Bankwatch comments on the draft EBRD Environmental and Social Policy with a focus on human rights due diligence

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The EBRD's safeguards revisions demonstrate some progress in the following areas: integrating contextual project risk assessments, including throughout the supply chain; strengthening language on gender; addressing risks and impacts; safeguarding the assurance process; requiring remedial actions and the consideration of retaliation risk; and enhancing disclosure and stakeholder engagement practices.

The draft policies largely strengthen client requirements, but the EBRD must enhance its own environmental and social due diligence, particularly on human rights, to prevent human rights abuses through early-stage risk identification and effective mitigation. To this end, the EBRD should increase environmental and social information disclosure, proactively seek information from rights holders, ensure effective retaliation prevention and response mechanisms, and share responsibility for providing remedies in cases where its actions or omissions contribute to harm.

Moreover, some of the changes proposed by the EBRD, such as a management-level grievance redress mechanism and a common approach to co-financed projects, might have negative unintended consequences.

Therefore, we recommend the following amendments and reflections in Section III and Section IV:

1. The EBRD needs to commit to proactively seeking information from rights holders as part of its due diligence, at least for projects outside the EU.

This should cover all stages, from initial risk screening and assessment through to implementation and monitoring.

This will allow for enhanced project categorisation, the consideration of alternatives, the verification of information supplied by the client, and will help ensure that adequate assessment and effective mitigation measures are in place. The EBRD claims that these steps are already taken in certain cases, so the approach needs to be systematically incorporated into its safeguards.

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The draft safeguards suggest achieving internal and external assurance on reported data (Paragraph 4.1.) and conducting the Bank's own public engagement activities to gauge stakeholder views (Paragraph 7.18), but only *in some cases or where possible*. The Bank should commit to proactively obtaining information from stakeholders and rights holders for projects outside the European Union as a mandatory element of its due diligence.

Bankwatch's analysis of Environmental and Social Impact Assessments for the EBRD's category A projects (2019-2023) revealed limited engagement of communities during early-stage risk identification (ESIA scoping phase) and project monitoring done by the clients. For category B and FI category projects, participatory risk assessment is not required at all, limiting the opportunities for rights holders to provide feedback. Altogether, this approach inhibits the EBRD's ability to obtain firsthand information on project risks, leading to missed potential for impact prevention and mitigation.

2. The EBRD must take responsibility for assessing and mitigating retaliation risk and developing an effective response mechanism.

The draft safeguards impose additional requirements on clients, who are required to conduct this assessment by themselves. However, this cannot be considered an effective approach given that the client is usually the source of retaliation.

A recent study carried out by the Coalition for Human Rights in Development, based on an analysis of 38 case studies of reprisals in the context of development projects, shows that in all but two cases, the clients of development banks played a direct role in perpetrating attacks against human rights defenders and community members who speak out. Thus, solely entrusting clients with tackling retaliation is a clear case of letting the fox guard the henhouse.

For example, in the case of the Amulsar gold mine project in Armenia, the EBRD's (now former) client filed more than 20 defamation lawsuits against activists, two media outlets, and even two members of the parliament. Some of these cases are still ongoing. The company's security personnel militarized the area and threatened people and an employee from the company was involved in a sexist online attack and surveillance against a woman human rights defender. In the case of the Indorama Agro cotton project in Uzbekistan, the company's workers have faced intimidation, job loss threats, interference in the operation of the trade union, regular warnings to refrain from any engagement with international human rights CSOs.

Therefore, it is crucial that the EBRD strengthens its own assessment, monitoring and response to reprisals at all stages of its projects, establishing clearly what procedures and actions the Bank will undertake to address allegations of retaliation.

3. The EBRD must commit to providing remedy in cases where its actions or omissions contribute to harm.

The draft safeguards reinforce the requirement that the client is solely responsible for providing remedy. This is not enough. In instances where the EBRD fails to comply with the Environmental and Social Policy, and this non-compliance contributes to harm, the EBRD should share the responsibility for remedy with the client. This does not necessarily imply financial compensation but rather whatever change is needed to remedy the harm done, whether a change in the project design, additional assessments, mitigation measures, responsible withdrawal from the project or something else.

For instance, in the case of the Corridor Vc in Bosnia and Herzegovina, EBRD's due diligence failed to protect the rights of vulnerable groups, such as war returnees and Serb farmers, and ignored affected people in the impact zone along the route, if their land was not needed for expropriation. Even after the Bank was found non-compliant, it shrugged off responsibility for the route selection and the lack of proper consultations with rights holders in the decision-making process, leaving people without an answer why a viable alternative route is not being considered.

Another example is from Armenia, where the EBRD exited the Amulsar gold mine project while the environmental and social harm caused by the investment remains unremedied. The EBRD should therefore also develop responsible exit principles to ensure that it does not leave environmental and social harm unaddressed when it withdraws from investments.

4. The EBRD should refrain from introducing a management-level grievance redress mechanism.

The draft safeguards provide scant information on the proposed mechanism, which means we are not in a position to assess its purpose and effectiveness. In any case, based on our frequent attempts to address environmental and social issues in dialogue with the Bank's management, we remain doubtful whether it would add any value to the existing mechanisms in place, such as the Independent Project Accountability Mechanism, the Office of the Chief Compliance Officer, the Access to Information Appeals Panel, and other project-level grievance redress mechanisms. The Bank should focus on improving the effective operation of the existing problem-solving and accountability mechanisms, not multiplying them.

For many project affected communities it is neither culturally acceptable nor safe to raise 'grievances'. Instead, they may prefer to request information, or they may request a meeting where their questions and concerns will be heard and answered. Therefore, the most effective approach for the EBRD to address 'grievances' should focus on enhanced project information disclosure, meaningful engagement with rights holders by the Bank's environmental and social specialists. during project appraisal and monitoring to obtain different perspectives and verify information provided by the client.

5. Risk of weakening of the ESP.

We suggest reconsidering some of the proposed changes which would weaken the safeguards:

- (Paragraph 2.14) **The EBRD should require a common approach to the assessment, development and implementation of projects co-funded by other financial institutions to be consistent in content and outcomes with the EBRD Environmental and Social Policy**. The draft safeguards indicate that the environmental and social performance of projects should be measured against the common approach without clarifying whether it would still require projects to align with the EBRD's Environmental and Social Policy. Despite the EBRD's intention to ensure mutual reliance and optimise the use of resources, unless a clear commitment is made to uphold the EBRD's own requirements, this strategy is likely to undermine the EBRD's environmental and social standards and its accountability for its own policy commitments and aspirations.
- (Paragraph 7.18) **The EBRD should reinstate the reference to the Aarhus Convention in the EBRD's policy commitments section** to demonstrate the EBRD's commitment to public access to information and public participation in decision-making on environmental matters, irrespective of

the fact that the Bank is not a party to the Convention. A clear reference to the Convention should also be added to Performance Requirement 10. This will send a clearer message to clients that they should act in line with the Convention irrespective of whether their country is a party.

- (Paragraph 7.9) **The EBRD should reinstate the financial intermediary referral list** (itself reinstated in the 2019 policy), which includes project types that must be notified to the EBRD by intermediaries for enhanced due diligence by the Bank. Instead, it states that financial intermediary clients are required to comply with ESR 2, ESR 4 and ESR 9, and that if subprojects financed by financial intermediaries through EBRD funding meet the criteria for category A projects, they will be required to meet ESRs 1 to 8 and 10. This weakens the policy compared to the current PR 9 referral criteria because it only requires category A projects to comply with ESRs 1-8 and 10, which would not include highly controversial smaller projects such as hydropower plants that do not meet the category A threshold.

6. Specific comments on the text:

- Paragraph 6.5 should be changed to ensure that in cases where associated facilities cannot be structured to meet the ESRs, the '*project appraisal will include reasonable efforts to identify the environmental and/or social risks and impacts* **on people and the environment'**, not only to the project.

- In Paragraph 7.4 it is not clear why the focus is on new and additional impacts: EBRD financing may and should sometimes focus on **mitigating existing impacts** as well (see e.g. older loans to ArcelorMittal).

- Paragraph 7.16 should be complemented by specifying the Bank's role in verifying the client's information: *'It is the responsibility of the client to ensure that adequate information is provided on the environmental and social impacts and risks of the project so that the Bank can undertake an environmental and social appraisal in accordance with this policy. The Bank's role is to: (i) review* ***and verify*** *the client's information; (ii) provide guidance to assist the client in developing appropriate measures consistent with the mitigation hierarchy to address environmental and social impacts to meet the relevant ESRs and (iii) help identify opportunities for additional environmental or social benefits.'*

- Page 7, footnote 3 (according to the new numbering) states that *'The EU's substantive environmental standards of the EU are to be found in EU secondary legislation, such as regulations and directives. Procedural norms aimed at Member States and EU institutions and the jurisprudence of the European Court of Justice and the Court of First Instance, which applies to Member States, EU institutions and EU legal and natural persons, are excluded from this definition.'* **European Court of Justice** jurisprudence is excluded from the definition of EU substantive law, which does not make sense, as the EBRD does not have the right to interpret the law differently from the Court of Justice.

Bankwatch comments on the draft EBRD Environmental and Social Policy, Performance Requirement 3: Resource efficiency and Pollution Prevention and Control and Appendix 1: EBRD Environmental and Social Exclusion List

Key recommendations

- The text of PR/ESR3 needs to set out a more explicit requirement to follow the EU waste hierarchy.
- The Bank needs to update the EBRD Protocol for Assessment of Greenhouse Gas Emissions to include Scope 3 downstream emissions.
- All fossil fuels should be in the Environmental and Social Exclusion List, as should primary forest biomass, due to its greenhouse gas emissions which cannot be sequestered on time to tackle the climate emergency. Waste incineration, gasification and pyrolysis should also be on the List, given their incompatibility with achieving circular economy goals and their reliance on mainly fossil-fuel based plastic and recyclable/compostable paper for their calorific value.

Specific comments on the ESR3 text

Resource efficiency, circular economy and waste

p.32 paras 6,7, 11, 12 and 13: PR3 needs to more **explicitly require adherence to the EU waste hierarchy**. Although the mitigation hierarchy should apply in any case, the Vinča case in Belgrade and various landfill projects have not followed the waste hierarchy, showing that the current ESP is not clear enough. Para. 11, for example, puts reuse, recycling, recovery and energy recovery on an equal footing instead of in a hierarchy based on circular economy principles.

In para. 7 we suggest adding the following (in bold):

'The client will adopt technically and financially feasible[42] and cost-effective[43] measures to minimise its environmental and social impact on resources, **in line with the EU waste hierarchy**, (...)'.

In para. 11 we propose the following formulation (changed text in bold):

'The client will avoid or minimise the generation of waste materials and reduce their impacts as far as practicable. Where waste generation cannot be avoided but has been minimised, the client **will apply the remainder of the EU waste hierarchy, prioritising reuse, recycling and composting, or, where suitable, backfilling**. **Organic waste may be used** as a source of energy in a manner that is safe for human health and the environment. Where waste cannot be recycled, reused or **materially** recovered, the client will need to appropriately treat and/or dispose of it in an environmentally sound and safe manner that includes the appropriate control of emissions and residues resulting from the handling and processing of the waste

material and, where relevant, in accordance with European Union (EU) substantive environmental standards or equivalent GIP standards.'

Greenhouse gas emissions

The Bank needs to **update the EBRD Protocol for Assessment of Greenhouse Gas Emissions to include Scope 3 emissions.** In cases like gas pipelines, failure to count the emissions from the actual combustion of the gas results in the project's main environmental impact being left out. This also conflicts with the EU EIA Directive's requirement to assess the cumulative impacts of a project. Preventing double-counting is a reasonable excuse only for country-level reporting to the UNFCCC, not for assessing the impacts of a planned project.

In addition, the methodology must take into account that primary forest biomass can no longer be replaced within a climate-relevant timescale, thus it cannot be considered climate-neutral and its emissions must be counted assuming they will not be sequestered, and that waste incineration mostly burns fossil fuel-based plastic or wood-based paper, thus can also not be considered carbon neutral.

Our proposed text changes: *'24. For projects that either have, or are expected to have, gross emissions in excess of 20,000 tonnes CO2- equivalent annually,* ***including Scope 3 emissions,*** *or are expected to result in a net change in emissions, positive or negative, of more than 20,000 tonnes of CO2-equivalent annually post-investment, the client will quantify these emissions in accordance with the EBRD Protocol for Assessment of Greenhouse Gas Emissions* ***and, where an ESIA is required, include them in the study****. The client will report emissions data to the EBRD on a yearly basis.*'

In order to avoid 'paper tiger' alternatives assessments regarding greenhouse gas emissions, we also propose to add in ESR3: '***The project alternatives assessment, which must be publicly disclosed, must take into account the lowest-GHG feasible alternative, not only the current situation, and not only alternatives that fall within the core business of the project promoter.***'

Bankwatch comments on the draft EBRD Environmental and Social Policy, Performance Requirement 9: Financial Intermediaries

Key recommendations

- Reinstate the financial intermediaries (FI) referral list.

Specific comments on the text

In 2019, significant improvements were made to PR9 following revelations that EBRD Financial Intermediaries had been involved in tens of controversial small hydropower projects across southeast Europe. This included re-introducing the FI referral list which had been present in the 2009 Policy and strengthening disclosure requirements.

Now the draft of ESR9 removes the referral list for high-risk projects and only requires referral for Category A projects:

'*14. Where an FI is financing sub-projects that meet the criteria in the list of Category A projects, included as Appendix 2 to the EBRD Environmental and Social Policy, such sub-projects will be required to meet ~~PRs~~ ESRs 1 to 8 and 10 and be referred to the EBRD.*

~~The FI Referral List, included as Appendix A to this PR ESR, lists a number of activities with particularly high environmental and social risks. Where a sub-project includes activities listed in Appendix A to this PR ESR, the FI will refer that sub-project to EBRD.~~'

It also adds in the EBRD's commitments section the following text: '*7.9. (...) FI clients are required to comply with ESR 2, ESR 4 and ESR 9. If sub-projects financed by FIs through EBRD funding meet the criteria of Category A projects as listed in Appendix 2 to this Policy, these will be required to meet ESRs 1 to 8 and 10.*'

This rolls back the improvements made in 2019 and seriously weakens the policy compared to the current PR 9 because:

- it only requires Category A projects to comply with ESRs 1-8 and 10, which would not capture projects such as hydropower plants or urban development projects that do not meet the Category A threshold, even though they may still have serious impacts.
- for higher-risk projects which are not Category A but appear on the referral list, it removes the additional EBRD due diligence introduced by the list. This is important because in our experience, FIs in non-EU countries generally are not able to properly assess compliance with EU substantive environmental standards.

Bank staff have informed us that this is partly because the Referral List is not used much, and partly because they want to build the capacity of the Financial Intermediaries to do their own due diligence. However, we do not agree with this argumentation. **If the Referral List is not being used much, this means that FIs are**

avoiding using the EBRD's funds for high-risk investments, which is a good thing, not something to be changed. And unfortunately, while attempts to raise FIs' capacity should always be made, our experience with small hydropower in the Western Balkans shows that **it is not realistic that all FIs will be able to undertake good quality environmental due diligence themselves, even for national standards, let alone EU or EBRD standards.** It cannot be underlined enough how few competent environmental specialists there are in the Western Balkans and presumably also in some of the EBRD's other countries of operation, and ignoring this fact will not help raise capacity but instead lead to more highly problematic projects that are not necessarily A category but can nevertheless cause significant harm.

We therefore strongly recommend reinstating the referral list in the following paragraphs, as well as the Appendix with the Referral List itself:

'13. The ESMS will include risk assessment management and monitoring mechanisms, as appropriate, to:

• *screen all ~~clients/~~ sub-projects against the EBRD's Environmental and Social Exclusion List, included as Appendix 1 to the Environmental and Social Policy;* ***and the FI Referral List included as Appendix A to this PR;****'*

'14. Where an FI is financing sub-projects that meet the criteria in the list of Category A projects, included as Appendix 2 to the EBRD Environmental and Social Policy, such sub-projects will be required to meet ~~PRs~~ ESRs 1 to 8 and 10 ~~and be referred to the EBRD~~.

The FI Referral List, included as Appendix A to this PR ESR, lists a number of activities with particularly high environmental and social risks. Where a sub-project includes activities listed in Appendix A to this PR ESR, the FI will refer that sub-project to EBRD.'

'16. (...) 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. ***FIs will also publicly disclose information on the environmental and social risks of any sub-project referred to EBRD in accordance with paragraph 14 of this PR ESR and the proposed mitigation measures to address such risks, subject to applicable regulatory constraints, market sensitivities or consent of the sponsor of the sub-project.'***