

CEE Bankwatch Network

Summary of comments on the draft of the EBRD Environmental and Social Policy (ESP)

March 2019

A. Comments on the EBRD's ESP Purpose, Definitions and Scope

1. EBRD Human Rights Due Diligence on projects

We welcome the EBRD's continued commitment (in #2.4) to respect human rights in projects it finances and we note the improved language that the bank will not just recognise the responsibility of its clients, but it will *"require clients, in their business activities, to respect human rights, avoid infringement on the human rights of others, and address adverse human rights risks and impacts"*. We also welcome the improvements in the EBRD policy with regards to human rights related to gender and labour safeguards, the enhanced focus on gender-based violence and vulnerable groups, yet we want to underline the importance of respecting the full suite of rights laid out in the International Bill of Human Rights.

The new draft states (in #2.4) that *"EBRD will continuously improve the operations it finances in accordance with good international practice and will seek to progressively strengthen processes to identify human rights risks during the appraisal process of projects"*. This commitment rings hollow, however, as the policy provides no further clarity on the appraisal processes or tools that will be used by the EBRD (not by its clients) in appraisal of human rights risks. We note also with disappointment that the new draft policy is:

- missing in Section II a clear definition on "Social" with reference to human rights (a limited definition of "social impact" is provided in PR1),
- missing the reference from the 2014 policy that *"the EBRD will be guided by the International Bill of Human Rights, the UN Declaration of Human Rights"* in the part on EBRD Commitments,
- missing a reference to the UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Corporations.

We recommend that the new EBRD Environmental and Social Policy includes:

- in Section II a definition, for example that *"Social is inclusive of the full suite of human rights laid out in the International Bill of Human Rights and evaluated for impact in line with the requirements of the UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Corporations"*,
- language on human and environmental rights defenders and a reference to the UN Declaration on Human Rights Defenders,
- specific commitments for the development of protocols on contextual risk assessment for highest risk projects associated with land and other natural resources, as well as issues related to security and conflict.
- a commitment to introduction of an early warning system for risk of oppression or violence towards human and environmental rights defenders.

2. Right to Know and Meaningful Participation

We welcome the continued commitment of the EBRD to ensure that its projects are structured “to meet EU environmental principles, practices and substantive standards, where these can be applied at the project level, regardless of their geographic location”, but we regret that the new draft Environmental and Social Policy the EBRD fails to expand and clarify how the commitment will be properly implemented by the EBRD, specifically with regards to **disclosure of environmental and social information and public participation of category B projects**.

The EBRD policy continues to significantly lag behind not only the standards and practices in the EU, but also behind the standards set by other international financiers. For example, in our experience the EBRD discloses, both proactively and upon request, significantly less environmental and social information on category B projects, if compared with the current practice of the International Financial Corporation or the European Investment Bank. Another example is the Green Climate Fund, which requires from its accredited entities (AEs), such as the EBRD, to disclose category B project information to affected people and to the public at least 30 days before Board date:

“17. Environmental and social reports. With respect to project and programme funding proposals that have an environmental or social impact, the Accredited Entities (AE’s) shall disclose and announce to the public and, via the Secretariat, to the Board and Active Observers: [...] (c) in the case of Category B projects, the ESIA and an Environmental and Social Management Plan (ESMP) at least 30 days in advance of the AE’s or GCF’s Board decision, whichever is earlier.”

In the [Green for Growth Fund](#), where the EBRD is one of the funders, an Environmental and Social Impact Assessment is required for Category A and for high-risk category B projects. High risk category B would include projects, such as electricity generation as per the [EBRD Environmental and Social Risk Categorisation List for Financial Intermediaries](#).

Furthermore, the EBRD limits the application of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters only to projects “subject to ESIA that have the potential to have significant environmental impacts” (#4.13). This limited approach lacks justification, as often it can be hard to establish in the first place the significance of potential impacts, if stakeholders are not involved as early as the screening and scoping stages of the project. The experience of [destructive category B hydropower projects](#) financed by the EBRD, often through Financial Intermediaries, has demonstrated the need for greater transparency and public participation, in line with the spirit and principles of the Aarhus Convention.

In view of the above, we recommend that the new EBRD policy will commit the bank to:

- Proactively disclose and consult environmental and social information for category B projects in line with better standards and practices used by its peer institutions, such as the IFC, EIB, GCF – e.g. minimum of 30 days before Board approval of projects.

3. Financial Intermediaries

With regards to **Financial Intermediaries**, we welcome the EBRD's reintroduction of the Referral List for projects with particularly high environmental and social risks (PR9 # 13-15 and PR 9 Appendix 1). However, the enhanced due diligence by the bank is not complemented by greater transparency that can inform the meaningful participation by project affected people or better scrutiny by the interested public. The EBRD has already started disclosing information for some FI investments (for example <https://www.webseff.com/>), so we believe that the bank should build on this practice in the future by disclosing information systematically, and before the sub-projects are signed.

In addition, the EBRD must be involved not only in the due diligence of FI projects, but also in the monitoring of such projects. The current policy is internally contradictory on this question, but the new draft explicitly deletes the provision of the 2014 Policy (#4.17) committing the EBRD to carry out monitoring "*including both direct investment and FI projects*".

In view of the above, we recommend that the new EBRD policy will commit the bank to:

- Extend the disclosure and consultation requirements for FI projects at minimum be to projects that are on the FI Referral List, not just for Category A projects.
- Monitoring of FI investments compliance with the Environmental and Social Policy and the PRs.

4. Categorisation of hydropower projects

The Category A list in **Appendix 2: Category A projects** already includes hydropower in protected areas but many sensitive areas are currently not legally protected. In non-EU countries, all hydropower plants need to be subject to an environmental impact assessment process, not only large dams, at least unless the host countries harmonise their legislation with the EU's and have a functioning Appropriate Assessment system in place.

In the EU, all hydropower projects are required to be screened according to the criteria in Annex III of the Environmental Impact Assessment Directive, but as the EBRD Environmental and Social Policy does not include these criteria, in practice such screening is not done in non-EU countries. In the Western Balkans, for example, national legislation states that plants below a certain capacity do not need EIAs, thus local people often have no idea that a project is going to happen until the diggers start work. Critical habitat assessments, while useful, cannot be a substitute for ESIA as they do not include social impacts and assessments of competing water use. They are not even substitutes for Appropriate Assessments as they are not part of the national legal system so there is no legal recourse in case they are not carried out sufficiently well.

In view of the above, we recommend that the new EBRD policy will commit the bank and require from its clients to:

- Undertake environmental impact assessments and public consultations for all sizes of hydropower plants outside the EU (classify them as Category A), at least until Appropriate Assessment systems are properly functioning on the national level.

5. Legal Documentation

We are concerned that the draft ESP, in the Overall Approach to Project Appraisal section (#4.7-4.14), is missing the content of the 2014 Policy (#42) on Legal Documentation: “*The EBRD’s financing agreements with clients in respect of a project will include specific provisions reflecting the EBRD’s environmental and social requirements*”. The current draft policy, in the section on Monitoring (#4.17), commits the EBRD to review “*the compliance of the client with the environmental and social covenants in the financing agreements*”, so we recommend that for clarity:

- the new ESP should reintroduce the part on Legal Documents, to ensure that the legal agreements with all of its clients will contain clear environmental and social covenants.

6. Associated facilities

The draft ESP uses a very narrow definition of Associated Facilities, which could be acceptable for a description of facilities to be covered by PRs, but cannot be a substitute for the project’s entire area of influence. For example, for projects with several phases, it is not acceptable only to assess the first phase, knowing that further phases are planned. It is also very concerning that the new draft states that the PRs “*do not apply to associated facilities*” (#3.7). In PR 1, point 6, associated facilities are expected to be in line with national law and “good international practices”, so it would be simpler and clearer to define those practices as meeting the PRs. As the definition of associated facilities is very narrow, we recommend that:

- The PRs need to apply to Associated Facilities.
- In addition, a wider project area of influence, including the cumulative impacts of existing and planned future facilities, need to be covered by due diligence.

7. Precautionary Principle

In the new draft ESP the Precautionary Principle is no longer an EBRD commitment, only a requirement to clients. The language in the policy has disappeared (# 14): “*The EBRD will be precautionary in its approach to the protection, conservation, management and sustainable use of living natural resources and will require relevant projects to include measures to safeguard and, where feasible, enhance ecosystems and the biodiversity they support*”.

In this regard we would like to note the **IUCN Motion no.26**, which among other things calls on governments to prohibit environmentally damaging industrial activities and infrastructure development in all IUCN categories of protected area and urges financial institutions, including development banks, not to conduct, invest in or fund environmentally damaging industrial activities and infrastructure development within, or that negatively impact protected areas or any areas of particular importance for biodiversity and

ecosystem services that are identified by governments as essential to achieving the Aichi Biodiversity Targets, and to make public commitments to this effect.

In view of the above, we recommend that the new EBRD policy will:

- Reinstate the EBRD's own commitment to the Precautionary Principle
- Integrate reference to IUCN Motion no.26

8. Commitment to Resource Efficiency

In the draft of the new ESP the commitment of the EBRD to “*promoting resource efficiency in projects*” (#50) has disappeared. In unison with its Green Economy Transition Strategy, the EBRD needs to underline in the new ESP its commitment to resource efficiency, not only GHG reduction and biodiversity protection. It needs to make clear that it will strive to finance projects which decrease materials, energy and water use, and which are in line with the waste management hierarchy.

In addition, fossil fuel infrastructure needs to be added to the EBRD Environmental and Social Exclusion List. Even the usually conservative IEA has confirmed in its World Energy Outlook 2018 that 95% of “allowed” emissions are already locked in to existing and under construction infrastructure. This means we cannot build more fossil fuel infrastructure if we want to meet the Paris Agreement targets.

In view of the above, we recommend that the new EBRD policy will commit the bank to:

- Promoting resource efficiency.
- Stop investments in fossil fuels.

B) Comments on the draft ESP Performance Requirements

PR 1 -Assessment and Management of Environmental and Social Risks and Impacts

In order to strengthen the implementation of the EBRD Human Rights Due Diligence and the respect of human rights, including the right to know and participate, we recommend:

PR 1 #10 requires from the client to identify the project's stakeholders and design a plan for engaging with them in a meaningful manner, to take their views and concerns into consideration in planning, implementing and operating the project only “*if projects could have adverse E&S impacts*”. This requirement should be a standard for all projects, as identification of potential adverse impacts is only possible if stakeholders are engaged in the early stages of project design, scoping and screening.

PR 1 #para 11 should be edited as follows: “*The assessment process will be commensurate with and proportional to the potential risks and impacts of the project and will cover, in an integrated way, all relevant direct and indirect environmental and human social risks and impacts of the project, and the relevant stages of the project cycle. Human rights (including gender) aspects shall be considered throughout the assessment process. It may be appropriate for the client to complement its integrated assessment with further studies focusing on specific risks and impacts, such as climate change and indigenous human rights. The assessment will also identify and assess potential improvement opportunities.*”

PR 3 - Resource Efficiency, Pollution Prevention and Control

EBRD investments need to result in absolute – not only relative - GHG emissions reductions and the EBRD needs to add value in this respect. EBRD clients with a high dependence on fossil fuels must be required to develop GHG emissions reductions plans (decarbonisation plans) as a condition for EBRD financing.

PR 5 - Land Acquisition, Involuntary Resettlement and Economic Displacement

We welcome the restructuring of the PR in the draft as it brings additional clarity to clients for implementation. Still there are some important questions. First, it is stated in the new text of PR 5 that *“This PR does not apply to [...] the settlement of refugees, internally displaced persons, and victims of natural disasters, conflict, crime or violence”* (#8), which contradicts the policy definition of vulnerable groups. It is understandable that vulnerable groups may need a different approach than other groups, however, simply excluding them without providing clarity on the approach is not acceptable. The new policy and PR5 need to have clear requirements with regards to refugees, IDPs and victims of natural disasters, conflict, crime or violence.

The second question related to the new provisions in PR5 for Voluntary Land Donations (#35). The application of the VLPs practice may become problematic and used by governments in an inappropriate way, unless a comprehensive VLPs framework would be developed. In accordance with best practices of VLPs carried out by the ADB and World Bank, it is also important to ensure compensatory measures for land donors, especially for vulnerable groups and/or ensure that voluntary donors (individuals, communities) are direct beneficiaries of the project. While there are no extensive studies regarding the VLD impacts, the available studies show that even in cases when VLD used for community infrastructures, in order to ensure the project sustainability, it is important to ensure social economic background, have set and agreed principles to minimise the project risks, develop systematic and clear project documentation, especially regarding legal status of donated land and the donation process.

PR 6 - Biodiversity Conservation and Sustainable Management of Living Natural Resources

The PR6 provisions on biodiversity conservation appear fairly strong on paper but in practice are too nuanced for countries with poor governance and regulatory capacity and high levels of corruption. PR6 **should integrate IUCN Motion no.26**, which among other things calls on governments to prohibit environmentally damaging industrial activities and infrastructure development in all IUCN categories of protected area and urges financial institutions (including development banks) not to conduct, invest in or fund environmentally damaging industrial activities and infrastructure development within, or that negatively impact protected areas or any areas of particular importance for biodiversity and ecosystem services that are identified by governments as essential to achieving the Aichi Biodiversity Targets, and to make public commitments to this effect.

In addition, no hydropower plants or any other industrial infrastructure should be allowed in critical habitats, priority biodiversity features, protected areas and internationally recognised areas of biodiversity value.

PR7 - Indigenous people

We note the improvements in the PR, for example the improved definition of Indigenous Peoples, which no longer imposes a criteria for indigenous communities to be transhuman or nomadic. We would welcome further clarifications, for example IPs are “*social and cultural groups*” (#1). Also the requirement for IPs to meet “*all of the following characteristics*” but “*in varying degrees*” has caused some uncertainty, and thus requires clearer language as to the interpretation and application of the criteria in accordance with the UN Declaration on the Rights of Indigenous Peoples and the ILO Convention no.169 (Indigenous and Tribal Peoples Convention).

We are concerned that the references to the UN Declaration on the Rights of Indigenous Peoples and to the Convention no.169 have disappeared. The clear reference to these standards in international law is very important to guide EBRD’s clients and to ensure that the implementation of PR 7 is done in coherence with international law.

Therefore we recommend that:

- PR 7 will include clear references to UN Declaration on the Rights of Indigenous Peoples and to the Convention no.169.
- In case the projects have already commenced and the provisions of international law have not been met - specifically if indigenous peoples have not given their Free Prior Informed Consent, the EBRD should refuse to fund the project.

PR 9 - Financial intermediaries

The main issues which need to be resolved with financial intermediary investments are:

a) the sub-projects need to be disclosed to the public - *before* they are signed - in order to ensure that any concerns can be resolved in a timely manner (see also above). This means that PR 9 #11 needs to add the following text: “*The ESMS (environmental and social management system) will include a clear procedure for adequate and timely information disclosure. Contracts with FIs will include a requirement to publish environmental information and a comprehensive definition of environmental information in line with the Aarhus Convention. Contracts will stipulate that the FIs will ensure their clients’ consent for such disclosure.*”

PR 9 #16 includes a statement that “*FIs will list on their website the link to any publicly available environmental and social impact assessment (ESIA) reports for Category A sub-projects which they finance.*” However in practice we have never seen this happen (see Bankwatch (2017): [To the best of our knowledge”: How to improve the transparency and accountability of intermediated EBRD investments in three steps.](#)) FIs must be also required to publish environmental information for the FI projects that fall under the FI Referral List. This must go beyond environmental impact assessments and include also eg. investors’ requests to Ministries for decisions on whether environmental impact assessments are needed and the accompanying decisions, as well as any studies carried out and decisions subsequently taken.

b) PR 9 #13 only includes a requirement for sub-projects to meet national regulatory requirements relating to environmental and social matters, including, where necessary, requiring clients to implement corrective action plans. This is not in line with the EBRD's commitment under the European Principles for the Environment, outlined in section 2.2 of the EBRD's commitments: "*As a signatory to the European Principles for the Environment, EBRD is committed to ensuring that projects are structured to meet EU environmental principles, practices and substantive standards, where these can be applied at the project level, regardless of their geographic location.*" The projects need to be structured to meet the PRs.

PR 10 - Information Disclosure and Stakeholder Engagement

In line with our comments above on PR1, PR 10 #4 narrows the requirements of this PR to the projects that are likely to have adverse environmental or social risks and impacts. It should however apply to all projects, as information disclosure and stakeholder engagement should start at the earliest stage possible in project design, scoping and impact assessment. Stakeholders cannot be expected to show interest, if they have no information about the project. Therefore PR 10 #19-20 on meaningful consultations should be unconditionally embedded into the project cycle and not conditioned to nature and scale of the project's adverse risks and impacts and the level of stakeholder interest.

CEE Bankwatch Network has 17 member groups in 14 countries in central and eastern Europe, the Caucasus and Russia. Our headquarters are in Prague, Czech Republic, but our staff is based in offices across the region and in Brussels. Our vision is an environmentally, socially and economically just world, built on solidarity, participation and respect for ecological limits, where people enjoy fulfilling lives and are aware of and responsible for the consequences of their actions. To make this vision become reality, we are working to prevent the environmentally and socially harmful impacts of international development finance, and to promote alternative solutions and public participation.

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