For more information:
Fidanka Bacheva McGrath
fidankab@bankwatch.org

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CEE Bankwatch Network, Comments on the drafts of the EBRD's good governance policies

On 21st January the EBRD invited the public to comment on the drafts of its good governance policies: the Environmental and Social Policy (ESP), the Public Information Policy (PIP) and the Project Complaint Mechanism's Rules of Procedure (PCM).

Bankwatch has submitted an initial briefing about concerns with the new drafts for a meeting between the EBRD's Vice President and 4 CSOs on 28 January. This set of comments is an elaboration on the briefing to the President, after clarifications were received during the public consultation meetings in Casablanca, Tbilisi, Sofia and London. CEE Bankwatch has also submitted separate comments on the draft Rules of Procedure for the PCM and participated in the preparation of two additional statements with other groups: one on Human Rights and one on the PCM, which will be submitted separately.

1) EU standards in non-EU countries and additionality (ESP)
The application of EU standards presents a major opportunity for the EBRD to bring added value to projects in non-EU countries with weak environmental legislation and regulatory capacity. Further to high technological standards, EU legislation is superior in its requirements for transparency and public participation in decision-making, which are instrumental for democratic and efficient management of natural and financial resources.

As a signatory of the European Principles for the Environment the EBRD is committed to apply EU standards and principles for environmental protection, and the new ESP draft reiterates this commitment. The 2008 policy language was very aspirational, but not binding, which indeed was not helpful, hence expectations were that the references to EU directives would have been clarified and strengthened, clearly stating which ones will be applied. Instead many of these references have been deleted (eg. in PR 6 on Biodiversity conservation) and application of EU law is left to the discretion of the bank

on a case-by-case basis, eg. by conditioning it with “where appropriate”, “where applicable” and “subject to” etc..

Recommendation: The strongest and clearest formulation is in PR 3 (on Resource efficiency and pollution abatement and control), that requires that EU law will be applied if more stringent than national law and clearly states which Directives are in question. This would be the approach Bankwatch would recommend also in all other PRs. Alternatively an overall, unconditional commitment to apply all EU law and standards could be stated in the first part of the policy on the EBRD's commitments.

2) Good International Practice (GIP) over International Law: Changes related to the Aarhus and Espoo Conventions in the EBRD Environmental and Social Policy (ESP)

The new ESP is committing the EBRD to Good International Practice (GIP), deleting previous commitments to International Law and subjecting its application to case by case discretion of the EBRD, again if and where appropriate. CEE Bankwatch is particularly concerned about changes being proposed to the EBRD Environmental and Social Policy that relate to the Aarhus and Espoo Conventions.

The bank’s own commitment and the requirements for its clients to be in line with principles of international law on access to environmental information and participation in decision-making on issues that may have negative transboundary impacts on the environment (including the UNECE Aarhus and Espoo Conventions) were clearly spelled out in the EBRD ESP 2008. These have had a very positive impact on the bank’s operations in non-EU countries, especially those in which the aforementioned conventions are yet to be ratified or are not properly implemented. However, in the new EBRD ESP draft reference to these conventions has been moved from the Policy (previously paragraph 8) to the PR 10 on Information Disclosure and Stakeholder Engagement (footnote to paragraph 1).

The bank's attempts to encourage clients to be more transparent and to consult with stakeholders are necessary, but hardly likely to be taken seriously when the bank fails to meaningfully do so itself. In this spirit, the new draft of the ESP states that the responsibility for impact assessment, preparation of management plans, public consultations, monitoring and implementation of mitigation measures is predominantly the responsibility of the client. This may appear useful in raising the capacity of clients to assess and deal with risks, however, this can only work in a combination with a clearly spelled out commitment on behalf of the EBRD to do more than simply “review” the information provided by the client, which is not the case in the current draft.

There are a number of recent cases that demonstrate the dangers of this approach. For example the Azeri state-owned company SOCAR hiding a coal plant integrated in its refinery project in Turkey or evictions of Roma households to clear the way for a water project in Romania. In both cases consultants hired by the EBRD and co-financiers worked with information provided by the client and failed to identify the 'hidden' problems.

Recommendation: We find narrowing of the scope of Aarhus convention application as a step in the wrong direction – instead we would recommend the bank to strengthen its commitments to the implementation of the Conventions and its own requirements on information disclosure and public engagement, particularly on category B projects.

3) Weakening of Human Rights safeguards

The proposed new draft of the ESP further weakens the EBRD's commitment to the protection of human rights, which was previously not strong enough, as demonstrated in several projects monitored by Bankwatch, especially the Kolubara lignite mine, in the last three years. The policy lacks an explicit commitment to apply to projects it finances a number of international treaties, instead relying only on domestic law and international conventions that are ratified by the country of operation.

Most importantly the draft fails to integrate proposals for the inclusion of human rights risk assessment and impact assessment as part of the due diligence of projects and in the designing of country strategies. Although the bank claims that 'gap analysis' is regularly performed to guide the designing of mitigation measures for the projects, this is done on a case by case basis and leaves a lot of space for discretion.

Additionally, the commitments towards country and sectoral strategies have been shrunk, not expanded, and therefore the recommendations of Bankwatch of how safeguards should be mainstreamed through enhanced strategies and policy dialogue have not been taken into account.

Recommendations: We would like to raise again our recommendations from the first round of consultations, namely:

- Country strategies (CSs) should include an assessment of the capacity of the state institutions to protect human rights and to provide redress for grievances of citizens from harm caused by business, including by state-owned companies. Additionally, CSs should set concrete strategic objectives for promotion of better respect and protection of human rights that investments in the given country will aim to achieve.

- Sectoral strategies and policies should similarly assess the capacity of the industry (eg. the extractive industry) and of the countries of operation to Protect, Respect and Remedy, i.e. to implement the United Nations Policy Framework For Business And Human Rights, and should set strategic sectoral objectives with regards to human rights.
- In order to prevent reputational and operational risk, and to improve the overall social corporate responsibility of its clients, due diligence should be improved to better pick up human rights problems as social factor investment risks. For example, due diligence should acknowledge disputes and pending court cases against the company, as part of setting a less biased baseline against which Stakeholder Engagement Plans (SEPs) and Environmental and Social Action Plans (ESAP) should be designed.
- As part of Social Impact Assessment, Human Rights Impact Assessment should be carried out for the whole operation, without a limitation being imposed by a narrowly defined project area of influence. This approach should especially apply for regular clients of the bank, who repeatedly receive investments for various sides of their business.
- SEPs should define clearly the communities and households, whose rights will be threatened or negatively impacted by the project. They should be distinguished from the range of institutional stakeholders, such as police forces or fire departments, and should be consulted separately prior to approval of the SEP by the EBRD and signing of the project.
- Progress with implementation of the SEP or ESAP – for example by setting up a grievance mechanism for project-affected people – should be a contractual condition for disbursement of investments.
- The EBRD should provide up-to-date information on the implementation of the project, on mitigation of anticipated human rights and other adverse impacts, including progress with SEO and ESAP implementation. This should be done through PSD up-dates, as well as monitoring data disclosure on the client's web site, and disclosure by the bank upon request.

4) Deferral for studies after board approval (ESP)

Bankwatch is concerned about the introduction of the new deferral option, as well as the “alternative approach” in Decision-making (paragraphs 40 and 41 in the new draft). Two of the recently concluded PCM investigations (Ombla and Boskov Most) are clear examples where the projects were approved and signed and only then additional nature studies were undertaken, with an additional and in our opinion unnecessary time and monetary cost from the side of the bank and the project sponsor. While some provisions have to be made for minor issues to still be clarified after board approval, issues which are serious enough to potentially prevent projects from going ahead must be fully

addressed before board approval. An up-date of the Project Summary Documents after board approval will not enable public participation, and moreover board approval sends a strong political signal that a project can go ahead and encourages clients to treat further studies as a mere formality.

Regarding 'alternative approaches', otherwise known as derogations, the purpose of having a policy is to implement it, not to create wide loopholes which allow the bank to bypass it.

Recommendation: For paragraph 40 of the Environmental and Social Policy section on the EBRD's commitments, amend text as follows (additions in bold): **The** EBRD's Board of Directors has the discretion to agree a deferred level of project appraisal following Board approval and after the signing of the financing agreements in specific circumstances **where the remaining issues are minor and do not have the potential to prevent the whole project from going ahead**. This approval will require completion of further environmental and social appraisal in compliance with this Policy and the PRs prior to disbursement or within an agreed implementation schedule (e.g., prior to acquisition of future assets). In cases where deferred appraisal has been agreed, the Project Summary Document will include a description of the approach agreed.

For Paragraph 41, delete the paragraph.

5) New formulation on technical cooperation and policy dialogue

The previously vague formulation on policy dialogue has been clarified: "*Through its technical cooperation activities and policy dialogue, EBRD will seek to support development of an enabling environment for example by promoting its clients to achieve environmentally and socially sustainable outcomes in their projects.*" Perhaps in practice this has been the approach all along, and the new draft just reiterates that. Nonetheless, this formulation is very problematic in suggesting that the EBRD will put the needs and interests of its clients above those of the country, the project-impacted communities and the environment in cases when these needs and interests are not fully compatible. Some of the EBRD's clients are large state-owned companies with strong political connections or transnational corporations with significant means to influence states' policies. Their projects already benefit from a number of exemptions and favourable conditions, and these clients already have the 'upper hand' in promoting their interests in cases when they clash with environmental policy objectives, or with community and societal needs.

Recommendation: The ESP paragraph should be expanded to elaborate on safeguards needed for the environment and project-impacted communities, which may be in contradiction or in addition to the client's objectives, for example (addition in bold):

"*Through its technical cooperation activities and policy dialogue, EBRD will seek to support development of an enabling environment for example by promoting its clients to achieve environmentally and socially sustainable outcomes in their projects,* ***while at the same time seeking to safeguard through relevant policy measures the environment, the rights and development objectives of project-impacted communities.***"

6) PR 1 on project alternatives

The PR states (para. 10) that "*The ESIA will include 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."* However project sponsors often dismiss alternatives as unfeasible without any publicly-available evidence being produced. The PR should therefore stipulate that the alternatives to be assessed are to be agreed during the scoping phase.

Recommendation: Amend para. 10 as follows (addition in bold): *"The ESIA will include 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.* ***The alternatives to be examined will be defined during the scoping phase.****"*

7) PR 3 on resource efficiency and pollution abatement and control (ESP)

Bankwatch welcomes the clear language in this PR requiring that EU law will be applied if more stringent than national law. This would be the approach Bankwatch would recommend as an overall, unconditional commitment in the part of the policy on the EBRD's application of EU law and standards.

Bankwatch welcomes the introduction of an obligation to consider the potential cumulative impacts of water abstraction upon third party users and local ecosystems placed on the EBRD's client by the Bank.

Bankwatch also welcomes the introduction of the principle that the client "*will consider alternatives and implement technically and financially feasible and cost-effective options to avoid or minimise project-related greenhouse gases ("GHG") emissions during the design and operation of the project. These options may include, but are not limited to, alternative project locations, adoption of renewable or low carbon energy sources, sustainable agricultural, forestry and livestock management practices, the reduction of fugitive emissions and the reduction of gas flaring*".

What Bankwatch understands by this is that, if the technically and financially feasible and cost-effective options to avoid or minimise project-related GHG emissions are more

expensive than the adoption of renewable or low carbon energy alternatives, the Bank will not engage in financing such a project and in fact will be open to analyse studies showing that other cost competitive renewables-based or low carbon alternatives options exist before approving a fossil fuels based project.

In order to ensure a thorough comparison of alternatives, it must be made clearer that the baseline being used for the calculation of the greenhouse gas comparison will be the most environmentally acceptable alternative, not merely the status quo, which in most cases can anyway not legally or technically continue for a long period.

Recommendation: In paragraph 14, we propose the following amendments (additions in bold): "*For projects that currently produce, or are expected to produce post-investment, more than 25,000 tonnes of CO2-equivalent annually, the client will quantify these emissions in accordance with [the] EBRD Methodology for Assessment of Greenhouse Gas Emissions. The scope of GHG assessment shall include all direct emissions from the facilities, activities and operations that are part of the project or system, as well as indirect emissions associated with the production of energy used by the project* ***and/or the use of the project. In order to be able to compare emissions with other alternatives, a baseline scenario must be developed based on the most environmentally, economically and socially sustainable alternative to the project, including potential for energy efficiency.*** *Quantification of GHG emissions will be conducted by the client annually in accordance with the EBRD Methodology for Assessment of Greenhouse Gas Emissions.* ***The EBRD will finance only projects whose emissions trajectories are consistent with global emissions reductions of 50-70 percent by 2050****".*

8) Weakening of PR 6 on biodiversity conservation

The Project Requirements on biodiversity conservation and sustainable management of living resources (PR3) has not been strengthened by more binding commitments on behalf of the EBRD to ensure compliance of financed projects with EU law and standards, as mentioned above. Moreover, a number of changes suggest a significant weakening of biodiversity safeguards, for example:

- At the very start we are told that "*The objectives of biodiversity conservation and sustainable management of living natural resources* ***must be balanced*** *with the potential for utilising the multiple economic, social and cultural values of biodiversity and living natural resources in an optimised manner.*";
- The objective is "*no net loss of biodiversity*", which suggests that biodiversity loss can be compensated, a claim which has yet to be sufficiently proven and should not be relied upon.

- It is not clear what happens if the status of a protected area does not allow for mitigation, eg. according to national law some protected areas are out of reach for industrial activities, although the implementation of this law can be weak: "*Where the project occurs within or has the potential to adversely affect an area that is* ***legally protected or internationally recognised or designated for protection****, the client must identify and assess potential project - related impacts and apply the mitigation hierarchy so as to prevent or mitigate impacts from projects that could compromise the integrity, conservation objectives or biodiversity importance of such an area.*" Also the requirements for '*due process*' are deleted, raising questions about the permitting procedures and the public participation in deciding on these measures.
- Destructive project activities can be implemented in **critical habitats** if, among other criteria, "*no other available alternatives within the region exist for development of the project in habitats of lesser biodiversity value*" - in the case of underground resources where project siting cannot have alternatives, this new condition is the exact opposite to Bankwatch's demand for no-go zones. But this condition will be applied to projects in other sectors as well, eg. for hydro-power, as long as there are "*no technically and economically feasible alternatives*" which clients will almost always argue is the case;
- EBRD's responsibility in designing and approving mitigation measures and strategies is underplayed by transfer of responsibilities to the client (see below).
- The general approach to safeguarding the environment, as environmental management rather than environmental protection, is clarified and enhanced. The mitigation hierarchy – avoid / minimise / mitigate / offset – confirms the approach that there are no show-stoppers, no no-go zones, no impact that cannot be managed and should thus prevent an investment proposal.
- Paragraphs 8 and 10 of PR6 practically lower the quality of the ESIA of the project required from the clients. According to paragraph 8 "in planning and implementing biodiversity related baseline and impact assessments clients will refer to relevant good practice guidance" and "where further investigations are needed to provide greater certainty of the significance of potential impacts, the client may carry out additional studies and/or monitoring before undertaking any project related activities," meaning that instead of requiring the client to prepare a high quality ESIA report that assesses all potential impacts of the project before board approval (which would be considered as an added value of the Bank) the Bank just accepts an ESIA relevant to the vague "good practice guidance utilising desktop and field-based approaches" that in most cases is not enough and is causing irreversible negative impacts on biodiversity. In paragraph 10 the Bank introduces adoption of adaptive management practice instead of stricter and more effective measures for environmental protection.

Recommendations:
On Para 4, Objectives, change the second bullet point as follows: *"To adopt the mitigation hierarchy approach, with the aim of achieving no ~~net~~ loss of* biodiversity, and where appropriate, a ~~*net*~~ gain of biodiversity;"

Throughout the PR, delete all references to biodiversity offsets and 'no net loss' of biodiversity.

Establish no-go zones for:
(a) areas protected by national or international law, such as national parks or reserves, Natura 2000 sites and UNESCO World Heritage sites
(b) areas not protected by law but which are (i) high conservation value areas, critical ecosystems, water-catchment areas and biological corridors; (ii) areas important for food security and traditional livelihoods; and (iii) territories of indigenous peoples where full free prior and informed consent has not been obtained, following the recommendations of the IUCN from the World Congress in Barcelona in 2008.

Modify Paragraph 8 as follows:
a) Specify what is 'good practice guidance' and who it is defined by and
b) amend the following sentence as follows: "*Where further investigations are needed to provide greater certainty of the significance of potential impacts, the client may carry out additional studies and/or monitoring before* ***board approval of*** ~~*undertaking any*~~ *project-related activities that could cause irreversible impacts to potentially affected habitats and the biodiversity that they support.*"

In Para. 14, clarify as follows: *"Consequently, in areas of critical habitat, the client will not implement any project activities unless* ***all of*** *the following conditions are met:"*

9) PR 6 Animal welfare standards welcome, but need strengthening
The introduction of animal welfare regulations in the PR6 is a welcome development. We see it as a step towards recognition of animals as sentient beings - the direction taken by the EU long time ago, presented in the constantly developing EU legislation and policies on animal welfare. EBRD policy should further distinguish between crops and livestock production as animals are sentient beings and deserve better treatment.

However, to ensure that the performance requirement on animal welfare is successfully implemented in the projects, a number of clarifications and more concrete commitments in the policy are still needed.

The major concerns are vague terminology and scope of application limited to farming:
(1) it is not clear what are good international practices and how they are defined - what practices are considered good and by whom,
(2) it is unclear what is “relevant EU animal welfare standards” and whether the term includes all the EU animal-related legislation.
(3) it should be made clear that application of standards should be required not only for “clients involved in farming” but also those that might be involved in transportation and/or slaughtering only.

Such formulations suggest that bank is leaving it up to its clients to decide which practices/standards to follow as there are at least 8 EU Directives and Regulations in this field introducing minimal requirements at different stages (keeping, transporting, slaughtering) and for different animals. Furthermore, the EU legislation in this field is actively developing to cover all aspects of animal welfare, and bank should ensure newly adopted EU laws become applicable for EBRD projects.

Recommendation: We suggest that the EBRD clearly spells out a requirement on the application of EU legislation in PR 6 by formulating that “all EU laws, currently in force or adopted in future, on animal welfare should be applicable for the projects financed by the EBRD”. This is important for ensuring European food production businesses do not move their production capacities (meaning also jobs) into neighbouring states in order to take advantage of lower environmental and animal welfare standards there.

10) The current EBRD exclusion list does not include items informally excluded by the EBRD: weapons production and equipment, alcohol, gambling and tobacco.
The EBRD in various places on its website states that it does not finance defence equipment, gambling or tobacco. In some instances it also adds strong liquors, in some not. In our opinion it would be logical to bring these exclusions into the Environmental and Social Policy so that clients and other stakeholders can clearly see in one place what is excluded and what is not. We propose the inclusion also of all alcohol. Although seen in many societies as socially acceptable, there is no reason why it should be financed by public money.

We also propose clarification on what constitutes defence equipment. For comparison the EIB's exclusion list from April 2013 has:

1) Ammunition and weapons, military/police equipment or infrastructure including explosives and sporting weapons.

The Nordic Investment Bank's Sustainability Policy's exclusion list also includes:

3: Production of ammunition and weapons, and weapons carriers

Recommendation: Add the following to the exclusion list:

- Weapons, ammunition, military and police equipment or infrastructure, including explosives and sporting weapons
- Alcoholic beverages
- Tobacco products
- Gambling

11) Disclosure of environmental and social information and enabling participation in decision-making (PIP and ESP)

The new draft of the PIP shows minor changes on disclosure, for example there are improvements on disclosure of information on category A projects. However, if we look into the portfolio of the bank in the energy and extractive industry sectors – only very few, greenfield projects are given category A and "*therefore require a formalised and participatory environmental and social impact assessment process*." The suggestion then is that most of the projects in these high-risk and high-impact sectors do not require a formalised and participatory process.

Considering the public interests that the bank should have registered on category B projects - such as nuclear reactors lifetime extension in Ukraine, coal-fired power plants up-grade in Romania, oil extraction in Albania, lignite mining in Serbia, gold mining in Kyrgyzstan and Armenia – its response to add several new provisions for improved disclosure only on category A projects is insufficient and unacceptable.

Additionally the new draft of the ESP transfers (or clarifies that) the responsibility for impact assessment, preparation of management plans, public consultations, monitoring and implementation of mitigation measures are predominantly the responsibility of the client. This may appear useful in raising the capacity of clients to assess and deal with risks, however, this can only work if there is a clear commitment from the EBRD side to do more than simply "review" the information provided by the client, which is not the case in the current draft. There are a number of recent cases that demonstrate the dangers of this approach, for example SOCAR hiding a coal plant integrated in its refinery project in Turkey or evictions of Roma households to clear the way for a water project in Romania. In both cases hired consultants worked with information provided by the client and failed to identify the 'hidden' problems.

In summary, the EBRD puts too much responsibility (and trust) on its client and external consultants, and excludes the public from the due diligence process. In this regard, Bankwatch would like to stress that high-risk and high-impact projects in the energy and

extractives sectors will continue to attract interest from the public and input from stakeholders can improve the quality of due diligence and implementation of mitigation measures. But for this, the public must be given quality information with sufficient notice and the space to participate - the current changes in the policy do not provide for that. Therefore the bank has to either change the rules on categorisation of projects, or has to improve disclosure and public participation provisions for category B projects.

Recommendation: Justification for categorisation should concretely specify what is being assessed against the EU EIA directive, for example the remediation or the expansion part of a project, the energy saving or the associated increased production aspect of an investment. If there are EIAs or other permitting procedures for facilities or aspects of the operation that fit the new definition of project area of influence, the public should be informed and consulted, to ensure safeguarding of the environment and local communities through a democratic and participatory process.

12) Secrecy of the policy dialogue or technical assistance with a country of operation (PIP):

Article E. 1.4 of the draft states: "*Information which, if disclosed, in the Bank's view would seriously undermine the policy dialogue with a member country" "This includes any documents, memoranda, or other communications which are exchanged with member countries, with other organisations and agencies, or with or between members of the Bank's Board of Directors (or the advisers and staff of the Bank's Board members), where these relate to the exchange of ideas between these groups, or to the deliberative or decision-making process of the Bank, its member countries, its Board of Directors or other organisations, agencies or entities with whom it cooperates.*"

This results in a situation when the criteria for keeping documents confidential becomes much too broad and denies the public the right to be adequately informed. This is especially important in cases of policy dialogues with a lasting impact on the future economic situation of the countries with which the policy dialogue is taking place such as i.e. water or food subsidies or fossil fuel policies. Without active oversight by civil society, unpopular decisions on sensitive issues can only add to the political volatility in the countries and keeping information secret will assist no-one in the end.

Recommendation: Clarify which documents will be made public under all circumstances and which documents will be subject to possible edits and make the criteria for redacting these documents much more precise.