

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

**PROJECT COMPLAINT MECHANISM
COMPLIANCE REVIEW REPORT**

COMPLAINT: RIVNE KYIV HIGH VOLTAGE LINE PROJECT

REQUEST NUMBER: 2012/02

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EXECUTIVE SUMMARY

On 10 January 2012, the Project Complaint Mechanism (PCM) Officer of the European Bank for Reconstruction and Development (EBRD) received a complaint regarding Rivne Kyiv High Voltage Line Project in Ukraine. The complaint was found eligible for a Compliance Review and Prof Geert Van Calster was appointed as the Compliance Review Expert for the Complaint.

The Complaint alleges that the Project has failed to comply with the EBRD's 2003 Environmental and Social Policy (ESP). Two grounds of alleged non-compliance with the 2003 EBRD Environmental Policy were withheld for review and have been examined in current Compliance Review:

- a. The alleged failure of the Bank to ensure that a comprehensive, and therefore adequate, Environmental Impact Assessment was carried out in respect of the Project, including consideration of Parts C and D; and
- b. The alleged failure of the Bank to ensure disclosure and meaningful public consultation in respect of Parts C and D.

Based on extensive due diligence of the project planning and execution stages, the information available regarding the extent of the project and details of same, to EBRD and others at various intervals, and on the Bank's obligations under the 2003 Environmental policy, the Compliance Review Expert has not withheld any finding of non-compliance in respect of any of the grounds set out in the Complaint. Parts C and D of the Project were justifiably not included in the 2007 ESIA: their technical detail was not known nor could have been known at the time, and they ought not to have been included in the ESIA.

1. Introduction

In respect of the Rivne Kyiv High Voltage Line Project two grounds of alleged non-compliance with the 2003 EBRD Environmental Policy were withheld and have been examined in current Compliance Review:

- a. The alleged failure of the Bank to ensure that a comprehensive, and therefore adequate, Environmental Impact Assessment was carried out in respect of the Project, including consideration of Parts C and D; and
- b. The alleged failure of the Bank to ensure disclosure and meaningful public consultation in respect of Parts C and D.

Broken down into its essence, current compliance review has had to review two main strands. The first one is a review of factual due diligence, the other a review of the precise scope and legal nature of the term 'project' in the corresponding obligations under applicable environmental law, and the extent to which the project met with the ensuing requirements.

2. The complaint and the initial response by the EBRD

2.1 The Complainant: The National Ecological Centre of Ukraine

Complainant argues that there has been a failure on behalf of the EBRD to:

- a. Ensure a comprehensive and therefore adequate ESIA of the Project including consideration of Part C and D of the project, and to
- b. Ensure disclosure and meaningful public consultation of the same Part C and D.

Complainant argues that 'damage' has been inflicted, in particular¹ that “the demonstrated difference in what was appraised and approved from one side and what was agreed for financing from another might undermine the public trust in seriousness of EBRD fundamental commitments declared by environmental policy”.² Hence alleged harm lies in the alleged violation of trust in the Bank’s process, rather than in any physical or material harm resulting from the project.

Complainant proposes as a remedy for the alleged failure, a compliance review of the Rivne-Kyiv High Voltage Line project “to prevent a repeat of such flaws in the future”³.

¹ References to delays in the project and to often consequential impacts on the Ukrainian taxpayer have not been held to be relevant for current review.

² National Ecological Centre of Ukraine, Complaint of 12 01 2012, p.3.

³ EBRD PCM Eligibility Assessment Report, p 1. See also Complainant’s Letter, Annex 1 to the Assessment Report.

2.2 Bank Management: The EBRD

In response, EBRD management essentially argues that

- a. The EBRD is not financing Part D, which will be financed by EIB. As a result the EBRD is not responsible for conducting an ESIA on Part D.⁴
- b. The project Part D, the original concept, was identified as part of the Project during the TDD in 2007 but not included in the ESIA as its design was not available at that stage.
- c. The need for Part D was only determined after the ESIA was concluded, following completion of the technical due diligence, 'TDD'.
- d. The design and construction of Part D were scheduled to take place several years in the future.
- e. The Lenders therefore required Ukrenergo to commit to undertake a separate ESIA and public consultation in accordance with the EBRD and EIB respective requirements for Part D at the appropriate time when detailed information on the line route was available. These requirements went into the Project Implementation Plan, a document which must at all times (as updated) be to the Lenders' satisfaction under the financing agreements.

2.3 The Client: Ukrenergo

The Client, Ukrenergo,

- a. accepts that Part D did not undergo an ESIA in May 2007. However, it points out that the Loan Agreement between the Client and the EIB expressly provides for an ESIA for these components once more details are available.⁵
- b. notes that the sites for Part D had not been selected in May 2007, hence it was impossible to hold public hearings.
- c. states that it was the EIB that suggested Part D in the course of 2007.
- d. notes that permission for routing Part D was only given by the State Administration in December 2012 so that only now can they begin to undertake scoping and conduct a thorough ESIA.
- e. is willing to pay for an independent consultant, to assist it with the development of Part D.
- f. notes that the appointment of the contractor and assessment of Part D was due to take place in April 2012.

3. Objective of the compliance review and two main strands of review

The PCM Eligibility Assessors found the complaint to be eligible for a Compliance Review.. The purpose of the Compliance Review, therefore, is to determine, “if (and if so, how and why) any EBRD action, or failure to act, in respect of the Project has

⁴ Ibidem, Annex 2 – not page numbered. The heading in the body of the text here is a summary of all the Bank's Management responses.

⁵ Annex 3 to the Eligibility Assessment Report, “Client's Response” as well as PCM team summary of Client's response, p 9 - 10.

resulted in non-compliance with a relevant EBRD's 2003 Environmental Policy. If in the affirmative, to recommend remedial changes."⁶

Broken down into its essence, current Compliance Review has had to review two main strands.

Firstly, as the summary of the arguments of the various parties involved shows, there would seem to be disagreement on what was and was not, factually, included in the project scope at the time of pivotal moments in the decision-making process. This has required a due diligence of the considerable stream of documents handled between the EBRD, Client, the EIB, and various consultants recruited to the process. Especially if 'project' under relevant ESIA rules were to be held to refer to a particular moment in time (a cut-off moment, as it were, at which precise point the extent of what is and what is not to be included in the ESIA would be judged),⁷ and hence the scope of what ought to have been included in particular in the briefing of the EBRD Board were to be determined at that precise moment, one needs to have an insight into what was and what was not contemplated by the EBRD and its Environment and Sustainability Team at that moment.

Secondly, a review of the precise scope and legal nature of the term 'project' under the rules applicable to EBRD projects, and the extent to which the project met with the ensuing requirements.

4. Factual due diligence: what was under contemplation by the EBRD at the time of project approval

4.1 Background to the project

The *Rivne Kyiv High Voltage Line Project* (The Project) aims to reinforce the electrical connections between Ukraine's western and southern borders. It forms part of an overall drive to modernise the entire electricity grid of Ukraine. In 2006 the Ukrainian government stated that the Rivne Kyiv Voltage Line Project was its top priority.⁸ To help fund the modernisation of this line the Ukrainian state applied for and was granted EBRD and EIB loans.

Under the EBRD 2003 Environmental Policy the construction of electricity lines is classified as a Category A Project. As such there is no doubt that the EBRD and EIB loans are conditional upon Ukrenergo conducting a full Environment Social Impact Assessment (ESIA) in due course.

Between February 2007 and May 2007 Ukrenergo (variously known in the documents as 'The Client' or 'The Promoter'⁹) conducted an ESIA on the Project with the support of a Consultant. The EBRD assisted in the process¹⁰, as is standard.

⁶ Ibidem, p 18.

⁷ Whether EIA involves a cut-off moment or not will be reviewed in the legal analysis, further in this report.

⁸ Ukrenergo Terms of Reference, p.2. (Aug Jul Sep Nov 2006).

⁹ 'Promoter' or 'promotor' is the term which corresponds most closely to the concept of 'developer' in the relevant European Union directives, in particular the EIA Directive, as codified in Directive 2011/92, OJ [2012] L26/1: Article 1(b): '*developer*' means the applicant for authorisation for a private project or the public authority which initiates a project;

¹⁰ Environmental and Social Summary – Concept Review, 6 December 2006.

4.2 The Project: Definition and Scope

It is clear from the file that, quite aside from the legal concept of ‘project’, the exact scope, definition and boundaries of what exactly was being financed, was not defined in equal detail throughout the approval process, up to and beyond the EBRD’s decision to finance.

At its simplest the Project refers to

*“a 350 km new high voltage transmission line, routed in a new corridor in the western region of Ukraine”.*¹¹

Beyond that there is no consistency as to the Project’s scope which varies from year to year and from document to document. At its earliest the Project’s definition and scope is defined in sentences, later it is variously divided into Parts A – D or alternatively as Lots 1-4. The difficulty in determining the Project’s scope is complicated by the fact that spellings, places and routes change depending on which document is being consulted.

Having regard to the Terms of Reference for this Compliance Review prepared by the Eligibility Assessors and included in the Eligibility Assessment Report, the Compliance Review Expert conducted a thorough review of all relevant Project documentation and of relevant internal and external Bank correspondence. The Compliance Review Expert is of the opinion that he has had access to sufficient information to consider the Bank’s alleged non-compliance with the requirements of the 2003 Environmental Policy (EP) as regards the present Project.

It should be noted generally in relation to the conduct of this Compliance Review that the Compliance Review Expert has adopted as rigorous a standard of review as possible in seeking to identify instances of non-compliance with the EP. In carrying out the present Compliance Review, therefore, the Compliance Review Expert, while subjecting the Bank’s conduct of the stipulated environmental appraisal processes to a rigorous examination for the purpose of identifying any actions or omissions which objectively would amount to ‘non-compliance with a Relevant EBRD Policy’¹², has also found it pertinent to have regard to the Bank’s policy on disclosure of documents in line with the 2011 Public Information Policy of the EBRD.¹³

The Compliance Review Expert has reviewed a large amount of documents, which were made available to him, partially at the own initiative of the EBRD, partially following a request by the expert to have access to the file as a whole. The expert wishes to note that the approach of Compliance Review and of the Environment and Sustainability team has been one of complete openness and transparency. The expert has been able to review the largest possible amount of documents and electronic correspondence of relevance to the file. For reasons of confidentiality, not all documents can similarly be opened up for general public access. However, in offering

¹¹ Environmental and Social Summary – Concept Review, 6 December 2006, Point 6.

¹² PCM Rules of Procedure, para. 36.

¹³ EBRD Public Information Policy as approved by the Board of Directors at its meeting on 26/27 July 2011, <http://www.ebrd.com/downloads/policies/pip/pipe.pdf>.

the timeline and contents below, all facts of relevance to current compliance review are available to complainant and to the interested public.

The documents presented here are selected from a large amount of correspondence and documents reviewed by the Compliance Review Expert. They represent an overall pattern, rather than being exclusively relevant to the case at issue.

The timeline of relevance to the issue under consideration, is as follows:

2006

2006 “Terms of Reference Ukraine –750 kv Rivne-NPP-Kyiv substation high voltage transmission project” written by Innogate.

January 2007

An ‘Environmental Impact Assessment /Scoping document

February 2007

Consultation Process Minutes of Consultation Meeting held end February 2007 and organised by Ukrenergo and EBRD (March 07).

24 April 2007

Initial ESIA report prepared by the Consultant

4 May 2007

Draft ESIA prepared by the consultant

14 May 2007

A similar draft ESIA submitted for comment

16 May 2007

UKENERGO response to the Consultant

27 May 2007

Amendment of draft ESIA

30 May 2007

Issuing of the draft ESIA to the Public for comment.

6 November 2007

Description of the Project included in the Board Document and approved by EBRD Board of Directors on this date.

28 February 2008

Loan Agreement between Ukraine and the EBRD

23 July 2008

Draft “Financial Contract” between the EIB and the Ukraine

May 2011

Contract signed with a service provider

2 November 2011

Project Implementation Plan (PIP)

12 November 2012

EBRD PCM Eligibility Assessment Report

Detailed review of the scope of the ‘project’ in these documents reveals in particular that the need for the construction of a number of 330 kV lines was clear from the start. Some of these were nearing completion at the time of EBRD financing and had been wholly financed by Ukrenergo. Of others, in particular those that later became part C and D of the project, only the need was projected, not the design neither the route. Part C and D however were part of the overall project, finance for which was to be provided by EBRD and EIB, even if design and route for these parts were not known at the time of financing. There were no explicit references to projects that became parts C and D in the *publicly available ESIA*, released to the public in 30 May 2007¹⁴, however in this document, too, it was acknowledged that additional projects would be undertaken to achieve the project's objectives, without being within the scope of the ESIA. Particular reference was made to the modernization of the 750 kV Kyiv substation, which, it was said, required upgrading works in order to be able to accommodate the new transmission line

At the end of 2007, documents sent to the EBRD Board of Directors formally classify the project into parts A through to D. *The February 2008 Loan Agreement between Ukraine and the EBRD*, too, specifically includes Parts C and D nominatim.

4.3 Intermediate conclusion on project scope factually being within the purview of the EBRD

The ESIA itself did not classify the projects into Parts A, B, C and D. The project was simply classified into bullet points. Yet, the Agreement between EBRD and Ukraine, concluded a few months after the ESIA, does classify the project into parts A-D, as did documents seen by the Board a few months earlier.

The Complainant correctly identifies that Parts C and D were *implied* in the project scope as identified in ESIA – even if not expressly stated, and not included in the actual ESIA study. However this implication in the ESIA, made in particular by referring to the need for further modernisation and upgrade, was not supplemented with the type of technical detail which parts A and B did already have at the time.

The Complainant notes that Part C and Part D were, moreover, specifically mentioned in the Loan Agreement between the EBRD and the Ukraine signed on 28 February 2008,¹⁵ as indeed they were.

¹⁴ ESIA May 2007, p 2, <http://www.ebrd.com/english/pages/project/eia/37598.pdf>

¹⁵ The 2008 EBRD Loan Agreement available to Complainant was drafted in Ukrainian/Russian. The Project Implementation Plan (PIP) is updated on a regular basis to take account of changing circumstances. The one reviewed by the Compliance Review Expert was revised on 2 November 2011. The latest PIP divides the Project into Lots 1-4.

5. 'Projects' in International and EU EIA law

5.1 The general interpretative context of the EIA requirements

The core legal issue in the review of current complaint, is whether the Bank should have insisted on inclusion of what came to be known as parts C and D of the 'project', in the ESIA carried out for said project, including public consultation, and what would have to be completed prior to the Board of Directors being asked to review the project¹⁶.

It is clear from the above factual due diligence that the need for what was to become parts C and D of the project, was firmly within the contemplation of the Bank's compliance agents from the very initiation of the file. The crucial consideration in the bank's response (which shall be further reviewed in detail below, Heading 6) is whether the more or less distant reality in practice, of parts of or indeed natural continuation of a project, and the absence at the time of approval of technical detail for same, impacts on the Bank's duty to have those realities reflected in the EIA.

Proper assessment of that consideration requires analysis of the EIA obligations applicable to the Bank in considering support for the project. As noted above, the 2003 Environmental Policy reads in relevant part (para 21):

'The EBRD requires that projects that it finances meet good international environmental practice. Therefore, 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. Where such standards do not exist or are inapplicable, the EBRD shall identify other sources of good international practice, including relevant World Bank Group guidelines, the approach of other IFIs and donors, and good industry practice, and require compliance with the selected standards.'

It has already been established in EBRD Compliance Review¹⁷, inter alia in view of the express reference in the 2003 Policy to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context; the close correspondence between the Espoo Convention and EU law with respect to EIA; and EU law reflecting international practice, that the EU's EIA Directive and relevant case-law of the ECJ on this subject, are to be *taken into account* as corresponding obligations for the EBRD in its application of the 2003 policy and as *playing guiding roles* in the application of same.

Environmental Impact Assessment is a process – not a guarantor of a particular outcome.

An environmental impact assessment (EIA) describes a process that produces a written statement to be used to guide decision-making, with several related functions. First, it should provide decision-makers with information on the environmental consequences of proposed activities and, in some cases, programmes and policies, and their alternatives. Second, it requires decisions to be influenced by that information. And, third, it provides a mechanism for ensuring the participation of

¹⁶ Of note is that the EBRD does not carry out the EIA itself, neither indeed to any authorities subject to EIA obligations. EIA is carried out under responsibility of the developer, with supervision by the relevant authorities, in casu with the EBRD having to review compliance with EBRD requirements of same prior to deciding to fund.

¹⁷ See in particular EBRD Compliance Review Report relating to the Vlorë thermal power generation project, 17 April 2008, paras 26 ff.

*potentially affected persons in the decision-making process.*¹⁸ (emphasis in the original)

Along similar lines, EIA needs to be thought of as

*iterative processes, where information that comes to light is fed back into the decision-making process.*¹⁹

Previous EBRD compliance review reports have noted in this respect

*it must be borne in mind that the EIA is but a legally mandated procedural technique for integrating environmental considerations into the decision-making processes regarding certain development projects. Its purpose is to provide a system whereby decision-makers are provided with material information with respect to the likely environmental consequences of a certain proposed project and their alternatives and, in so doing, it facilitates the participation of potentially affected persons or interested groups in the decision-making process. The EIA, therefore, generally involves procedural requirements rather than substantive rules or environmental standards and provides a formal route by which information is to enter decision-making procedures, but it does not determine the outcome of those procedures.*²⁰

It is with these general aims in mind, that compliance with the EBRD 2003 Environmental Policy needs to be reviewed.

ESIA regulates a *process*, not a particular outcome. It is fair to say that in regulating behaviour rather than substantial outcome, EIA requirements necessarily lack the level of precision which product- or outcome driven law may achieve. As a result, case-law on the precise obligations is relatively frequent, however, they concern mostly the decision whether or not to conduct an E(S)IA at all, rather than the scope of such.

The European Commission, in its 2009 report on the application of the corresponding EU Directive, summarises relevant case-law as follows:

*The ECJ has emphasised that the Directive is broad in scope and purpose and confines the MS' degree of discretion. Most of the ECJ rulings focus on "screening" and the decision as to whether or not to carry out an EIA. The ECJ has also provided interpretations of some of the project categories and the concept of "development consent", and has dealt with the issue of retention permissions.*²¹

5.2 'Project' as defined in the corresponding obligations of the EIA Directive

Article 1(2)(a) of the Directive defines 'project' as

(a) 'project' means:

— the execution of construction works or of other installations or schemes,

¹⁸ Sands, P, and Peel, J. (with Adriana Fabra and Ruth MacKenzie), *Principles of International environmental law*, 3rd ed., Cambridge, CUP, 2012, p.601.

¹⁹ Bell, S., and McGillivray, D., *Environmental Law*, Oxford, OUP, 6th ed. 2006, p.509.

²⁰ EBRD Compliance Review Report relating to the Vlorë thermal power generation project, 17 April 2008, para 24-25.

²¹ Commission report of 23 July 2009 on the application and effectiveness of the EIA directive, COM(2009) 378, at 2.3.

— *other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;*

This definition is of not much use or controversy for current review. ‘Projects’ subject to ESIA are necessarily ‘draft’ or ‘planned’ projects: for SESA works proactively, considering a project’s environmental²² impact prior to permission being granted. The challenge in current review, concerns the application of ESIA to ‘incremental’ projects: projects which develop in stages.

With respect to corresponding obligations, the ECJ has unequivocally rejected *inter alia* in *Ecologistas en Acción*, the artificial splitting of projects to circumvent EIA requirements:

‘as the Court has already noted with regard to Directive 85/337, the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive (see, as regards Directive 85/337, Case C-392/96 Commission v Ireland [1999] ECR I-5901, paragraph 76, and Abraham and Others, paragraph 27).’²³

This strict approach of the Court prevents ‘salami’ projects, i.e. artificial splitting up in order to remain under relevant thresholds.

There is no suggestion that in the case at issue, the project was artificially split up so as to keep it outside of ESIA requirements: rather, whether the ESIA that was carried out included all relevant parts of the project.

The Court of Justice also held in *Ecologistas en Acción* that where individual projects carried out or planned to be carried out are part of a larger project, the authorities giving the go-ahead (and the national courts reviewing compliance with the Directive), must judge

*whether they must be dealt with together by virtue, in particular, of their geographical proximity, their similarities and their interactions.*²⁴

Relevant case-law with respect to incremental projects, also known as ‘cumulative assessment’ may also be found in the application of Article 1(2)’s ‘*development consent*’.²⁵ With reference to the concept of development consent in Article 1(2) of the EIA Directive, the term was found by the ECJ to refer to a single type of consent, that is the authorities’ decision on whether a project can be proceeded with or not.²⁶

However, as established in *Wells*, for multiple staged projects, the

“effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the

²² A crucial distinction with the SEA Directive being that EIA sees to *environmental* impact only, not to the complete sustainable development picture.

²³ Case C-142/07 *Ecologistas en Acción-CODA v Ayuntamiento de Madrid*, [2008] ECR I-6097, paragraph 44.

²⁴ *Ibidem*, paragraph 45.

²⁵ Defined as ‘*the decision of the competent authority or authorities which entitles the developer to proceed with the project*’.

²⁶ Case C-332/04 *Commission v. Spain*, [2006] ECR I-40, paragraph 53.

implementing decision that the assessment should be carried out in the course of that procedure.”

In the case at issue, therefore, applying the *Wells* criteria, only if the effects of Part C and D were not identifiable at that time, ought they not validly to have been included in said ESIA. We shall come back to this issue below.

Judgment in *Barker* would seem of less precedent value. The ECJ ruled that

*“Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.”*²⁷

In *Barker*, the local authority when issuing outline planning permission ruled that the first stages of the project would not have any significant effects on the environment and that only at a stage when reserved matters (part of the rolling-out of the planned project) would be dealt with, that there might be such effects and hence the need for an EIA. In the case at issue, by contrast, the environmental impact of parts A and B was never in doubt – rather whether Part C and D ought to have been joined.

5.3 ‘Project’ as defined in the 2003 EBRD environmental policy

The 2003 EBRD Environmental Policy, which applies to the project under consideration, does not define ‘project’²⁸. Of relevance to the current dispute, however (in particular: with respect to the co-financing by EIB), is that Para 14 of the 2003 Policy describes the ‘environmental appraisal process’ with reference to the project as a whole, not just the EBRD-financed part:

‘EBRD-financed projects undergo environmental appraisals both to help the EBRD decide if an activity should be financed and, if so, the way in which environmental issues should be incorporated in project financing, planning and implementation. The EBRD supports a precautionary approach to the assessment of environmental impacts.

The EBRD’s environmental appraisal work will seek to verify that each project in which the EBRD invests will be implemented on an environmentally sound basis. It is the responsibility of the project sponsor to provide the EBRD with all information required for the environmental appraisal to the satisfaction of the EBRD.’ (emphasis added)

Para 20 of the 2003 Policy, too, talk of EBRD- financed projects: projects as a whole: not just the EBRD financing of it: see for instance para 21:

²⁷ Case C-290/03 *Diane Barker v London Borough of Bromley*, [2006] ECR I-3949, paragraph 49.

²⁸ This is in contrast with the 2008 Policy, which defines ‘project’ in para 17 as ‘In this Policy, the term “project” refers to the business activity for which EBRD financing is sought by the client regardless of the type of EBRD operation. EBRD operations (that is to say, the act of providing financing) comprise a range of different types of financing for proposed projects, such as project finance/limited recourse finance, corporate finance, working capital, quasi-equity, equity, or grants.’

'The EBRD requires that projects that it finances meet good international environmental practice. Therefore, 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. Where such standards do not exist or are inapplicable, the EBRD shall identify other sources of good international practice, including relevant World Bank Group guidelines, the approach of other IFIs and donors, and good industry practice, and require compliance with the selected standards.

The EBRD will not finance projects that would contravene country obligations under relevant international environmental treaties and agreements, as identified during the environmental appraisal. In addition, projects will also be structured to meet IFC Safeguard Policies on indigenous peoples, involuntary resettlement and cultural property,³ if they involve potential impacts related to such matters.' [emphasis added]

6. Whether EBRD practice in current project met with the legal requirements

6.1 Whether Parts of the project are financed by others has no impact on the Bank's ESIA requirements

It has been argued inter alia that because the EBRD is not financing Part D, the EBRD is not responsible for conducting an ESIA on Part D.

That the EBRD are not financing Part D does, indeed, appear to be the case. It is also set out in the Board Document sent to the Secretary General for EBRD Board Approval in July 2007:

Board Document sent to the EBRD Board of Directors for approval of the Project, July 2007

Ukrenergo, the Bank and European Investment Bank (EIB) will jointly finance the Project, with Bank participating in the financing of the construction of 750 kV overhead line between Rivne NPP and the new 750/330 kV Kiev substation. (See Annex 3 for line route map.) (Part A and B) EIB will also finance the construction of 750 kV overhead line, and will finance construction of two 60km 330kV lines from Kyiv Substation. Table 2 below summarises the cost estimates and sources of financing for each of the Project items. (Part C and D).²⁹

At what moment exactly the precise co-financing responsibilities for the project became clearly defined, is less clear. It would seem that financing in full by the EBRD was not envisaged from the start. However, at any rate, and as noted above, the 2003 Environmental Policy describes the 'environmental appraisal process' with reference to the project as a whole, not just the EBRD-financed part. Should there be remaining doubt - quod certe non - as to the exact nature of the term 'project' in the Policy, interpretation of such needs to be guided by the environmental objectives which the Policy seeks to serve. Limiting EBRD-disciplined ESIA requirements to those parts of

²⁹ Memorandum for Board Approval :Ukraine – Rivne - Kyiv High Voltage Line Construction Project, date of document 12 October 2007, p.13.

the project which are EBRD financed (as the Management's argument implies, even if this was not the factual intention in the case at issue), runs the risk of rendering the Policy nugatory: for ESIA could be circumvented simply by removing ESIA sensitive parts of the project from EBRD funding, and having these financed by less environmentally sensitive means (which could include, self-financing).

Consequently, the ESIA responsibilities apply to the project as a whole, not just those parts of it that are EBRD financed.

6.2 Whether availability of design details has an impact on the extent of the EIA

It has been suggested that project Part D, was identified as part of the Project during the TDD in 2007 but not included in the ESIA as its design was not available at that stage.

The Board Document sent to the Board of Directors on the Project appears to confirm that this is indeed the case.

Board Document submitted to the EBRD Board of Directors for approval of the Project, July 2007

Environment

- *Screened A/O, requiring an Environmental and Social Impact Assessment ("ESIA") of the 750 kV electricity transmission line from Kiev to Rivne. The Project is just one element of a major wide ranging modernization and energy efficiency drive of the Ukrainian national grid aimed at increasing reliability.*
- *The Project has also been subject to Ukrainian EIA and an additional EIA was undertaken by an international consultant to meet EBRD Environmental Policy and Procedures for A level projects of this type. **It should be noted that the detailed designs for instance assessing the location of each pylon will be done by the chosen construction contractor at latter date. Therefore the ESIA focused on the overall environmental and social impacts and provision of appropriate guidance and recommendations for future contractors during the construction process. These recommendations are included in the environmental management and monitoring plan and any contractor will need to adhere to these requirements.** (emphasis added)³⁰*

Following the ECJ's ruling in *Ecologistas en Acción*, precited³¹, where individual projects carried out or planned to be carried out are part of a larger project, the authorities giving the go-ahead must judge

³⁰ Memorandum for Board Approval :Ukraine – Rivne - Kyiv High Voltage Line Construction Project, date of document 12 October 2007, p.11.

³¹ Note 23 above.

*whether they must be dealt with together by virtue, in particular, of their geographical proximity, their similarities and their interactions.*³²

Per the *Wells* criteria, referred to above, for multiple staged projects, the

“effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.”

Part C and D were firmly within contemplation at the same time as part A and B. They are geographically proximate to Parts A and B, and clearly interact with them. However their technical detail was not available at the time, nor was that detail inevitable (i.e. parts C and D could take a variety of directions). They could not therefore have been included in the ESIA.

6.3 Whether the need for Part D was only determined after the ESIA was concluded, following completion of the Technical Due Diligence.

The need for Part D was most definitely present from the very start of EBRD funding being considered, as was the need for Part C. What was absent, was the technical detail for both parts. Parts C and D were eventually given permission by the relevant authorities in the final quarter of 2012.

6.4 Whether the design and construction of Part D were scheduled to take place several years in the future.

Parts C and D were seen from the very beginning as being an essential part of the project realising its potential. However as noted above, their technical design was not known at the time of the ESIA for the project.

6.5 Whether the appropriate ESIA was carried out at a later date

The argument has been made that the lenders required Ukrenergo to undertake a separate ESIA and public consultation in accordance with the EBRD and EIB respective requirements for Part D at the appropriate time when detailed information on the line route would become available. A separate ESIA is being conducted by Ukrenergo on Part D of the project, and is outside the scope of this Compliance Review.

³² Ibidem, paragraph 45.

7. Whether relevant information was disclosed to the public and whether the public was properly consulted on Parts C and D

Parts C and D were not included in the 2007 ESIA for the reasons pointed out above. The ESIA currently being carried out for parts C and D is outside the scope of current Compliance Review.

8. Conclusion and recommendations

Given that

- There is no suggestion that in the case at issue, the project was artificially split up so as to keep it outside of ESIA requirements: rather, whether the ESIA that was carried out included all relevant parts of the project.
- There is a discrepancy in the range, definition and scope of the Project. Its contours are fluid and change from document to document.
- The Complainant correctly identifies that Parts C and D were *implied* in the ESIA – even if not expressly stated.

Having established

- That Part C and D were firmly within the contemplation of the EBRD at the time of the initiation of the ESIA; however the effects of Part C and D were not identifiable at that time, and they ought not validly to have been included in said ESIA.
- That under the 2003 Environmental Policy ESIA responsibilities apply to the project as a whole, not just those parts of it that are EBRD financed.
- That where individual projects carried out or planned to be carried out are part of a larger project, the Bank must assess whether they must be dealt with together by virtue, in particular, of their geographical proximity, their similarities and their interactions.
- That Part C and D were firmly within the contemplation of the Bank at the same time as part A and B, and that they are geographically proximate to Parts A and B, as well as clearly interacting with them; however their technical detail was not known nor could have been known at the time, and they ought not to have been included in the ESIA.
- That the claim that “*the need for Part D was only determined after the ESIA was concluded, following completion of technical due diligence*” is incorrect, insofar as the future need for what became Part D was firmly established; technical detail however for parts C and D was not known at the time.

Finds

That Parts C and D of the Project were justifiably not included in the 2007 ESIA and, on this basis, the Compliance Review Expert declines to find that EBRD failed to comply with Environmental Policy 2003.