amounts to a failure on the part of the Bank to comply with the precautionary standards required under PR 6.6 and PR 6.15 of the ESP.

Fourthly, the Complaint alleges that the Bank failed to ensure that the “critical habitats” potentially affected by the Project must not be converted or degraded unless strict conditions specified in the ESP have been satisfied in accordance with the precautionary approach. Taking the view that the safeguards stipulated in PR 6 related to “natural”, “critical” or “protected” habitats rely primarily on the carrying out of a rigorous biodiversity assessment, the Compliance Review Expert has determined that consideration of this element of the Complaint may be conflated with the question of the deferral of the biodiversity assessment until after the approval of the Project.

Finally, the Complaint alleges that the Bank’s approval of the Project in the absence of a strategic environmental assessment (SEA) of the 2008 Croatian National Energy Strategy or the relevant special planning policies constitutes a breach of its obligations under the ESP. The Compliance Review Expert has determined that the Ombla HPP Project could not have arisen by virtue of the later adopted National Energy Strategy or Special Plan for the Dubrovnik-Neretva County, and so there was no need to consider whether SEA was required in respect of either nor whether either was actually subjected to such an SEA process. Therefore, there is no finding of non-compliance in respect of this ground of complaint.

Therefore, the Compliance Review Expert has made a finding of non-compliance in respect of only one of the grounds set out in the present Complaint. This Compliance Review has determined that the Bank’s approval of the Project in advance of the completion of a conclusive biodiversity assessment amounts to non-compliance with the requirements of Performance Requirement 6 of the 2008 ESP.

I Introduction

Factual Background

1. On the 22nd November 2011, the Board of Directors of the European Bank for Reconstruction and Development (EBRD) approved provision of a senior loan to Hrvatska Elektroprivreda d.d. (HEP) of up to EUR 123.2 million out of an estimated total project cost of EUR 152.4 million for the Omba Hydro Power Project in Croatia (EBRD Operation ID 42219). The project consists of a 68MW hydroelectric power plant situated at Omba near Dubrovnik involving, *inter alia*, construction of an underground grout curtain dam 130 meters high x 1300 meters across, causing a significant rise in the water table, excavation of an underground cavern to locate the power house, the blocking of existing water conduits and the construction of new tunnels for water conveyance, the construction of new drinking water infrastructure, as well as associated access roads, storage areas and electricity lines.
2. On 17th November 2011 the Project Complaint Mechanism (PCM) Officer received a complaint regarding the Omba HPP Project from Mr Enes Cerimagić of Friends of the Earth (FoE), Croatia. In accordance with PCM Rules of Procedure 10 (PCM RP 10), the Complaint was registered by the PCM Officer on 24th November 2011. Notification was sent to the Complainant and the Relevant Parties pursuant to PCM RP 12, and the Complaint was registered on the PCM website, according to PCM RP 13. One of the PCM Experts, Dr. Owen McIntyre was assigned to assist the PCM Officer in the Eligibility Assessment of the Complaint. The Eligibility Assessment Report (EAR) declared the Complaint eligible for a Compliance Review and included the relevant Terms of Reference (ToRs). Pursuant to PCM RP 35, the PCM Officer appointed another of the PCM Experts, Mr. Graham Cleverly, as the Compliance Review Expert with responsibility for conducting this Compliance Review.

Summary of the Positions of the Relevant Parties

3. **The Complainant** alleges non-compliance on the part of EBRD with its 2008 Environment and Social Policy (ESP) on five grounds as follows:
 - a. **Outdated and Illegal Environmental Impact Assessment:** The Complainant alleges that in appraising the Project, the Bank has relied upon an Environmental Impact Assessment (EIA) dating from 1999, which it contends is outdated and no longer legally valid under the applicable Croatian law. The Complainant argues that if the Bank relied solely on the 1999 EIA, it would not be adequate to meet the requirements of the 2008 ESP.
 - b. **Failure to hold Meaningful Public Consultation:** The Complainant also alleges that the Bank failed to ensure that meaningful public consultation took place, as required under the Aarhus Convention, Croatian law and the 2008 ESP. Essentially, the Complainant contends that, due to the time lapse since the conduct of the EIA, meaningful public consultation could not be undertaken prior to the taking of certain decisions and could not have been based on disclosure of relevant and adequate information.
 - c. **Incomplete Biodiversity Assessment:** In addition, the complainant alleges that the Project has been authorised by the Croatian national authorities and, more recently, approved by the Bank without having undergone a biodiversity

assessment to ensure protection of the overall coherence of the Natura 2000 network. Since a number of natural features likely to be impacted by the Project, including the Vilina Cave system, the Ombla Spring and the general karst habitat complex, are parts of sites proposed for designation as Natura 2000 sites, the Complainant contends that the Project should not have been approved by the Bank until completion of a biodiversity study equivalent to an “appropriate assessment” under Article 6(3) of the EU Habitats Directive¹, concluding that the Project will not adversely affect the integrity of the sites concerned.

- d. **Damage to Habitats without Adequate Justification:** As a result of the above, the Complainant further claims that the natural features listed in the previous paragraph constitute “critical habitats” for the purposes of the EBRD’s 2008 ESP and, thus, that they must not be converted or degraded unless certain strict conditions specified in the policy have been satisfied in accordance with the precautionary approach.
- e. **Lack of Strategic Environmental Impact Assessment:** Finally, the Complainant alleges that the failure of the Croatian Authorities to subject either the 2008 Croatian National Energy Strategy or the relevant special planning policies to a Strategic Environmental Assessment (SIA) procedure constitutes a breach of Croatian law. According to the Complainant, the Bank’s approval of a project referenced under that Strategy and permitted under those policies constitutes a breach of its obligations under the 2008 ESP.

4. In its response to the Complaint, **EBRD** has addressed each of the specific issues raised by the Complainant² as follows:

- a. According to EBRD, advice received from officials of the Ministry of Environmental Protection, Spatial Planning and Construction, as well as from independent counsel retained by the Bank, confirms that the permits issued by the Croatian national authorities on the basis of the 1999 EIA remain legally valid and in effect and, further, there was at the time of appraisal no legal basis for the national authorities to require any further assessment. Regarding the adequacy of the 1999 EIA, EBRD concedes that in certain respects it is not fully compliant with the requirements of the EU EIA Directive³ and EBRD’s 2008 ESP. EBRD claims that the potential impacts not covered in depth by the 1999 EIA (including the potential impacts of the Project on biodiversity) have been identified in the course of EBRD’s appraisal process and will be additionally addressed in line with EU law and the 2008 ESP under the provisions of the Environmental and Social Action Plan (ESAP). Envisaged actions include completion of the studies and reports required under the EU Habitats Directive, including an Appropriate Assessment and, if appropriate, a Biodiversity Management Plan, developed with appropriate public consultation.
- b. EBRD points out that although the Bank’s Board of Directors approved the Project on 22nd November 2011, under the terms of the financing agreement with HEP, a series of express conditions must be satisfied before funds will be

¹ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora

² EBRD Response, 19 December 2011.

³ Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment as amended by Council Directive 97/11/EC.

disbursed. These conditions require, *inter alia*, the completion of a biodiversity study that meets the standards foreseen under the EU Habitats Directive. The Bank's response points out that this biodiversity study will be carried out in a fully transparent manner, as required under EU law, involving appropriate stakeholder engagement. In addition, EBRD's response explains that funding of the project will not be able to proceed unless the biodiversity study conclusively establishes that it would meet the objective standards of species and habitats protection and/or the requirements as regards public importance stipulated under the Directive. Thus the Bank argues that the biodiversity assessment conducted to date cannot be considered to be final. Regarding actions already taken, EBRD notes that, further to compliance with applicable regulations at the date of the EIA, disclosure and public consultation have recently taken place in respect of the ESIA package, which includes a Stakeholder Engagement Plan (SEP) and the biodiversity study required in the ESAP and outlined above, each requiring further disclosure in accordance with the SEP. In relation to the adequacy and relevance of the information disclosed in respect of biodiversity aspects of the Project, EBRD points out that one further study⁴ already conducted by the Croatian Ministry of Culture was not previously disclosed until the EBRD-required disclosure period, when it was disclosed as part of the "ESIA package", which included the 1999 EIA, 2007 Bat Survey, SEP, Non-Technical Summary (NTS), Resettlement Action Plan (RAP), and ESAP. Further, EBRD notes that the key issues addressed in the ESAP, and disclosed by means of the NTS of the ESAP, were in part identified during the extensive scoping exercises involving consultations with a broad range of local and national stakeholders.

- c. The Bank argues that although the Board of Directors approved the Project in advance of the completion of an additional study of its biodiversity impacts, the project has been structured so that there will exist "restrictions of any activity being undertaken...until a study and decisions equivalent to those required under the EU Habitats Directive were completed". Therefore, EBRD has only agreed to provide funding for works that might affect the proposed Natura 2000 sites on the strict condition that the "Appropriate Assessment" will be completed and will have conclusively established that the conservation objectives of the sites and the overall integrity of the Natura 2000 sites are adequately protected or, alternatively, that the Project meets the requirements of Article 6(4) of the EU Habitats Directive as regards "imperative reasons of overriding public importance".
- d. EBRD insists that as "critical habitats" for the purposes of the 2008 ESP, the Ombla Spring and Vilina Cave will be adequately protected. The Bank expresses confidence that the biodiversity study stipulated under the ESAP, which is to be equivalent to an "appropriate assessment" required under the EU Habitats Directive and, followed by a Biodiversity Management Plan (BMP), will satisfy all the requirements of PR 6 of the Policy, particularly those relating to the protection of critical habitats under PR 6.14.
- e. Whilst acknowledging the importance of SEA as a key tool for sustainable development and for assessing cumulative impacts of plans and programmes on the environment, EBRD argues that the Ombla HPP Project is authorised on the basis of the 1999 permit and, thus, that the validity of this permit

⁴ 2007/2008 Biodiversity (Bat) Study for Vilina Cave.

cannot be impacted by any invalidity alleged in respect of the 2008 Croatian National Energy Strategy arising from a failure to conduct an SEA thereof. The Bank also argues it is beyond its role to adjudicate on the compliance of national authorities with national, EU or international requirements in respect of SEA.

5. In its response to the Complaint, **HEP** has in turn addressed each of the specific issues raised by the Complainant (HEP's response dated 16th December) as follows:
 - a. HEP points out that it has conducted an EIA and followed the comprehensive administrative approval process which was required under Croatian law at the relevant time, with concurrent approval of the EIA. While it concedes that the legal requirements applicable under Croatian law may change over time, HEP states that there can be no retroactive application of the new legal requirements to those statutory permits that a developer has already obtained, unless in accordance with explicit national laws to that effect. Indeed, HEP claims that the Complainant has been selective in terms of the legal provisions cited therein, so that those provisions which confirm non-retroactive application of legislative changes are omitted.
 - b. HEP reports that all applicable legal requirements regarding disclosure of the Project and public participation were fully complied with during the conduct of the 1999 EIA and the results of such public participation were compiled and officially recorded. While HEP contends that further public participation, subsequent to the conduct of the EIA, was not legally required during the preparation of the Project, detailed information on the Project was disclosed in May 2011 in such a manner and form as to comply with the requirements of EBRD's 2008 ESP.
 - c. HEP argues that the studies of the environmental impact of the Project carried out thus far, including those conducted in the course of the 1999 EIA and the 2007/2008 Biodiversity Study of Vilina Cave, are adequate in order to fully understand all its potential biodiversity impacts and to identify the measures necessary for the protection of nature in compliance with the standards set out under the EU Habitats Directive.
 - d. Regarding the alleged risks to the natural features characterized as "critical habitats" in the Complaint, HEP reiterates its position that existing studies have adequately identified all possible impacts as well as the measures necessary to avoid or mitigate such impacts. HEP provides further assurances that the existing monitoring system will be upgraded and that certain information will be made selectively available in accordance with the requirements of the ESAP.
 - e. HEP points out that the Ombla HPP Project was included in the Physical Plans of the Republic of Croatia and that the process of obtaining the required permits commenced in 1999, presumably with a view to establishing that it predates the 2008 introduction of the requirement under Croatian law for SEA of plans and programmes. Therefore, HEP appears to imply that the project is compliant with national legal requirements and, thus, that EBRD approval is in compliance with PR 6.15 of the 2008 ESP.

Steps Taken to Conduct the Compliance Review

6. The Compliance Review Expert accompanied by the PCM Officer visited Croatia during week beginning 23rd July 2012 and had separate meetings on both 24th and 25th July 2012 with representatives of HEP and with the Complainant and other FOE Croatia representatives. The Compliance Review Expert and the PCM Officer visited the Ombla HPP site near Dubrovnik accompanied by a senior representative of HEP on 26th July 2012.
7. Following a thorough review of all Project documentation and background reviews including internal and external Bank correspondence, the Compliance Review Expert and the PCM Officer held a meeting with Bank staff on 16th August 2012 at EBRD Headquarters in London and on 17th August with the Consultants responsible for the Environmental Gap Analysis / Due Diligence Report for the Project, who are also currently undertaking the Biodiversity Study and preparation of the Biodiversity Management Plan (BMP) for the Project.
8. On a general point in relation to the conduct of this Compliance Review and in line with the conduct of previous Compliance Reviews, the Compliance Review Expert has adopted as rigorous a standard of review as possible in seeking to identify instances of non-compliance with the relevant and applicable safeguard policies of the Bank. However it is also important to note that the Compliance Review process should take a common sense approach to the interpretation and application of such policies where appropriate, in order to ensure outcomes that serve to further the objectives and principles set out therein. In carrying out the present compliance review, therefore, the Compliance Review Expert, while subjecting the Bank's conduct of the stipulated environmental appraisal process to a rigorous examination for the purposes of identifying any actions or omissions which would objectively amount to "non-compliance with a Relevant EBRD Policy", has also found it pertinent to have regard to the key objectives and principles of the Bank's Environmental and Social Policy 2008.

II EBRD Policy Obligations

9. This Compliance Review requires an examination of the core questions of compliance raised in the Complaint in order to assess whether the Bank has complied fully with all of the requirements arising under the EBRD Environment and Social Policy 2008. Therefore, it is first of all necessary to identify every individual element of alleged non-compliance contained in the Complaint and to link each element to the corresponding requirement or requirements in the EBRD Environmental and Social Policy 2008. This is particularly important for the clarity and coherence of a Compliance Review process such as the current one, as the present Complaint includes a number of inter-related and potentially overlapping grounds of alleged non-compliance. In addition, in preparing a complex and multi-faceted Complaint, there is always the possibility that the Complainant might inadvertently fail to invoke the most directly relevant and appropriate Performance Requirement under the ESP. At this point, it is also helpful to outline the practical implications of each relevant requirement of the EBRD Environmental and Social Policy 2008.

A-Outdated and Illegal Environmental Impact Assessment

10. In contending that EBRD ought not to have relied upon an EIA dating from 1999, which the Complainant describes as ‘outdated and illegal’, the Complaint alleges breach of three key performance Requirements of the 2008 Environmental and Social Policy, *i.e.* PR 1.5, PR 1.9 and PR 6.15.

11. PR 1.5 sets down the general requirements for the environmental and social appraisal of projects, but the Complaint expressly refers to the specific requirement that ‘[t]he appraisal process will be based on recent information’. While PR 1.5 does not elaborate on what might amount to sufficiently recent information, it does state that, in order to enable the Client to

‘consider in an integrated manner the potential environmental and social issues and impacts associated with the proposed project ... [t]he appraisal process will be based on recent information, including an accurate description and delineation of the ... project, and social and environmental baseline data at an appropriate level of detail’.

PR 1.5 explains that the information obtained in the course of the appraisal process conducted by the Client ‘will inform the EBRD’s own due diligence related to the client and project’, while PR 1.8 further provides that

‘The nature of due diligence studies undertaken will be commensurate with the risks and issues involved. It will be an adequate, accurate, and objective evaluation and presentation of the issues, prepared by qualified and experienced persons.’

In relation to Category A projects ‘with potentially significant and diverse adverse environmental or social impacts’, such as the Ombla HPP Project, PR 1.9 is quite unequivocal about the nature of the appraisal process required, providing that such a project

‘will require a comprehensive environmental and/or social impact assessment, to identify and assess the potential future environmental and social impacts associated with the proposed project, identify potential improvement opportunities, and recommend any measures needed to avoid, or where avoidance is not possible, minimise and mitigate adverse impacts.’

PR 1.9 goes on to list some of specific issues which this assessment should address including, for example, ‘an examination of technically and financially feasible alternatives to the source of such impacts, and documentation of the rationale for

selecting the particular course of action proposed’, as well as its compliance with ‘any applicable requirements of national EIA law and other relevant laws’. It is also apparent from careful reading of the ESP that the standard of project appraisal required should be broadly consistent with that of the EU Environmental Impact Assessment (EIA) Directive.⁵

12. It is clear from the above provisions that the appraisal process must consist of one or more due diligence studies, which in combination provide a comprehensive, accurate and objective evaluation and presentation of all the potential environmental and social impacts of the Project, as well as of opportunities for mitigation of adverse impacts and for environmental and social improvement. Therefore, the examination of the adequacy of the Project’s appraisal process conducted under the current Compliance Review will ask whether the investigations conducted in the course of the ESIA, in combination with the 1999 EIA and the 2007 Bat Survey, provided a body of information which was sufficiently accurate, comprehensive, objective, and of course up-to-date, to enable the Bank to adequately appraise and approve the Project. This body of information was contained in the “ESIA package” disclosed during the consultation period required by the Bank.
13. It should be noted at this point that, for reasons of clarity and coherence, the adequacy of the appraisal process in respect of biodiversity impacts specifically will not be considered under this ground of alleged non-compliance as an alleged failure to prepare a sufficiently complete biodiversity assessment is raised as a separate ground of non-compliance under the Complaint. Therefore, this issue is addressed separately in this Compliance Review process.
14. Whereas PR 1.9 sets out the general requirements for the environmental and/or social impact assessment associated with a Category A project, such as Ombla HPP, the Complaint refers to the specific requirement that the ESIA process ‘shall meet PR10 and any applicable requirements of national EIA law and other relevant laws’. The express reference in PR 1.9 to PR 10 simply confirms that an ESIA must meet the information disclosure and stakeholder engagement requirements that are set out in detail in PR 10.12 – PR 10.18. Notably, PR 10.18 stipulates, *inter alia*, that in the case of a Category A project, ‘[i]nformation disclosed must include a full EIA/SIA report in accordance with the Bank’s requirements’. This provision in turn simply confirms the requirement under PR 1.9 that a Category A project ‘will require a comprehensive environmental and/or social impact assessment’, which should be completed in time for meaningful information disclosure to take place pursuant to PR 10.12. However, the Complaint does not focus, at least in respect of the present ground of alleged non-compliance, on this requirement for a full EIA/SIA report at the time of disclosure. Instead, it emphasises the requirement under PR 1.9 to meet ‘any applicable requirements of national EIA law and other relevant laws’. Clearly, such applicable national laws would include the Croatian 1994 Environmental Protection Act (EPA)⁶ and the 1997 Governmental Directive on Environmental Impact Assessment (GDEIA)⁷ cited by the Complainant as being applicable at the time the 1999 EIA was carried out. In addition, the ESP suggests that

⁵ Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, amended by Directive 97/11/EC. See further, note 8, *infra*.

⁶ Official Gazette # 82/94 and 128/99. See Complaint, at 3.

⁷ Official Gazette # 34/97 and # 37/97. See Complaint, *ibid*.

the standards of appraisal required for an adequate ESIA prepared for a Bank-funded project should be informed by those standards set out under the EU EIA Directive.⁸

15. Therefore, in addition to assessing the adequacy of the various studies undertaken in the course of the appraisal process for this Project, a key task of this Compliance Review process is to ascertain whether the Bank took reasonable steps to satisfy itself that the appraisal process for the Project, including the 1999 EIA, met the applicable requirements of Croatian national EIA law and any other relevant laws. Though it is clear from PR 10.18 that adequate disclosure cannot take place in the absence of a full EIA/SIA report, it seems appropriate to concentrate on the substantive adequacy of the EIA/SIA report itself, rather than the secondary procedural issue of the adequacy of disclosure, except where compliance questions arise by virtue of alleged shortcomings in the disclosure process over and above any alleged inadequacy in the EIA/SIA report. Indeed, where an EIA/SIA is found to be deficient, the inadequacy of the disclosure process may be assumed.
16. PR 6.15 requires that, for Projects within or adjacent to areas ‘designated by government agencies as protected’ for the purposes of biodiversity conservation, the Client is required to ‘demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country’. As the project site has now been proposed for protection under Natura 2000,⁹ it is reasonable to determine that the requirements of PR 6.15 apply. However, it is quite clear from the Complaint that PR 6.15 is invoked in connection with this particular ground of alleged non-compliance in order, once again, to question the validity under Croatian national law of any building or development permit based on the 1999 EIA. Therefore, this element of the Complaint will also be addressed by ascertaining whether the Bank took reasonable steps to satisfy itself that the 1999 EIA, as a key component of the appraisal process, met the applicable requirements of Croatian national EIA law and other relevant laws.

B-Failure to Hold Meaningful Public Consultation

17. In alleging a general failure to hold meaningful public consultation, the Complaint alleges non-compliance with four Performance Requirements under the 2008 ESP, *i.e.* PR 1.5, PR 1.9, PR 10.10 and PR 10.15. In addition, the Complaint alleges violation of the requirements of the Aarhus Convention¹⁰ and thus of several provisions of the 2008 ESP.
18. As regards PR 1.5, the Complaint once again expresses general concern that the appraisal process, which relied heavily on the 1999 EIA, could not have been based on sufficiently recent, accurate and detailed information and contends, therefore, that it was inadequate

⁸ Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, amended by Directive 97/11/EC. For example, footnote no. 4 to PR 1.9 notes that ‘[a] report format for EIA/SIA, consistent with the EU EIA Directive, will be available from the EBRD’, and suggests that it ought to be used, even in relation to projects which are not located in EU Member States. A similar suggestion is made in footnote no. 4 to PR 10.18 in relation to the stipulation therein that ‘[i]nformation disclosed must include a full EIA/SIA report in accordance with the Bank’s requirements’. More generally, the ESP provides, at 3-4, para. 4, that ‘stakeholder interaction should be consistent with the spirit, purpose and ultimate goals of the ... EU Environmental Impact Assessment Directive’.

⁹ See EBRD Response, 7 November 2011.

¹⁰ 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

for the purposes of facilitating meaningful public consultation. While this concern raises a perfectly valid question of non-compliance with the requirements of the 2008 ESP, it was decided above that it would be more appropriate to concentrate on the substantive adequacy of the ESIA report itself, rather than the related secondary procedural issue of the adequacy of disclosure.¹¹ In addition, the specific inadequacies cited in connection with this particular ground of alleged non-compliance all relate to biodiversity impacts¹² which, in the interests of consistency and coherence, are more appropriately examined later in this Compliance Review process under the rubric of the third ground of alleged non-compliance, *i.e.* that of the incomplete biodiversity assessment. However, once again, it would logically follow from any finding of inadequacy and non-compliance in respect of the ESIA and/or the biodiversity assessment that there had been a failure to hold meaningful public consultation.¹³

19. As regards PR 1.9, which requires that the ESIA ‘shall meet PR 10 and any applicable requirements of national EIA law and other relevant laws’, it has been noted above¹⁴ that PR 10.18 requires disclosure of a full EIA/SIA report in accordance with the Bank’s requirements and, further, that this provision simply confirms the requirement under PR 1.9 that a Category A project ‘will require a comprehensive environmental and/or social impact assessment’, which should be completed in time for meaningful information disclosure to take place. Once again, it is more appropriate in the case of the present Complaint to concentrate primarily on the substantive adequacy of the ESIA report itself, rather than the related secondary procedural issue of the adequacy of disclosure.¹⁵
20. However, as regards the requirement to ensure compliance with ‘any applicable requirements of national EIA law and other relevant laws’, including the Aarhus Convention, the Complaint contends that, because the 1999 EIA had already been approved by the national authorities and environmental permits had already been granted on the basis of this EIA, ‘there is no legal process in place which would ensure the incorporation of comments received or explanation as to why they have not been included’. It also argues that ‘it is very unlikely that the zero option, *i.e.* the project not going ahead, will be seriously considered at so late a stage’. Thus, it is argued, there has been a failure to fulfil the requirements set out in the Aarhus Convention regarding ‘meaningful consultation’. Therefore, a key task of this Compliance Review process is to examine the extent to which the standards enshrined in the Aarhus Convention have been complied with in the Bank’s appraisal of the present Project. Even if the provisions of the Convention were not applicable in a strict legal sense, it is still a requirement of the 2008 ESP that disclosure and stakeholder engagement should be in line with the standards set down under the Convention. For example, Paragraph 7 of the 2008 ESP provides in

¹¹ *Supra*, para. 15.

¹² See Complaint, at 5 (original emphasis), which points out that:

‘Much of the *relevant information and environmental baseline data at an appropriate level of detail* is simply missing because the Natura 2000 study and other baseline studies have not been undertaken yet.’

The Complaint proceeds to list the surveys required under the ESAP, covering terrestrial ecosystems, aquatic ecosystems, protected bat species, locations and extent of the species populations in the caves affected by the Project, birds, and additional analysis of the sufficiency of the measures that have already been identified to mitigate impacts on flora and fauna.

¹³ *Supra*, para. 15.

¹⁴ *Supra*, para. 14.

¹⁵ See, *supra*, para. 18.

relation to the Bank's general commitment 'to the principles of corporate transparency, accountability and stakeholder engagement', that

'Such stakeholder interaction should be consistent with the spirit, purpose and ultimate goals of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters'.

21. Article 6(4) of the Aarhus Convention, which is concerned with 'public participation in decisions on specific activities', unequivocally provides that '[e]ach Party shall provide for early public participation, when all options are open and effective public participation can take place', and the PCM's predecessor, the Independent Recourse Mechanism (IRM), has previously relied upon the precedential value of a finding by the Aarhus Convention Compliance Committee (ACCC) to the effect that

'once a decision to permit a proposed activity in a certain location has already been taken without public involvement, providing for such involvement in the other decision-making stages that will follow can under no circumstances be considered as meeting the requirement under article 6, paragraph 4, [of the Aarhus Convention] to provide "early public participation when all options are open". This is the case even if a full environmental impact assessment is going to be carried out. Providing for public participation only at that stage would effectively reduce the public's input to only commenting on how the environmental impact of the installation could be mitigated, but precluding the public from having any input on the decision on whether the installation should be there in the first place, as that decision would already have been taken.'¹⁶

22. Consequently, there can be no doubt that the requirements of Article 6(4) of the Aarhus Convention are relevant and applicable.¹⁷ A key issue to be determined, therefore, regarding this element of the present alleged ground of non-compliance is that of whether "all options" remained open at the time that public consultation took place. As 'the zero option, *i.e.* the project not going ahead', with which the Complaint is primarily concerned,¹⁸ does not fall within the Bank powers to decide upon, the corresponding "zero option" for the Bank must be that of declining to fund the Project. It follows, therefore, that this Compliance Review process must determine whether such a "zero option" remained a possibility until the Bank's approval of the Project. In addition, it must determine, as regards outstanding elements of the appraisal required under the ESP, and especially any biodiversity assessment, whether the "zero option" remains a plausible possibility once the Bank's decision to approve the Project has been taken and only ESAP remain.

¹⁶ See IRM, *Compliance Review Report on Vlore Thermal Power Generation Project*, at para. 77, available at <http://www.ebrd.com/downloads/integrity/0701crr.pdf> where the Report refers to ECE Aarhus Convention Compliance Committee, *Findings and Recommendations with regard to Compliance by Albania* (13-15 June 2007), para. 79, at 18-19, and to previous statements of the ACCC in respect of Art. 6(4), ECE/MP.PP/C.1/2005/2/Add.4, para.11 and ECE/MP.PP/C.1/2006/2/Add.1, para.29.

¹⁷ PR 10.2, which introduces and informs the requirements for information disclosure and stakeholder engagement under the 2008 ESP, expressly provides that

'On environmental matters in particular, the bank supports the approach of the UNECE Aarhus Convention, which ... affirms the public's ... right to meaningful consultation on proposed projects or programmes that might affect the environment'.

The Aarhus Convention is also expressly cited under PR 1.5 of the 2008 ESP as an example of 'host country obligations under international law'.

¹⁸ See Complaint, at 5.

23. As regards PR 10.10, which stipulates that
‘the client will engage in a scoping process with identified stakeholders to ensure identification of all key issues to be investigated as part of the Environmental and Social Impact Assessment process ... [and to] ... facilitate development of a Stakeholder Engagement Plan for the project’,
the Complaint alleges that
‘there appears to have been no scoping process – not surprising considering that the EIA process was already finished over a decade ago – and the Stakeholder Engagement Plan was published at the same time as the EIA and the Environmental and Social Action Plan.’¹⁹
- Therefore, it will be necessary to examine whether a scoping process was conducted with appropriate stakeholders which, having regard to the circumstances of the present Project, would be likely to satisfy the requirements of PR 10.10.
24. As regards, PR 10.15, which elaborates upon the requirement of “meaningful consultation” for the purposes of information disclosure and stakeholder engagement under PR 10, the Complaint once again specifically highlights the requirements that meaningful consultation ‘should be based on the disclosure of relevant and adequate information ... prior to decisions being taken when options are still open’, and ‘should begin early in the environmental and social appraisal process’.²⁰ The question of whether such consultation could have taken place having regard to the inadequacies alleged in relation to the information disclosed will be answered by means of the examination of other grounds of alleged non-compliance included in the Complaint and addressed in this Compliance Review. However, the question of whether meaningful consultation could have taken place having regard to the timing of such disclosure will require an examination of the likely effectiveness of the public disclosure and consultation activities undertaken in the course of the Project appraisal process conducted with a view to meeting the requirements of the 2008 ESP.
25. Therefore, a key task of this Compliance Review process is to examine whether, having regard to all the relevant circumstances of the present Project, “all options” remained open at the time that public consultation took place and would continue to remain open during the course of any subsequent public consultation, especially consultation conducted as part of a process of biodiversity assessment. In addition, it is necessary to examine whether a scoping process was conducted with appropriate stakeholders, which would be likely to satisfy the requirements of PR 10.10 of the 2008 ESP.

Incomplete Biodiversity Assessment

26. The Complaint argues that the stipulation in the ESAP ‘that HEP must, before construction: “Undertake [listed] pre-construction ecological surveys to establish a robust baseline”’ provides evidence of ‘[t]he fact that the biodiversity assessment is incomplete’ in breach of PR 6.6.²¹ PR 6.6 provides in part:
‘Through the environmental and appraisal process, the client will identify and characterise the potential impacts on biodiversity likely to be caused by the

¹⁹ Complaint, at 5, footnote no. 4.

²⁰ Complaint, at 5.

²¹ Complaint, at 6.

project. The extent of due diligence should be sufficient to fully characterise the risks and impacts, consistent with a precautionary approach and reflecting the concerns of relevant stakeholders.’

As the Project site has now been proposed for protection under Natura 2000,²² the Complaint might also have cited PR 6.15, which relates to the conservation of areas ‘designated by government agencies as protected for a variety of purposes’, in connection with this ground of alleged non-compliance.²³ The Complaint proceeds to express concern that ‘the EBRD is about to approve the project in the absence of detailed, comprehensive and up-to-date information’, as well as about the fact that the EBRD Management’s Response to the Complaint places emphasis on mitigation measures and ‘does not address the question of what will happen if the study finds that the project is too harmful to the Natura 2000 site to proceed with’.²⁴ Though it also questions ‘how this [subsequent] study would legally be able to impact on those environmental permits already issued’, this issue is clearly beyond the competence of EBRD, which has no role whatsoever in the environmental permitting process administered by the Croatian national authorities.

27. It is now well established in the practice of the PCM²⁵ that, where protected areas may be affected, the biodiversity assessment required under PR 6.6 ought to correspond closely to the “appropriate assessment” required under Article 6(3) of the EU Habitats Directive²⁶ in terms of its thoroughness, conclusiveness and its significance for the ultimate decision on whether or not to approve a Project. In this regard, it is significant that PR 6.2 provides that

‘In pursuing these aims, [*i.e.* the protection and conservation of the biodiversity in the context of projects in which it invests²⁷] the Bank is guided by and supports the implementation of ... relevant EU Directives.’

The same provision then expressly refers to the 1992 EU Habitats Directive²⁸ and the 1979 Wild Birds Directive,²⁹ both of which rely on an “appropriate assessment” under Article 6(3) of the Habitats Directive as the principal means of ensuring that proposed development plans or projects will not adversely affect the integrity of sites designated for protection under either Directive. This understanding of the safeguards required under EBRD policies for the purposes of biodiversity conservation, and of the corresponding

²² See EBRD Response, 7 November 2011.

²³ See PCM, *Compliance Review Report for Boskov Most HPP*, Request No. 2011/5, at paras, 22-23, available at <http://www.ebrd.com/pages/project/pcm/register.shtml>

²⁴ Complaint, at 6.

²⁵ See *Compliance Review Report for Boskov Most HPP*, at para, 17.

²⁶ Article 6(3) of the Habitats Directive provides:

‘Any plan or project ... likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.’

²⁷ 2008 ESP, PR 6.1

²⁸ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, 21 May 1992, (as amended).

²⁹ Council Directive 79/409/EEC on the conservation of wild birds, 2 April 1979, (as amended).

relevance of the rigorous “appropriate assessment” process stipulated under Article 6(3), can be traced back to Paragraphs 6 and 21 of the EBRD’s 2003 Environment Policy,³⁰ which the EBRD Project Complaint Mechanism has found to impose a requirement similar to Article 6(3) in respect of assessment of the biodiversity impact on protected areas of Projects proposed for Bank funding.³¹

28. Though the role of the Bank in approving a project for EBRD financing ought not to be confused with the role of a “competent national authority” in permitting a project in accordance with the requirements of national law and, where applicable, EU law, it is possible to identify an obligation imposed upon the Bank by PR 6.6 and PR 6.15 corresponding to that imposed upon a competent national authority under Article 6(3), which provides that

‘In the light of the conclusions of the assessment of the implications for the site ... the competent national authority shall agree to the plan or project *only after having ascertained that it will not adversely affect the integrity of the [protected] site concerned ...*’.³²

Thus, the biodiversity assessment necessitated by PR 6.6 (and PR 6.15) should, in the case of a protected site, conclusively and definitively ascertain that the project as proposed will not adversely affect the integrity of the protected site in question taking account, where appropriate, of additional measures identified in the biodiversity assessment to avoid or mitigate any adverse ecological effects. Alternatively, it may be possible in exceptional cases, and in a manner which corresponds with Article 6(4) of the Habitats Directive,³³ for the Bank to approve a project which a completed biodiversity assessment has determined will adversely affect the integrity of a protected site where that project is deemed necessary ‘for imperative reasons of overriding public interest’.³⁴

³⁰ Paragraph 6 of the 2003 Environment Policy provides that:

‘The EBRD supports a precautionary approach to the management and sustainable use of natural biodiversity resources (such as wildlife, fisheries and forest products) and will seek to ensure that its operations include measures to safeguard and, where possible, enhance natural habitats and the biodiversity they support.’

Paragraph 21 of the 2003 Environment Policy provides that:

‘the EBRD will require that projects be structured so as to meet: (i) applicable national environmental law; and (ii) EU environmental standards, insofar as these can be applied to a specific project.’

³¹ See, PCM, *Compliance Review Report: D1 Motorway, Phase 1, Slovak Republic*, Request No. 2010/01, paras. 8-10 and 12, available at <http://www.ebrd.com/pages/project/pcm/register.shtml>

³² Emphasis added.

³³ Article 6(4) of the Habitats Directive provides:

‘If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.’

³⁴ Indeed, a corresponding exception to the general obligation not to proceed with a Project that would adversely affect the integrity of a protected site would appear to have been included by PR 6.15 of the ESP, which provides in relation to “natural habitats” that

‘there must be no significant degradation or conversion of the habitat ... unless:

- there are no technically and economically feasible alternatives
- the overall benefits of the project outweigh the costs, including those to the environment and biodiversity’.

On the practical application of Article 6(4) of the EU Habitats Directive, see generally D. McGillivray, ‘Compensating Biodiversity Loss: The EU Commission’s Approach to Compensation under Article 6 of the Habitats Directive’, (2012) 24:3 *Journal of Environmental Law* 417-450.

29. As noted elsewhere by the PCM, acknowledging the relevance of the Article 6(3) “appropriate assessment” for the biodiversity assessment required under PR 6 has numerous advantages.³⁵ For example, as pointed out in the *DI Motorway Compliance Review Report*,

‘Considerable [official] technical guidance exists to assist national authorities in ensuring correct implementation of the Article 6(3) appropriate assessment, setting out the specific steps and tests that need to be applied in sequential order.’³⁶

Indeed, PR 6.6 itself expressly refers to an indicative selection of such guidelines.³⁷ In addition, the European Court of Justice has provided some judicial clarification as to the standards required for an adequate “appropriate assessment” under Article 6(3), which must inform any determination by the PCM as to the adequacy of a biodiversity assessment under PR 6.6. Of particular relevance to the present Complaint is the Court’s reasoning in arriving at a 2007 finding that successive reports relating to the ecological impacts of a proposed project on a protected site in Italy

‘have gaps and lack complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA [Special Protection Area designated under the 1979 Wild Birds Directive] concerned.’³⁸

30. Therefore, a central concern of this Compliance Review process is to determine whether Bank approval of such a Project, likely to impact upon a protected area, while deferring key aspects of the biodiversity assessment required under PR 6.6 (and PR 6.15), can be consistent with the requirements of PR 6, as informed by practice relating to Article 6(3) of the EU Habitats Directive. This will require an examination of whether the Bank was entitled, on the basis of a proportionately “purposive” approach to the interpretation of PR 6 and the principle of “additionality”,³⁹ to approve the Project subject to contractual conditions requiring satisfactory completion of an adequate biodiversity study and agreement of an appropriate biodiversity management plan before any disbursement of funds would take place. This will in turn require a determination of whether “approval” of the Project by the Bank or “disbursement” of funds corresponds to the analogous “agreement” of a competent permitting authority under Article 6(3) of the EU Habitats Directive.

³⁵ See *Compliance Review Report for Boskov Most HPP*, at para, 19.

³⁶ *DI Motorway Compliance Review Report*, para. 9, at 5. See European Commission, *Managing Natura 2000 Sites: The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*, (Luxembourg, 2000); European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002). In addition, many EU Member States have produced detailed guidance for their national competent authorities, e.g. Irish Department of Environment, Heritage and Local Government, *Appropriate Assessment of Plans and Projects in Ireland: Guidance for Planning Authorities* (Dublin, 10 December 2009).

³⁷ In advising that ‘clients should refer to best practice guidelines on integrating biodiversity into impact assessments’ PR 6.6. includes a footnote 2 which explains that

‘Best practice guidelines on integrating biodiversity into impact assessment include:

- *Voluntary Guidelines on Biodiversity-inclusive Environmental Impact Assessment* (Contained in the CBD Decision VIII/28 from COP8 in 2006).
- *Biodiversity in Impact Assessment* (IAIA Special Publication Series No. 3).
- Various products of *The Energy and Biodiversity Initiative*.

³⁸ Case C-304/05, *Commission v. Italy*, Judgment, 20 September 2007, para. 69.

³⁹ See PCM, *Eligibility Assessment Report for Ombla HPP*, Request No. 2011/06, at 23-24, available at <http://www.ebrd.com/pages/project/pcm/register.shtml>

Damage to Habitat without Adequate Justification

31. The Complaint argues that the Vilina Cave – Ombla Spring habitat satisfies the EBRD’s criteria for identification as a “critical habitat”⁴⁰ and expresses concern that, in the absence of a comprehensive biodiversity assessment, it is at risk of adverse ecological impacts due to the Project.⁴¹ Therefore, the Complaint cites PR 6.14 which provides that ‘[c]ritical habitat must not be converted or degraded’. More specifically, PR 6.14 also stipulates, , that

‘in areas of critical habitat, the client will not implement any project activities unless the following [*inter alia*] conditions are met:

* Compliance with any due process required under international obligations or domestic law that is a prerequisite to a country granting approval for project activities in or adjacent to a critical habitat has been complied with.

* There are no measureable adverse impacts, or likelihood of such, on the critical habitat which could impair its ability to function ...

* Taking a precautionary perspective, the project is not anticipated to lead to a reduction in the population of any endangered or critically endangered species or a loss in the area of the habitat concerned such that the persistence of a viable and representative host ecosystem be compromised.’

The Complaint claims that approval of the Project in the absence of a comprehensive biodiversity assessment amounts to a breach of due process requirements and fails to provide the required precautionary guarantees that the integrity of the habitat in questions will not be compromised.

32. Of course, as the Project site has now been proposed for protection under Natura 2000,⁴² PR 6.15, which relates to the conservation of areas ‘designated by government agencies as protected for a variety of purposes’, might also be relevant to this ground of alleged non-compliance. In addition to the requirements for the protection of biodiversity stipulated under PR 6.14, PR 6.15 provides that

‘In addition to the applicable requirements of paragraph 14, the client will:

- consult protected area sponsors and managers, local communities and other key stakeholders on the proposed project in accordance with PR 10;
- demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country, if applicable, and the client; and that the development follows the mitigation hierarchy (avoid, minimise, mitigate, offset) appropriately; and
- implement additional programmes, as appropriate, to promote and enhance the conservation aims of the protected area.’

33. However, regardless of whichever of these categories of habitats and areas may best describe the Project site, it is quite clear that the protection afforded under each provision requires an in-depth biodiversity assessment, as these provisions focus, for example, on the identification of ‘appropriate mitigation measures’⁴³ following the mitigation

⁴⁰ Set out under PR 6.13 of the 2008 ESP. In support of this contention, the Complaint highlights ‘its importance to endemic or geographically restricted species and sub-species’.

⁴¹ Complaint, at 7.

⁴² See EBRD Response, 7 November 2011.

⁴³ PR 6.14.

hierarchy,⁴⁴ findings of ‘no measurable adverse impacts or likelihood of such’,⁴⁵ or findings of no likelihood of ‘a reduction in the population of any endangered or critically endangered species or a loss in area of the habitat concerned’.⁴⁶ The Complaint itself suggests that the primary problem lies with the lack of a comprehensive biodiversity assessment, noting that

‘There is too little information available to give a definitive opinion on *all* the adverse impacts on the Vilina Cave – Ombla Spring habitat from the Ombla HPP project, however it seems reasonable to argue that there are likely to be serious changes in the habitat due to changes in water levels and seriously disruptive construction work.’⁴⁷

34. Indeed, the final sentence of PR 6.6 itself suggests that the protection intended under these latter provisions of PR 6 is to be achieved primarily by means of a biodiversity assessment required under PR 6.6, by stipulating that ‘[w]hen the requirements of paragraphs 13, 14 and 15 apply, the client will retain qualified and experienced external experts to assist in conducting the appraisal.’ This suggests that the true significance of PRs 6.13, 6.14 and 6.15 is that they require a rather more rigorous biodiversity assessment conducted according to the highest standards of technical expertise. Further, the references in the latter provisions of PR 6 to the taking of a precautionary perspective⁴⁸ and to consultation with local communities and stakeholders,⁴⁹ correspond notably with the nature of the biodiversity assessment required under PR 6.6⁵⁰ and guided by the standards and practices established under Article 6(3) of the Habitats Directive.
35. Therefore, examination of this alleged ground of non-compliance can be undertaken alongside the determination of whether Bank approval of the Project while deferring key aspects of the biodiversity assessment can be consistent with the requirements of PR 6.

Lack of Strategic Environmental Assessment on the Croatian Energy Strategy and local Spatial Planning Documents

36. In connection with this ground of alleged non-compliance the Complaint cites PR 6.15, concerning areas designated as protected areas for the purposes of biodiversity protection, and specifically highlights the requirement therein that ‘the client will ... demonstrate that any proposed development in such areas is legally permitted and that due process leading to such permission has been complied with by the host country, if applicable’. The Complaint claims that the 2008 Croatian Energy Strategy, which it describes as having been approved in October 2009, has not been subjected to SEA despite the requirements of Croatian law⁵¹ and contends, therefore, that ‘none of the projects which arise from that

⁴⁴ PR 6.14 and PR 6.15.

⁴⁵ PR 6.13.

⁴⁶ PR 6.13.

⁴⁷ Complaint, at 7-8 (original emphasis).

⁴⁸ PR 6.14.

⁴⁹ PR 6.15.

⁵⁰ Note the stipulation under PR 6.6 that

‘The extent of due diligence should be sufficient to fully characterise the risks and impacts, consistent with a precautionary approach and reflecting the concerns of relevant stakeholders.’

⁵¹ According to the Complaint, at 8, the relevant and applicable Croatian legislative instruments include the Regulation on strategic environmental assessment of plans and programmes (OG 64/08), the Regulation on information and participation of the public and public concerned in environmental matters (OG 64/08) and the Ordinance on the Committee for Strategic Assessment (OG 70/08), which were adopted in June 2008 and fully transpose into Croatian legislation the provisions of EU Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

strategy are fully compliant'.⁵² Though the Complaint provides no further details on the local spatial planning policies at issue in connection with this ground of alleged non-compliance details are provided in subsequent correspondence with the Compliance Review Expert.⁵³

37. There can be no doubting the relevance of the EU SEA Directive as an element of the requirements of 'due process leading to such permission', for the purposes of PR 6.15. PR 6.2 provides, for example, that in pursuing the aims of biodiversity conservation and sustainable management of living resources

'the Bank is guided by and supports the implementation of applicable international law and conventions and relevant EU Directives ... [including] ... Council Directive 2001/42/EC June 2001 on Strategic Environmental Assessment.'

The Complaint appears prescient as regards the relevance of the SEA Directive to an individual Project, as the European Court of Justice has only recently suggested that the failure to conduct an SEA of a plan or programme as required under the EU SEA Directive could result in measures preventing related projects from being implemented.⁵⁴ Thus, the Court appears to regard the SEA Directive as part of an integrated and coherent set of due process requirements applying to development planning and approval.

38. Whereas the Bank would not normally be required to ascertain, in the course of its environmental and social due diligence of Projects, that national authorities have complied with applicable requirements, PR 6.15 appears to impose just such a role, requiring in respect of Projects that might impact upon 'protected and designated areas' that the Client will:

'demonstrate that any proposed development in such areas *is legally permitted* and the due process leading to such permission *has been complied with by the host country*, if applicable, and by the client'.

This wording requires the Bank, in its supervisory role in relation to the Client, to satisfy itself that national authorities have complied with due process requirements for the permitting of Projects, which may include any applicable national or EU rules on SEA.⁵⁵ Indeed, a similar obligation to ascertain compliance by national authorities with legal due process requirements is imposed upon the Bank in respect of a 'critical habitat' under PR 6.14, which stipulates that:

'in areas of critical habitat, the client will not implement any project activities unless the following conditions are met:

- Compliance with any due process required under international obligations or domestic law *that is a prerequisite to a country granting*

⁵² Complaint, at 8.

⁵³ Letter from Complainant to Compliance Review Expert, dated 3 August 2012.

⁵⁴ In its February 2012 judgment in *Inter-Environment Wallonie ASBL v. Région Wallonne*, which concerned an action for the annulment of a programme for nitrate vulnerable zones adopted by the Belgian Regional Government under the EU Nitrates Directive due to a failure to conduct an SEA, the Court stated:

'The fundamental objective of Directive 2001/42 [SEA Directive] would be disregarded if national courts did not adopt in such actions brought before them ... the measures provided for by their national law, that are appropriate for preventing such a plan or programme, *including projects to be realized under that programme*, from being implemented in the absence of an environmental assessment [SEA]'.

See Case C-41/11, *Inter-Environment Wallonie ASBL v. Région Wallonne*, Judgment of the Court (Grand Chamber), 28 February 2012, at page 6 of 9 of online version (emphasis added), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0041:EN:HTML>

⁵⁵ See Case C-41/11, *Inter-Environment Wallonie ASBL v. Région Wallonne*, *ibid.*

approval for project activities in or adjacent to a critical habitat has been complied with.⁵⁶

Indeed, in an effort to illustrate the type of due process requirements envisaged, PR 6.14, referring implicitly to the requirements of Article 6 of the EU Habitats Directive, explains that ‘[f]or example, *countries may have to demonstrate* that no plausible alternatives exist or that the project is in the national interest.’⁵⁷ Thus, in the particular context of the onerous safeguards imposed in respect of biodiversity conservation, PR 6 requires EBRD to satisfy itself that relevant permits issued by national authorities are legally valid and that national authorities followed due process in making the decision to issue such permits.

39. Therefore, this element of the Compliance Review process will first of all need to examine whether the Ombla HPP Project can reasonably be regarded as having arisen under, or as being closely related to, the 2008 Croatian Energy Strategy or the relevant special planning policies and, if so, whether SEA was required in respect of the Strategy or planning policy and whether either was actually subjected to such an SEA process.

⁵⁶ PR 6.14 (emphasis added).

⁵⁷ PR 6.14, footnote no. 3, 2008 ESP at 47 (emphasis added).

III. Analysis

Core Compliance Issue A. Outdated and Illegal Environmental Impact Assessment

40. Regarding the first key question arising under the present ground of alleged non-compliance, *i.e.* that of whether EBRD has taken reasonable steps to ascertain that the 1999 EIA, and the permit(s) based thereon, are in compliance with the requirements of Croatian law, it is very important to note that EBRD employed local expert legal counsel⁵⁸ in 2011 to confirm HEP's assurances that the 1999 EIA was legally valid under the applicable Croatian law. Legal counsel confirmed the legal validity of the 1999 EIA, their letter concluding:

'Although strictly formally HEP has complied with Croatian legal requirements valid at the time of adoption of the 1999 EIA and subsequent permits, and based on strictly formal interpretation, the 1999 EIA and permits are valid. However, in [the] light of the Accession of Croatia to EU and in the context of EU law, the forgoing issues might involve some risks for the successful completion of the development of [the] Ombla project'.⁵⁹

Therefore, notwithstanding the caveats in the expert legal opinion above regarding 'some risks for the completion of the development of Ombla project', it can be safely concluded that EBRD did take reasonable steps to determine the legality of the 1999 EIA.

41. Indeed, in a letter to the Compliance Review Expert following the site visit in July 2012,⁶⁰ the Complainant, while continuing to express concerns about the quality of the study and deficiencies in public consultation, appears to confirm the formal legality of the 1999 EIA and the permit(s) based thereon:

'Based on the evidence which has come to light since the submission of our complaint *we conclude that the EBRD took reasonable steps to ascertain that the EIA dating from 1999 is in compliance with the requirements of Croatian law in terms of formal chronology of the issuing of permits* but not in terms of the quality of the study. The use of the 1999 EIA also means that public consultations as part of the legal process last took place around 13 years ago'.⁶¹

42. Regarding the second key question arising under the present ground of alleged non-compliance, *i.e.* whether the investigations conducted in the course of the ESIA, in combination with the 1999 EIA and other studies, were sufficient to satisfy the requirements of the ESP, in particular PR 1.5 and PR 1.9, it is important to note EBRD's position as set out in its Response to the Complaint:

'Regarding the adequacy of the 1999 EIA, EBRD concedes that in certain respects it is not fully compliant with the requirements of the EU EIA Directive and EBRD's ESP ... [but] ... the potential impacts not covered in depth by the 1999 EIA (including the potential impacts of the Project on biodiversity) have been identified in the course of EBRD's appraisal process and will be additionally addressed in line with EU law and the 2008 ESP under the provisions of the Environmental and Social Action Plan (ESAP).'⁶²

⁵⁸ Law Firm Glinska & Mišković Ltd, Zagreb.

⁵⁹ Letter to EBRD, dated 10th October 2011.

⁶⁰ Letter entitled, 'Additional input on the Questions Outlined in the Eligibility Assessment for the Ombla hydropower plant', dated 3rd August 2012.

⁶¹ *Ibid.*, at 1, (emphasis added).

⁶² EBRD Response, dated 19th September 2011.

Though the Bank's Response focuses primarily on the requirement for a biodiversity assessment and the associated Biodiversity Management Plan, which is to be examined later in this Compliance Review, it is clear from earlier correspondence from the Complainant⁶³ and from documentation produced during the course of project appraisal⁶⁴ that a number of other issues required further study, including seismic risks, flooding risks, as well as possible landslides and instability. Although certain aspects of the evaluation of these risks during project appraisal might be described as incomplete or unresolved,⁶⁵ it can generally be concluded that the ESIA package of studies was assembled carefully and professionally in line with the requirements of the ESP. Therefore, it is possible to conclude that, disregarding the alleged lack of a comprehensive biodiversity assessment, the investigations conducted in the course of the ESIA process were probably sufficiently adequate to enable the Bank to adequately appraise and approve the Project. In this regard, it must be remembered that the ESIA process required under PR 1, which is informed by the requirements of the EU EIA Directive, need not be as conclusive as the biodiversity assessment required under PR 6, which is informed by the requirements of the EU Habitats Directive, as the findings of the former are not intended to be determinative of the final decision whether to approve a project. Therefore, the ESIA can be deemed to have met the general requirements of PR 1.5 and PR 1.9.

43. Regarding the particular requirement of PR 1.9 highlighted in the Complaint, *i.e.* that the ESIA 'shall meet PR 10 and any applicable requirements of national EIA law and other relevant laws', it has been demonstrated above that the 1999 EIA would appear to comply with the requirements of Croatian EIA law that that the overall ESIA process would appear to meet the broad requirements of the EU EIA Directive. Also, while the inadequacy of the ESIA or the lack of a biodiversity assessment, if required, would almost certainly contravene the requirement under PR 10.18 for disclosure of 'a full EIA/SIA report in accordance with the Bank's requirements', it has earlier been decided, for reasons of clarity and coherence, to concentrate at this stage in the Compliance Review on the substantive adequacy of the ESIA report itself and, later, on compliance with any applicable requirement under PR 6 to prepare a sufficient biodiversity assessment for the Project. Therefore, compliance with the requirements of PR 10 will not be considered further at this stage.
44. While the Complaint also invokes a violation of PR 6.15 in connection with this ground of alleged non-compliance with regard to the contested validity under Croatian law of any permit(s) based on the 1999 EIA, this Compliance Review has already established that the Bank has taken reasonable steps to determine the legality of the 1999 EIA and of any permit(s) based thereon.

⁶³ Letter from FoE Croatia to EBRD, dated 8th September 2011.

⁶⁴ See, for example, the *Gap Analysis / Environmental and Social Due Diligence Report*, (April / May 2012), prepared for HEP and EBRD by WSP Energy and Environmental and Black and Veatch (B&V).

⁶⁵ For example, the assertion in the Non-Technical Summary (NTS) that 'the risk of earthquakes in Dubrovnik is low' can be regarded as incorrect, while assurance that 'construction should not cause landslides or other slope stability problems' can be regarded as premature. Similarly, a key mitigation measure proposed in the NTS to the effect that 'an emergency response plan will include plans for dealing with earthquakes or landslips during construction and operation' was not specifically included in the ESAP.

45. Therefore, the Compliance Review Expert finds that, disregarding the alleged lack of a comprehensive biodiversity assessment, the overall ESIA process has met the general requirements of the 2008 ESP.

Core Compliance Issue B - Failure to Hold Meaningful Public Consultation

46. As regards the Complainant's reliance on the requirement under PR 1.5 that the appraisal process must be based on sufficiently recent, accurate and detailed information for the purposes of alleging a failure to hold meaningful public consultation, it has been decided earlier in this Compliance Review process that it would be more appropriate to concentrate on the substantive adequacy of the ESIA report itself, rather than the related secondary procedural issue of the adequacy of disclosure.⁶⁶ In addition, the specific inadequacies cited in connection with this particular ground of alleged non-compliance all relate to biodiversity impacts⁶⁷ which are more appropriately examined later in this Compliance Review process under the rubric of the third ground of alleged non-compliance, *i.e.* that of the incomplete biodiversity assessment. Therefore, while the Complaint raises a perfectly valid question of non-compliance with the 2008 ESP, the adequacy of the ESIA or of any biodiversity assessment required under the ESP will not be considered at this stage for the purposes of establishing a failure to hold meaningful public consultation.

47. Similarly, by invoking PR 1.9, it appears that the Complainant is referring to the requirement set out under both PR 1.9 and PR 10.18 that, for the purposes of public disclosure, a full and comprehensive ESIA is required. Once again, it is more appropriate in the case of the present Complaint to concentrate primarily on the substantive adequacy of the ESIA report itself, and/or of any biodiversity assessment included therein, rather than the related secondary procedural issue of the adequacy of disclosure.⁶⁸ Therefore, this issue will not be addressed further with regard to this alleged ground of non-compliance.

48. In invoking the Aarhus Convention, the Complaint contends that EBRD relied to an inappropriate degree on the public consultation undertaken during the course of the 1999 EIA. However, it is apparent from the SEP that relatively little reliance was placed on the 1999 disclosure process. Instead, the main focus for consultation and stakeholder engagement for the Project was the 120 day disclosure period which ran from 25th May 2011 to 22nd September 2011 and was followed by at least four public meetings in Zagreb and Dubrovnik throughout October 2011. Indeed, in correspondence addressed to the Compliance Review Expert following his site visit, the Complainant himself admits that:

'EBRD did not intend to rely to a significant degree on the 1999 public consultation and did make some attempts to make up the deficiencies surrounding the fact that the public consultation had taken place around 12 years before project approval [by the EBRD Board]. These attempts consisted of the 2011 disclosure of EIA on the EBRD and HEP websites and subsequent public presentations plus the forthcoming biodiversity impact assessment which should also allow public consultations.'⁶⁹

Therefore, it would appear that this particular aspect of this ground of alleged non-compliance has effectively been withdrawn by the Complainant. At any rate, it would

⁶⁶ *Supra*, paras. 15 and 18.

⁶⁷ See Complaint, at 5. See further, fn. 12, *supra*.

⁶⁸ See, *supra*, paras. 18, 19 and 46.

⁶⁹ Letter from the Complainant to the Compliance Review Expert, dated 3rd August 2012.

appear that effective, and therefore meaningful, disclosure and public consultation was undertaken in the course of the Project appraisal process conducted in order to meet the requirements of the 2008 ESP.

49. As regards the requirement under Article 6(4) of the Aarhus Convention to ‘provide for early public participation, when all options are open and effective public participation can take place’, it appears that all such options, including the “zero option”⁷⁰ remained open in principle to the Bank throughout the public disclosure period and during the public meetings, which preceded the Bank’s decision to approve the Project.
50. As regards outstanding elements of the appraisal required under the ESP, especially the biodiversity assessment, the Bank is adamant that the “zero option” remains a plausible possibility even though the Project has been approved and only subsequent decisions on the disbursement of funds remain. In relation to the proposed biodiversity assessment Bank Management insists that:
- ‘This study will include a comprehensive evaluation of data to determine if further mitigation is needed, whether specific mitigation measures can reduce or control impacts to an acceptable level, and/or whether compensation should be provided for unavoidable impacts. *This process will allow any number of options to be considered, so it cannot be said that options are no longer open.*’⁷¹
- Indeed, the Bank subsequently expresses a very strong view that all options, including the “zero option” of declining to fund the Project at all, remain open pending the outcome of the planned biodiversity assessment, stating that:
- ‘options remain open ... [because] ... the fundamental question of whether to proceed with fully funding the project has not been made. Options are open concerning the selection of the construction techniques and the ultimate design of the project if these are considered to be necessary to mitigate adverse effects and/or compensate for unavoidable effects. *Only if such options exist can HEP move forward with Bank financing.*’⁷²
51. At any rate, even though legitimate questions remain as to the true likelihood that the Bank might exercise the “zero option” once the Project have been approved by the Board, and as to whether a disbursement decision(s) can constitute final approval of the Project for the purposes of PR 6.6, PR 6.14 and PR 6.15, (corresponding to “agreement” to a Project for the purposes of Article 6(3) of the EU Habitats Directive), such questions are better addressed in the examination of the third ground of alleged non-compliance, *i.e.* that of incomplete biodiversity assessment. Therefore, these questions will not be examined further at this stage.
52. As regards the question of whether a scoping exercise was conducted with appropriate stakeholders which would be likely to satisfy the requirements of PR 10.10, it is important to note that the SEP describes in detail the scoping stage for the disclosure of the ESIA package. It is clear from the 11 different organisations contacted during the scoping exercise that a representative selection of organisations were approached, taking account of the fact that, for practical reasons, every relevant stakeholder need not be engaged with during scoping. The Bank has provided the Compliance Review Expert

⁷⁰ See *supra*, para. 22, where it has been determined that the corresponding “zero option” for the Bank must be that of declining to fund the Project.

⁷¹ EBRD Response, dated 7 November 2011 (emphasis added), quoted in Complaint, at 5.

⁷² EBRD Response, dated 19th December 2011 (emphasis added).

with a “summary timeline of disclosure and public consultations” for the Project, which contains details of every organisation contacted by e-mail by EBRD at the beginning of the consultation process. These include FoE Croatia amongst 20 local NGOs contacted and CEE Bankwatch and Friends of the Earth amongst the 10 international NGOs. This strongly suggests that the scoping exercise was adequate and effective. Further, it appears that the environmental gap analysis / due diligence consultants appointed by HEP engaged experienced local consultants⁷³ to support HEP during the Project scoping and public consultation stages. Therefore, the Compliance Review Expert finds that an adequate scoping exercise has been conducted.

53. On the basis of the findings set out above, the Compliance Review Expert has determined that there was no failure to hold meaningful public consultation and, therefore, finds no non-compliance on the part of the Bank in respect of this ground of alleged non-compliance.

Core Compliance Issue C- Incomplete Biodiversity Assessment

54. As regards the third ground of alleged non-compliance, *i.e.* the allegation in the Complaint that the Bank had failed to ensure that a complete assessment of the Project’s potential impacts on biodiversity was conducted, it has been conclusively established in the course of this Compliance Review, and accepted by the Bank,⁷⁴ that a portion of the Project site qualifies as a “protected and designated area” for the purposes of PR 6.15 of the ESP⁷⁵ and, further, that a range of biodiversity impacts remained to be studied at the time of the approval of the Project by the Bank.⁷⁶ Therefore, it must be determined whether the ESP permitted the Bank to approve the Project while deferring key aspects of the biodiversity assessment required under PR 6.6 and PR 6.15, but subject to contractual conditions requiring satisfactory completion of such assessment and agreement of an appropriate biodiversity management plan (BDM) before any relevant disbursement of funds would take place.

55. It is important at this point to reiterate the general requirement under PR 6 of the 2008 ESP. Where “protected and designated areas” are involved, PR 6.6 and PR 6.15, if interpreted in line with Article 6(3) of the EU Habitats Directive, require that a conclusive and definitive biodiversity assessment must have determined that there will be no adverse impact on the integrity of the area(s) concerned before the Bank may approve a project.⁷⁷ It is helpful here to consider the recent interpretive statements of the Advocate General of the Court of Justice of the EU regarding the precise normative implications of Article 6(3) of the Habitats Directive. She states unequivocally that

‘the assessment must be undertaken having rigorous regard to the precautionary principle. That principle applies where there is uncertainty as to the existence or extent of risks. The competent national authorities may grant authorisation to a plan

⁷³ The same team of local consultants has been retained by the environmental gap analysis/ due diligence consultants as part of the biodiversity study/ BMP assignment which included a 4 week consultation stage. This stage, according to HEP was provisionally scheduled for October/November 2012 and will allow discussion of the findings of the biodiversity study and the recommended mitigation and or compensation measures proposed and will allow stakeholder comments and concerns to be answered through public meetings in Zagreb and Dubrovnik.

⁷⁴ EBRD Response, 7 November 2011.

⁷⁵ *Supra*, para. 26.

⁷⁶ EBRD Response, 7 November 2011.

⁷⁷ See, for example, *Boskov Most Compliance Review Report*, para 18, at 12.

or project *only if they are convinced that it will not adversely affect the integrity of the site concerned*. If doubt remains as to the absence of adverse effects, they must refuse authorization.’⁷⁸

56. It is quite clear that, in deciding to proceed to approve the Project in advance of the completion of a conclusive biodiversity assessment, the Bank relied to a significant degree upon the precedent established by the PCM’s findings in the earlier *D1 Motorway Compliance Review*. At a meeting between Bank officials and the Compliance Review Expert to discuss the current Complaint, Bank officials expressed the view that the Ombla Project was ‘similar’ to the D1 Motorway Project.⁷⁹ Indeed a subsequent e-mail from Bank officials advised that

‘The recommendations and findings drawn from the D1 Compliance Review were of a general nature mainly related to the precautionary principle ... We believe that the interpretations and clarifications on the precautionary principle in the D1 Compliance Review could be applied widely.’⁸⁰

However, the situation pertaining with regard to both Projects is markedly different. The outstanding biodiversity studies for the Ombla Project were far less advanced and any appropriate mitigation and/or compensation measures unknown at the time of seeking Board approval compared to the D1 Motorway Project, where most of the biodiversity studies had already been completed with the active involvement of EBRD prior to Board approval. Also, the biodiversity studies remaining to be conducted are of an entirely different scale in the case of the Ombla Project. The financial value of the further biodiversity / BMP consultancy work to be undertaken by consultants on the Ombla Project is over 18 times that of the corresponding consultancy work on the D1 Motorway, which mainly concerned preparation of a BMP and limited further biodiversity studies / fieldwork, ‘if necessary’. Indeed, the Bank itself acknowledges this distinction in e-mail correspondence, advising that

‘It is quite clear that, at the time of the EBRD Board [approval], the required biodiversity assessments were far less advanced on Ombla than D1. ... Regarding D1, it was quite clear that the existing studies, albeit more advanced than on Ombla, were not adequate to satisfy the requirements for an appropriate assessment and therefore, in the TOR for the BMP, additional investigations to assess the project’s adverse effect on the integrity of the Natura 2000 sites was required.’⁸¹

57. The D1 Compliance Review position should be understood as a limited exception to the general requirement under PR 6.6 and PR 6.15 that a definitive and conclusive biodiversity assessment should be completed as regards the potential adverse impacts of a project on the integrity of the biodiversity of protected and designated areas in advance of Project approval. As an exception to a general policy requirement, it should be interpreted and applied restrictively. Therefore, the decision to approve the Ombla Project can be regarded as an excessive reliance on the “D1 exception”, despite the inclusion of much stricter contractual conditions in the case of Ombla regarding a subsequent biodiversity assessment. Though the PCM has found in the D1 Compliance Review that, in exceptional circumstances, a “purposive” approach⁸² might be taken to

⁷⁸ Case C-258/11 *Sweetman v. An Bord Pleanála*, Opinion of Advocate General Sharpston, 22 November 2012, at para. 51 (original emphasis).

⁷⁹ Meeting held on 16 August 2012.

⁸⁰ Dated 24 August 2012.

⁸¹ E-mail dated 24 August 2012.

⁸² On a “purposive” approach, see *Ombla HPP Eligibility Assessment Report*, at 23, footnote no. 7.

the interpretation and application of the requirements of PR 6 in accordance with the principle of “additionality”,⁸³ the approach taken by the Bank to the assessment of biodiversity impacts in Ombla cannot be regarded as reasonable and proportionate⁸⁴ having regard to all the relevant circumstances.

58. It is also worth noting that the ESP 2008 is arguably more onerous and specific regarding environmental appraisal requirements, including the requirement for biodiversity assessment in the case of projects potentially affecting “protected and designated sites”, than the previous 2003 Environmental Policy applicable to the D1 Motorway Project. For example, the onerous biodiversity assessment requirements explicitly or implicitly stipulated under PR 6.2, PR 6.6, PR 6.14 and PR 6.15 are dealt with elsewhere in this Compliance Review Report.⁸⁵ Also, as noted above, PR 10.18 requires that the information disclosed in respect of a Category A Project, such as Ombla, must include a *full* EIA/SIA.

59. As regards compliance with the spirit and intent of Article 6(4) of the Aarhus Convention, as well as the practical outcomes of the proposed biodiversity assessment, it is significant that the approach taken by the Bank inevitably legitimates the concerns raised in the Complaint as to the true likelihood that the Bank might exercise the “zero option” once the Project have been approved by the Board.⁸⁶ The Bank’s Response to the Complaint explains that:

‘the project was structured so additional information would be collected both before and after Board of Directors approval, and so there would be restrictions on any activities being undertaken that would affect the primary resources at risk until a study and decisions equivalent to those required under the EU Habitats Directive were completed.’⁸⁷

This statement suggests that funding of certain aspects of the Project, *i.e.* those which ‘would affect the primary sources at risk’, would be delayed pending the results of the subsequent biodiversity assessment. In other words all other aspects of the Project not anticipated to be likely to impair the ecological integrity of the site would proceed, despite the lack of a biodiversity assessment to inform such assumptions. Indeed, the Bank’s Response further explains that:

‘the EBRD has agreed to fund the project only on the condition, among others, that prior to any disbursement that could affect the proposed protected areas, a biodiversity study would be completed. The study will need to result in mitigation to the integrity and the conservation objectives of the sites, or compensation to ensure overall integrity of the Natura 2000 network is protected, in order for the Bank to provide financing for activities that could affect the resources of concern.’⁸⁸

This statement appears to assume that mitigation can ensure the integrity of the site or that compensation can ensure the overall integrity of the Natura 2000 network. Therefore, though Bank Management made a genuine effort to meet the requirements of the EU Habitats Directive, and thus of PR 6,⁸⁹ its approach misunderstood the sequential

⁸³ See EBRD Environmental and Social Policy (2008), para. 1, at 2.

⁸⁴ On the concept of “proportionality”, see *Ombla HPP Eligibility Assessment Report*, at 23-24, footnote no. 9.

⁸⁵ *Supra*, paras. 27-30.

⁸⁶ *Supra*, paras. 50-51.

⁸⁷ EBRD Response, 15 December 2011, at 7 (emphasis added).

⁸⁸ EBRD Response, 15 December 2011, at 8 (emphasis added).

⁸⁹ For example, the EBRD Response, 15 December 2011, states, at 7-8, that:

‘The final ESAP now requires a study equivalent to an *Appropriate Assessment* to be completed, and decisions taken in accordance with the EU Habitats Directive, before the Bank will disburse any

ordering of the various stages of an “appropriate assessment” under Article 6(3) of the EU Habitats Directive⁹⁰ as well as the interrelationship and sequential application of Articles 6(3) and 6(4).⁹¹

60. As regards the Bank’s environmental and social governance more generally, the approach taken in approving the Ombla HPP Project subject to contractual conditions requiring satisfactory completion of an appropriate biodiversity assessment might amount to an excessive delegation of the Board’s decision-making powers and responsibilities in the absence of any clear stipulation that the ultimate decision on the disbursement of funds be referred once again to the Board. Indeed, the lack of any clear guarantee that the decision on disbursement of funds is to be taken at an appropriately senior level within the Bank’s institutional hierarchy and/or is to be subjected to sufficient institutional oversight means that it is not possible to regard such a decision as capable of corresponding to the analogous “agreement” of a competent permitting authority within the spirit and intent of Article 6(3) of the EU Habitats Directive.
61. Therefore, on the basis of the findings set out above, the Compliance Review Expert determines that the approval of the Project by the Bank was premature and amounts to non-compliance with the requirements of PR 6 of the 2008 ESP. Of course, the failure to carry out an appropriate biodiversity will, by definition, also amount to technical non-compliance with the requirement under PR 1.9 to ensure ‘a comprehensive environmental and/or social impact assessment’, as well as the requirement under PR 10.18 that ‘[i]nformation disclosed must include a full EIA/SIA report in accordance with the Bank’s requirements’, though the focus of this Compliance Review exercise has been on the present question of compliance with the substantive obligations to ensure the conduct of an appropriate biodiversity assessment.

Core Compliance Issue D - Damage to Habitat without Adequate Justification

62. As has been determined earlier in this Compliance Review, whether the Vilina Cave – Ombla Spring habitat is characterised as a “critical habitat” under PR 6.14 or a “protected and designated area” under PR 6.15, it is quite clear that the protection afforded under each provision requires an in-depth biodiversity assessment.⁹² In fact, the Compliance Review Expert has concluded that ‘the true significance of PRs 6.13, 6.14 and 6.15 is that they require a rather more rigorous biodiversity assessment conducted according to the highest standards of technical expertise’ guided by the ‘taking of a precautionary perspective’.⁹³

funding that could affect Ombla Spring, Vilina Cave, and the underground karst complex. As required by the Habitats Directive, the biodiversity study will fully characterize key environmental conditions, including the conservation objectives established for the proposed protected area. Thus, the project is structured so it will be able to meet EBRD PRs.’

⁹⁰ See, European Commission, *Assessment of plans and projects affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC* (Luxembourg, 2002).

⁹¹ Under the EU Habitats Directive, the Art. 6(4) exception does not apply contemporaneously with the conduct of the Art. 6(3) “appropriate assessment” – it may only be explored in the light of the findings of the “appropriate assessment” that damage to the integrity of the site cannot be avoided. On the practical application of Article 6(4) of the EU Habitats Directive, see generally D. McGillivray, ‘Compensating Biodiversity Loss: The EU Commission’s Approach to Compensation under Article 6 of the Habitats Directive’, (2012) 24:3 *Journal of Environmental Law* 417-450.

⁹² See *supra*, paras. 31-34.

⁹³ *Supra*, para. 34, citing PR. 6.6 and PR 6.14.

63. Consequently, the requirement that the biodiversity assessment should be complete, definitive and conclusive, similar to an “appropriate assessment” under Article 6(3) of the Habitats Directive, is all the more forcefully established under PR 6 in the case of either a “critical habitat” or a “protected and designated area”, such as the Vilina Cave – Ombla Spring habitat.⁹⁴ Therefore, it follows from the findings above⁹⁵ that the lack of a biodiversity assessment in advance of the Bank’s approval of the Project amounts to a breach of either PR 6.14 and/or PR 6.15, depending on the appropriate characterisation of the Vilina Cave – Ombla Spring habitat.

Core Compliance Issue E – Lack of Strategic Environmental Assessment

64. In seeking to determine, first of all, whether the Ombla HPP Project can reasonably be regarded as having arisen under, or as being closely related to, the 2008 Croatian Energy Strategy, it is important to note that the Project has been validly permitted on the basis of the 1999 EIA some considerable time before the adoption of Croatian legislation requiring SEA.⁹⁶ Therefore, in terms of Croatian national law the Project cannot have arisen under, or be legally connected to, the 2008 Croatian National Energy Strategy or the relevant changes to the Special Plan for Dubrovnik-Neretva County. On this basis, it is not necessary to consider whether SEA was required in respect of either the National Energy Strategy or the Special Plan for Dubrovnik-Neretva County, nor whether either was actually subjected to such an SEA process.

65. Therefore, the Compliance Review Expert declines to make a finding of non-compliance in respect of the alleged lack of Strategic Environmental Assessment.

⁹⁴ See further, *Boskov Most Compliance Review Report*, para. 48.

⁹⁵ *Supra*, para. 61.

⁹⁶ Under the Environmental Protection Act (OG 110/07), the Government of the Republic of Croatia adopted, in June 2008, the Regulation on strategic environmental assessment of plans and programmes (OG64/08), the Regulation on information and participation of the public and public concerned in environmental matters (OG 64/08) and the Ordinance on the Committee for Strategic Assessment (OG 70/08). In addition, both Croatia and Bosnia and Herzegovina have signed the Protocol on Strategic Environmental Assessment to the Espoo Convention, which entered into force in 2010.

IV. Recommendations

66. Where, as in the present Complaint, the Compliance Review Expert concludes that the Bank was in non-compliance with relevant EBRD Policy, PCM RP 40 requires inclusion in the draft Compliance Review Report of recommendations to:

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

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

- Development of guidance / formal procedures by ESD to assist Bank staff in deciding at which point the environmental and social appraisal of a project is sufficiently complete to allow submission of the project for Board approval.
- Where, due to exceptional circumstances, project approval is unavoidably required in advance of completion of the requisite environmental and social appraisal:
 - o Development of formal procedures for taking decisions on disbursement of funds where such disbursement is subject to the satisfaction of contractual conditions relating to further environmental and social appraisal;
 - o Development of formal procedures to ensure full transparency in relation to the fact that that a project has received Bank approval with disbursement of funds subject to subsequent satisfaction of contractual conditions relating to further environmental and social appraisal, and in relation to decision-making on such disbursement.

B. Recommendations to address the findings of non-compliance in the scope or implementation of the Project

- Development of an open and transparent scheme for monitoring whether the requirements of the ESAP and, to the greatest extent possible, the requirements of PR 6 of the 2008 ESP, have been adequately fulfilled before disbursement of funds takes place. Such a scheme should be subjected to independent monitoring and oversight, possibly by the Compliance Review Expert or another PCM Expert pursuant to PCM RP 46.⁹⁷

C. Monitor and report on the implementation of any recommended changes

⁹⁷ PCM RP 46: The PCM Experts will be responsible for serving as Eligibility Assessors, Compliance Review Experts, or Problem-solving Experts, and may be responsible, upon delegation by the PCM Officer, *for any follow-up monitoring and reporting*. (Emphasis added).

The Compliance Review Expert recommends that implementation of the various recommendations proposed above are monitored by Bank officials and that a report be prepared upon completion of these tasks and agreed with relevant Bank officials, the PCM Officer, and HEP before being posted on the PCM section of the EBRD website.