



Project Complaint Mechanism Officer
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Complaint regarding

The OLTENIA – TURCENI REHABILITATION Project, Romania

Contact details of complainants

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This complaint is not submitted by an authorised representative and we are not requesting our complaint to be kept confidential.

Background of the project

In 2008, the EBRD approved a loan for the rehabilitation of units 3 and 6 of the Turceni Power Plant. The project was modified in 2009 to modernise Unit 6 only, however, the project was never completed because of unclear procurement issues. In 2013, the EBRD decided to restructure and re-finance the EUR 150 million loan arranged in 2009. The syndicated loan was approved in July 2013 and signed at the beginning of 2014. According to the available information the loan has not been disbursed yet.

We are of the opinion that several provisions of Bank's Environmental and Social Policy of May 2008 (hereinafter "ESP") have been breached for the reasons explained below. As a result, the environmental and social impact of the project was not sufficiently assessed, which may lead to future further harm. The breaches of relevant policies specified below shall be in our opinion subject to a Compliance Review. In case the Compliance Review proves the breaches of the relevant Bank's policies, we respectfully request the Bank to cancel its support for the Oltenia – Turceni Rehabilitation project (hereafter also the "Project") as otherwise it will act contrary to the Bank's Founding Agreement¹, its own policy and undermine its reputation.

Communication with the Bank

In order to clarify and resolve the issues concerning the project in question, we have contacted the EBRD and the project sponsor, Complexul Energetic Oltenia, on the following occasions:

February 12th 2013: meeting with Complexul Energetic Oltenia requested, rejected by its representatives.

June 20th 2013: request for access to information about the details of the previous project concerning the Turceni power plant² and of the current project sent to the EBRD CSO department (Biljana Radonjic Ker-Lindsay) and operation leader Mihnea Craciun.

July 8th 2013: meeting with Environmental and Social Department ("ESD") specialists Robert Adamczyk and Jack Mazingo in Bucuresti.

July 18th 2013 to August 5th 2013: Notes from the meeting on July 8th were sent to ESD specialists Robert Adamczyk and Jack Mazingo and operation leader Mihnea Craciun, along with questions about several issues including emission reductions, feasibility studies and other issues; additional information regarding the legal violations around

¹ Article 2. paragraph 1. vii) of the Agreement Establishing the European Bank for Reconstruction and Development enshrines as a function of the Bank to „*promote in the full range of its activities, environmentally sound and sustainable development.*“

² <http://www.ebrd.com/pages/project/psd/2008/37696.shtml>

deforestation performed by Complexul Energetic Oltenia and a request to change the project category to A and run a strategic environmental assessment. This was followed by email communication with ESD specialist Robert Adamczyk. He indicated that Unit 6 would comply with current BAT and IED requirements, however was able neither to disclose the requested studies and documents, nor answer some questions.

July 26th: meeting in Targu Jiu with Ion Petroniu, Adrian Petrescu, directors at Complexul Energetic Oltenia, no dialogue established, no information disclosed.

September 10th 2013 and October 2nd 2013: requests for access to information (board document for the Oltenia-Turceni Rehabilitation project, environmental and social action plan, livelihood restoration framework, resettlement action plan, stakeholder engagement plan) sent to CSO department (Biljana Radonjic Ker-Lindsay).

October 21st 2013: CSO department (Luisa Balbi) released a copy of the board document.

October 22nd 2013: CSO department (Luisa Balbi) replied to the request sent on October 2nd (some of the project documents are only available upon request directed towards the Client).

December 3rd 2013 – January 2nd 2014: communication with CSO department (Luisa Balbi) concerning another request for access to information (market analysis commissioned by the EBRD for the project). Only very limited information offered.

December 5th: CSO department (Luisa Balbi) replied to the request sent on December 3rd, analysis cannot be disclosed, offered to disclose specific information.

April 18th 2014 - April 28th 2014: another round of communication with CSO department (Luisa Balbi) - request for access to information (loan agreement or any non-confidential parts) sent to CSO department. Material was not disclosed.

June 18th 2014: request for access to documents ("Oltenia-Turceni Rehabilitation, Framework Resettlement Action Plan", „Environmental and Social Action Plan", construction permit, environmental permit) submitted to the project sponsor.

In our opinion, the Bank has failed to comply with specific provisions of the ESP, as described in more detail in sections below. **The breaches have taken place in relation to the following:**

1. Inadequate assessment of environmental impacts of the project by the EBRD and failure to ensure compliance of the Project with the Directive 2011/92/EU³ (hereinafter the “EIA Directive”).
2. Failure to assess compliance of the Project with obligations stemming from the EIA Directive and the UNECE Aarhus Convention in connection to the public participation.
3. Incorrect categorization of the Project by the EBRD.
4. Insufficient assessment by the EBRD of whether the Project complies with the emission limit values under the Directive 2010/75/EU⁴ (hereinafter the “IED Directive”).
5. Failure to assess relevant issues directly linked to the Project - deforestation of certain areas taking place due to the enlargement of the lignite mines providing supply for the Turceni Power Plant.
6. Failure to review compliance of the Project by the EBRD with Article 36 of the IED Directive.

1. Inadequate assessment of environmental impacts of the project – non-compliance with the EIA Directive

The EBRD’s ESP states, that its commitment is to ensure that projects it finances are, besides other requirements, designed and operated in compliance with applicable regulatory requirements and good international practice.⁵ The ESP also states that “*the Bank is committed to promoting European Union (EU) environmental standards as well as the European Principles for the Environment, to which it is a signatory...*”.⁶ This principle is further developed in Performance Requirements (hereinafter “PR”) 1 (Environmental and Social Appraisal and Management) and 3 (Pollution Prevention and Abatement).

PR 1.5 establishes the obligation of the Bank to identify during the appraisal “*applicable laws and regulations of the jurisdictions in which the project operates that pertain to environmental and social matters, including those laws implementing host country obligations under international law.*”

³ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

⁴ Directive 2010/75/EU of the European Parliaments and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

⁵ Environmental and Social Policy 2008, p. 2, paragraph 3.

⁶ Ibid.

PR 3.5 of the ESP establishes that *“As a signatory to the European Principles for the Environment, the EBRD is committed to:*

- supporting, through the activities it finances, the precautionary principle, the prevention principle, the principle that environmental damage should as a priority be rectified at source, and the polluter pays principle

- requiring compliance with relevant EU environmental standards, in particular those related to industrial production, water and waste management, air and soil pollution, occupational health and safety, and the protection of nature, where these can be applied at the project level⁷ (hereafter: “EU environmental requirements”).

PR 3.5 of the ESP further establishes that: *“Subject to paragraph 6 below, projects will be designed to comply with relevant EU environmental requirements as well as with applicable national law, and will be operated in accordance with these laws and requirements.”*

In this regard the EIA Directive should be noted. It applies pursuant to its Article 1 to the assessment of the environmental effects to those public and private “projects” which are likely to have significant effects on the environment. A “project” is defined as the execution of construction works or of other installations or schemes.⁸ The Directive lists the projects which are presumed to have significant effects on the environment and for which an EIA is mandatory (Annex I of the Directive) among which thermal power stations and other combustion installations with a heat output of 300 megawatts or more are included.⁹ Pursuant to para 24 of Annex I, an EIA is mandatory also for *“Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex”¹⁰.*

As Unit 6 meets the threshold of thermal power plant of 300 MW or more, further the present project involves significant change to a pre-existing construction and it concerns the works which are necessary to establish the operation of the Unit 6 for the next 15 years, it follows that the project in question falls under the requirement of mandatory EIA as laid down in the EIA Directive.

The project overview of the Oltenia – Turceni Rehabilitation says that *“given that the project is a modernization of an existing unit and no development consent was required, the Competent Authorities have not required an EIA”¹¹.* As described above, for the purpose of EIA Directive it is irrelevant whether the project is a modernization of an

⁷ Environmental and Social Policy 2008, PR 3, p. 26, paragraph 2.

⁸ Article 1, paragraph 2. (a) of the EIA Directive.

⁹ Annex I paragraph 2 (a) of the EIA Directive.

¹⁰ In this regard it is important to note that Annex I projects must be assessed irrespective of whether they are separate constructions, are added to a pre-existing construction or even have close functional links with a pre-existing construction. For details please see judgement of the ECJ of 11 August 1995, case C-431/92, Commission of the European Communities v Federal Republic of Germany, paragraphs 34-36.

¹¹ <http://www.ebrd.com/english/pages/project/psd/2013/44732.shtml>.

existing unit or completely new unit, if the project meets the criteria set out in the EIA Directive and Annex I. thereof.

In view of the above stated it can be concluded that the EIA Directive should have been applied to the project of the rehabilitation of Unit 6 and for this reason, we are of the opinion that the EBRD's Oltenia – Turceni Rehabilitation Project assessment did not take relevant EU legislation sufficiently into account and as a consequence the project does not meet “relevant EU environmental requirements” and the appraisal failed to identify “applicable laws and regulations of the jurisdictions in which the project operates that pertain to environment and social matters”. The Bank was in this regard obliged to verify that the project promoter had met relevant requirements for environmental and social impact assessment and as Romania is an EU Member State, assess and require compliance with the EU legislation, including the EIA Directive, and therefore to review whether the decision not to run an EIA assessment was or was not in compliance with the EIA Directive. Failure to review this results in a breach of the ESP's PR 1 and PR 3. As a consequence of not carrying out an EIA assessment, the potential impact of the project was not sufficiently examined, resulting in a breach of the ESP's PR 1 and PR 6.

2. Failure to provide with sufficient public participation in the decision-making process in connection to the Project

ESP PR 1.5 establishes the obligation of the Bank to identify during the appraisal “*applicable laws and regulations of the jurisdictions in which the project operates that pertain to environmental and social matters, including those laws implementing host country obligations under international law.*” Within the relevant international law, the Aarhus Convention is listed.

ESP PR 3.5, as already discussed, establishes the obligation of the Bank to assess compliance of the Project with the EU law. In this context we note that the European Council ratified on behalf of the European Union the Aarhus Convention on 17 February 2005¹² and after this date the Convention has become, as so called “mixed agreement”, integral part of Community law, now EU law. is legally enforceable part of the EU law.

Further, ESP PR 10.2 expressly states that “*the Bank supports the approach of the UNECE Aarhus Convention, which identifies the environments as public good. The Convention affirms the public's right to be informed...; the right to meaningful consultation on proposed projects or programmes that might affect the environment*”¹³ and in its introductory statements ESP stipulates that “*the Bank is committed to promoting*

¹² Council decision 2005/370/EC of 17 February 2005, on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters OJ L 124, 17.5.2005, p.1.

¹³ ESP 10.2.

European Union (EU) environmental standards as well as the European Principles for the Environment, to which it is a signatory, which is reflected in the PRs”¹⁴.

The Aarhus Convention and the EIA Directive require signatories/Member States of the EU to provide for early participation in decisions on specific activities, when all options are still open¹⁵ and consequently take due account of the results of such participation.¹⁶ The applicability of the EIA Directive to the Project has already been discussed; Article 6 of the Aarhus Convention dealing with public participation in decisions on specific activities is applicable with respect to decisions on whether to permit proposed activities listed in its Annex I. In the case of power stations the threshold is set to the output of 50 megawatts or more, which is in this case fulfilled.

Article 6 of the Aarhus Convention and the EIA Directive consist of a number of specific obligations, such as to inform the public concerned in an adequate, timely and effective manner, to include reasonable time-frames for the different phases of decision making etc. It means not only that there is an obligation to allow public participation whenever a project falls within the scope of the relevant legal instrument, but this process has to have a certain level of quality.

However, in the decision-making process concerning the complex renovation of Unit 6 there has been no opportunity for the public to participate in the processes connected to the Project so far. First of all, if an EIA had been carried out, it would most probably have provided the public with an opportunity to provide their views and comments on the project. But as already stated, the EIA was not run in this case.

Secondly, there was not any other option during the evaluation of the project, where the public could effectively participate. The Non-Technical Summary was not published by the Bank for consultation, as it sometimes does. It was only published by the Oltenia company on its website in 2013, however, it was after the loan was already signed and without any call for public to submit their comments concerning the Project.

This leads to the situation that there was no opportunity for members of the public interested in the project to raise their concerns and opinions and to have their comments considered by the Romanian authorities during the process. For this reason Article 6 of the Aarhus Convention was breached.

Since the Bank, according to the ESP PR 1.5 and 10.2, has to take relevant international as well as European requirements into account, among others the Aarhus Convention, during the appraisal and pursuant to PR 3.5 to design the Project to comply with EU law, we are of the opinion that because in the case of Turceni rehabilitation the requirements stemming from the EU law (the EIA Directive) and international law (the Aarhus

¹⁴ ESP p. 2.

¹⁵ Article 6 paragraph 4 of the Aarhus Convention; Article 6 paragraph 4 of the EIA Directive.

¹⁶ Article 6 paragraph 8 of the Aarhus Convention.

Convention) were not fulfilled, the Bank did not act in compliance with PR 1, 3 and 10 of the ESP.

3. Incorrect categorization of the project by the Bank

The ESP divides projects into several categories. Category A applies, among others, in cases of thermal power plants with a heat output of 300 megawatts or more, when the project is “greenfield” or a major extension or transformation-conversion project.¹⁷ Different categories imply different obligations in connection with the project appraisal. The Oltenia – Turceni Rehabilitation project has been classified as a category B project.

However, according to the Bank’s policy, projects shall be categorised as A in case they represent a major extension of the listed “project categories”, among which thermal power plants with output of 300 megawatts or more are included. In the present case, Unit 6 meets the threshold of 300 MW heat output and should be assessed as a major extension due to the fact that since 2006, the Unit 6 has not been in operation. Oltenia-Turceni Non-Technical Summary states that the project operator has only 5 units in operation and Unit 6 has not been operational since 2006.¹⁸ Furthermore, works concerning dismantling of parts of Unit 6 have taken place. It follows, that since 2006, there were no emissions from Unit 6, which resulted in overall emission reduction from the Turceni power plant. The complex modernisation of Unit 6 which is covered by the project concerned would lead to launching the operation of this unit, resulting in estimated emission levels of 1.6 million tonnes of CO₂ per year¹⁹, as well as additional emissions of SO_x, NO_x, PM and heavy metals. Moreover, the project is intended for 15

¹⁷ Appendix 1 to Environmental and Social Policy of May 2008. Also specific provisions from European Union law can serve as guidance on what should be considered as a large scale, or category A project. For example, Article 1 paragraph 9 of the IED Directive says, that “*substantial change means a change in the nature or functioning, or an extension, of an installation or combustion plant, waste incineration plant or waste co-incineration plant which may have significant negative effects on human health or the environment*”.²⁰ Since the capacity of Unit 6 is planned to be 330 MWe and as shown above the changes which are going to happen are of a large scale, the project needs to be seen as being at least a substantial change.

¹⁸ Oltenia-Turceni Non-Technical Summary, point 2.2.

¹⁹ The estimate was conducted by the complainants, based on the Oltenia company assumption of 300 MW capacity working for 6,000 hours per year with emission levels of 0,844 tonnes of CO₂ per MWh. It also should be noted that the Project is according to the OCR said to result in an annual emission reduction of 160,000 tonnes of CO₂. The calculation is based on historical emission levels of the Unit 6 (0.94 - 0.97 tonnes of CO₂ per MWh) and estimated emissions after the Project implementation (0,844 tonnes of CO₂ per MWh), which results in an increase in greenhouse gas efficiency of 10.2%. This calculation uses the assumption that the Unit 6 would operate 6,000 hours per year. The complainants are of the opinion that the major flaw of the calculation is that the baseline is represented by the situation where the Unit 6 would continue to emit 0,94 tonnes of CO₂ per MWh in case the Project is not implemented. Concerning the fact that the Unit 6 has been out of operation for last 7 years, the baseline for the calculation should be 0 emissions from the Unit 6.

years operation in the future which, compared to current non-existing operation, presents a major extension.

In addition, as noted in the Oltenia-Turceni Non-Technical Summary, the works associated with the complex reconstruction of the Unit 6 are to have significant environmental impact due to the production of large volumes of waste as a result of the dismantling and disposal of old equipment before upgrade, including contaminated materials. The Oltenia-Turceni Non-Technical Summary also refers to possible negative impacts in relation to fugitive emissions of dust, hazardous materials, noise nuisance or other nuisance issues.²⁰ In this regard it is important to note, that the Turceni power plant is officially recognised as an installation falling under the Directive 2012/18/EU, the “Seveso Directive”²¹, thus the negative impact of a possible release of hazardous substances during the dismantling and changes on the site can have aggravated impacts on environment and human health.

As stated in the Operation Change Report of 5 July 2013 (hereinafter the “OCR”), Turceni’s requirements for the refurbishment of the Unit 6 are²²:

- boiler and steam turbine replacement,
- partial overhaul of the generator and replacement of excitation system,
- replacement of the feed-water pumps and some steam pipes,
- implementation of new instrumentation and control system,
- improvement of the electrical balance of plant,
- ESP filters installation,
- rehabilitation of coal mills, ash and slag exhaust installation.

It is clear that without changes of this extent the unit would not be able to comply with the emission limit values (“ELV’s”) set for the Unit 6 in the IPPC permit as updated in January 2014.²³

It follows that the major parts of the technical equipment will be replaced or substantially upgraded within the project. Moreover, these parts are the parts of the installation which are directly associated with the emissions/pollution performance of the installation and as such present major changes in the power plant concerned. As already noted, without the replacements covered by the project and works connected, the installation would not be operational and it would not be provided with the considerable lifespan extension of 15 years. Besides that, the operator itself declares that the construction works will not be of a minor character, when in the NTS it says that

²⁰ Oltenia-Turceni Non-Technical Summary, point 3.1.

²¹ Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

²² Annex 4 to the Turceni Rehabilitation and Modernization Operation Change Report from 5 July 2013, page 35, received on 21 October 2013 from EBRD’s CSO department (upon request).

²³ Permit no. 11/ 05.07.2006 and its revisions.

*“as with all projects which require large scale construction or upgrade there will be associated, potentially negative impacts.”*²⁴ Despite the fact that the Bank and the Oltenia company presents the Project as reconstruction of an existing unit, the complainant is of the opinion that given the extent of planned works, the Project can be considered as building a new unit.

The construction permit for the works connected to the Project has not, according to the available evidence, been granted yet²⁵, despite the fact that it is needed according to Romanian law nr. 50/1991 Coll.

The classification was done on the basis of an initial Environmental and Social Examination (“IESE”), which, according to project information on the website of the EBRD, confirmed that environmental and social issues associated with *the modernizations of a boiler* of this existing power plant can be readily assessed and mitigated. In this regard the complainant deems to again emphasize, that the Project does not concern the *„modernization of a boiler“*, but rather covers the exchange of major parts of the technical equipment necessary for the operation itself.

It follows that the complex modernisation of the Unit 6 shall be assessed and perceived as a new unit not a mere modernisation and in view of the above we are of the opinion that the categorization of the project was conducted incorrectly. Works which are going to be done at the site are of such an extent, that the project should be treated as project of an A category, with all the consequences, such as special formalized and participatory assessment processes as stipulated in the ESP PR 1.9. It can be concluded that the project could result in issues which, at the time of categorisation, cannot readily be identified or assessed and therefore it should not be classified as Category B. The Bank for these reasons breached PR 1 of its ESP.

4. Non-compliance with the Article 30 of the IED Directive

The updated IPPC permit²⁶ sets conditions of the future operation of Unit 6, which are in compliance with the emission limit values for combustion plants laid down in Part 1 of Annex V. to the IED Directive. Part 1 of Annex V. is, pursuant to Article 30 paragraph 2 of the IED Directive, applicable only for combustion plants which have been granted a permit before 7 January 2013, or the operators of which have submitted a complete application for a permit before that date, provided that such plants are put into operation no later than 7 January 2014.

²⁴ Oltenia-Turceni Non-Technical Summary, 4 July 2013, point 3.1.

²⁵ The only construction permit that was issued concerning the rehabilitation of Unit 6 is construction permit no.2/16.02.2011. However, it covers only the rehabilitation of electro filters of this unit and not the unit as such and therefore cannot be considered as construction permit for the Unit 6.

²⁶ Permit no. 11/ 05.07.2006 and its revisions.

Unit 6 is not currently operating and would be put into operation only after 7 January 2014 which means paragraph 3 of Article 30 shall be applied instead of paragraph 2. For installations falling under paragraph 3, Part 2 of the Annex V. applies, setting stricter emission limit values than Part 1. Therefore in case it is concluded during the Compliance Review that the Project shall be considered as a new unit, as justified earlier in the present compliant, article 30 paragraph 3 of the IED Directive will inevitably be applicable instead of paragraph 2.

The emission limit values set forth in Part 2 of Annex V are, pursuant to Article 30 paragraph 7, applicable also to the part of the plant which has changed in relation to the total rated thermal input in the case of change to a combustion plant of rated thermal input of 50 MW or more, which may have consequences for the environment²⁷. This provision came into force on 6 January 2011 with implementation date of 7 January 2013. The Project was signed by the Bank on 23 April 2013, or after the article was in force and should have been followed. Therefore even if the Bank is of the opinion that Unit 6 is an existing installation, the current project has to be assessed as a change to the installation and as this change fulfils conditions set in the Article 30 paragraph 7 of the IED Directive, the ELV's from Part 2 of the Annex V should be required in order to comply with the IED Directive.

As the project is a change of the existing installation, or it is a new installation which is being put into operation later than 7 January 2014, the emission limit values set in Part 2 of Annex V to the IED Directive need to be followed. In view of the above it can be concluded that the Project falls into at least one of these categories and therefore the ELVs set in the updated IPPC permit and actual expected emission amounts as described in the NTS²⁸ are not in compliance with relevant requirements of the IED Directive. It follows that the Project fails to comply with relevant EU environmental requirements, which amounts to a breach of the ESP PR 1.5 and 3.5 by the EBRD.

5. Mining issues and deforestation

According to the available information, there are a number of social issues directly linked to the project in question which are raising concerns and which, in line with the Bank's policies, should have been thoroughly assessed prior to the approval of the loan. In particular, mining operations and their progress are directly linked to the operation of

²⁷ Article 30 paragraph 7 of the IED Directive: *"Where a combustion plant is extended, the emission limit values set out in Part 2 of Annex V shall apply to the extended part of the plant affected by the change and shall be set in relation to the total rated thermal input of the entire combustion plant. In the case of a change to a combustion plant, which may have consequences for the environment and which affects a part of the plant with a rated thermal input of 50 MW or more, the emission limit values as set out in Part 2 of Annex V shall apply to the part of the plant which has changed in relation to the total rated thermal input of the entire combustion plant."*

²⁸ Oltenia-Turceni Non-Technical Summary, point 3.2.

the “Oltenia” energy complex, i.e. also Unit 6 and amount to wide-scale deforestation in the area.

As stated in the operational change report the lignite for the operation is to be provided mainly from the Oltenia region,²⁹ which means that lignite mines providing supply for the Turceni power plant are being expanded. The company uses the so-called “salami slicing method”, while getting a number of approvals for deforestations of areas.³⁰ The current practice of granting permits for the deforestation is being challenged on the national level (8 court cases initiated in 2012, all of them are currently at the appeal stage) as well as the European level (official complaint submitted to the European Commission on the breach of the EIA Directive submitted in December 2012 and not resolved so far).³¹

The Operation Change Report mentions the mines, admitting it is directly connected to the operation of the whole “Oltenia” energy complex, including the future Unit 6.³² The President’s Recommendation, which is part of the OCR, literally states that: *“The impact of the Loan will go further than the rehabilitation of Unit 6. The scope of the new Environmental and Social Action Plan will extend beyond the assets of TPP, to the Company as a whole, covering mining activities as well. The Bank also intends to finance from loan proceeds a mining and power efficiency study which will deliver a strategy for optimizing both lignite mining and human resource activities, which will improve the efficiency, competitiveness and profitability of the Company in the future.”*

Similarly, the OCR also states that: *“The Project also allows the Bank to be closely involved in the implementation of the mining and power strategies of Oltenia and therefore to improve its initial transition impact objectives by extending the scope of the ESAP to the other assets of Oltenia aside from TPP. The Bank also intends to finance from loan proceeds a mining and power efficiency study which will deliver a strategy for optimizing both lignite mining and human resource activities, which will improve the competitiveness and profitability of the company in the future.”*³³

Nevertheless, when this issue was raised during the communication with the Bank, the response was that lignite mining extension is not related to the scope of the project and

²⁹ Operational Change Report, p. 35.

³⁰ ECJ case-law has addressed the issue of “salami-slicing” i.e. the practice of splitting projects into sub-projects so that each of these fall below screening thresholds or criteria and therefore avoid the obligation to undergo an EIA.⁶ In case C-227/01, Commission v Spain, the Court confirmed that *“a long-distance project cannot be split up into successive shorter sections in order to exclude both the project as a whole and the sections resulting from that division from the requirements of the Directive. If that were possible, the effectiveness of the Directive could be seriously compromised, since the authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude it from the requirements of the Directive.”*

³¹ For details of the complaint please see attachments to the present complaint.

³² OCR, p. 20.

³³ Operation Change Report, p. 8.

deforestation caused by lignite mining expansion was not part of the project. We were also reassured that the Bank has had several meetings with the Company to promote compliance by the Company with national and EU law, including the EIA Directive.³⁴ According to our information, the due diligence did not flag the problems with deforestation for lignite mining expansion at all.³⁵

It follows that the mining is an issue directly associated to the project concerned and as such should have been according to PR 1, especially PR 1.6, of the ESP assessed during project appraisal. As part of the due diligence process, the Bank was pursuant to PR 3.5 of the ESP obliged to require compliance of the activities of the operator with EU law.

6. Missing CCS readiness assessment

As already noted, the PR 3.5 of the ESP establishes the obligation of the Bank to require compliance with the EU law of the projects it is supporting. Article 36 paragraph 1 of the IED Directive Requires to carry out a “CCS readiness assessment” for installations with a rated electrical output of 300 MW or more for which the original construction licence or, in the absence of such a procedure, the original operating licence is granted after the entry into force of the CCS Directive (25 June 2009). The assessment shall include an assessment of whether suitable CO₂ storage sites are available as well as of the technical and economic feasibility of CO₂ transport and retrofitting CO₂ capture technology. If the conditions laid down in the paragraph 1 are met, member states are according to paragraph 2 obliged to ensure that suitable space on the installation site for the equipment necessary to capture and compress carbon dioxide is set aside.

Pursuant to the IED Directive, the Member States shall ensure that such an assessment has taken place. It was already found in previous PCM conclusions³⁶ that the obligation to carry out a CCS readiness assessment amounts to “relevant environmental requirements” within the meaning of PR 3.5.

In light of the reasons provided in part 3 of this complaint, the rehabilitation of Unit 6 which due to the large extent of the upgrade of the Unit as well as the fact that without the excessive change of the technological equipment the Unit will not be operational shall be assessed as a new installation which was not granted a respective construction

³⁴ Email from the ESD specialist Robert Adamczyk of 5 August 2013.

³⁵ Email from the ESD specialist Robert Adamczyk of 5 August 2013.

³⁶ For example Compliance Review Report concerning Šoštanj Thermal Power Plant Project, paragraph 30-32. http://www.ebrd.com/downloads/integrity/sostanj_cr.pdf, paragraph 32.: “As Article 33(1) of the CCS Directive in essence involves an assessment of the readiness of certain new thermal power stations for the retrofitting of carbon capture and sequestration technology, it can easily be concluded that it amounts to a requirement ‘related to industrial production’ which ‘can be applied at the project level’ as stipulated under PR 3.2. Any other understanding of the relevance of Article 33(1) of the CCS Directive would render meaningless PR 3.2 and PR 3.5 of the 2008 ESP. “

permit yet, however the competent authorities are obliged to do so under the national law nr. 50/1991 Coll. regarding the authorisation for execution of construction works).

What is more, there are indications that the company was aware of the need to take CCS technology into consideration, since it was reported that a CCS project would cost EUR 500 million and it asked for EU funds³⁷, which it did not get and there are no recent developments on this matter. Nevertheless, the OCR only notes that since the Project is a rehabilitation of an existing plant, an assessment of readiness for CCS is not required under the IED guidelines.³⁸

The role of the Bank connected to CSS readiness assessment was to check, whether such an assessment was done and whether it was done sufficiently well to achieve the objectives of the Directive. This interpretation was confirmed by the outcome of the Project Compliance Expert of the EBRD, who on the Compliance Report on the Šoštanj Power Plant confirmed that it is part of the Bank's responsibility to ensure that the CCS assessment meeting requirements of the CCS Directive is carried out under the ESP.³⁹

Since the CCS readiness assessment was not in the end conducted, we are of the opinion that the EBRD's Oltenia – Turceni Rehabilitation Project assessment did not take relevant EU legislation sufficiently into account and as a consequence the Bank breached PR 3.5 of the ESP.

7. Corruption allegations concerning the Turceni power plant

We would like to note that the complainants lodged a report to the Bank's Chief Compliance Officer on 27 May 2014 concerning several cases of corruption and other unfair practices which happened in connection with the Turceni power plant. In this place we only deem necessary to emphasize that the Revised Enforcement Policy and Procedures are part of the EBRD's policies and all projects shall comply with their provisions. Please see attachments of the present complaint for details of the report.

³⁷ <http://www.romanalibera.ro/timpul-liber/eco/500-de-milioane-de-euro-pentru-un-turceni-verde-196003.html>

³⁸ p. 8 of the OCR.

³⁹ Compliance Review Report concerning Šoštanj Thermal Power Plant Project, paragraph 30-32. http://www.ebrd.com/downloads/integrity/sostanj_cr.pdf.

Result requested

For the reasons provided in the present complaint, we expect the Bank to undertake a Compliance Review to determine whether the EBRD has failed to comply with its relevant policies, namely the Environmental and Social Policy of May 2008. All the issues raised need to be subject to comprehensive assessment and the categorization of the project needs to be reconsidered. Until the Compliance Review is closed, we ask that the disbursement of the money does not take place and following the findings of the appointed PCM expert, appropriate actions shall be taken.

If a finding of non-compliance of the Project with the Bank's ESP results from the review, the Bank must, in order to comply with its own policy, cancel the loan.



Petra Hodysová
Frank Bold Society



Ionut Apostol
CEE Bankwatch

Attachments:

- Complaint to the European Commission concerning infringement by Romania of the Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (the Directive 2011/92/EU codified version) of 21 December 2012.
- Report of the complainants to the Chief Compliance Officer of the EBRD of 27 May 2014.