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 Európska investičná banka
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 Euroopan investointipankki
 Europeiska investeringsbanken

CEE Bankwatch Network

main@bankwatch.org

Luxembourg, 11 October 2024

JU/CORP/CL/2024-13671/KC/mrb

Subject: Request for Internal Review, lodged in accordance with Regulation 1367/2006, of the Decision of the EIB Board of Directors approving the financing proposal for the Poklecani Wind Farm in Bosnia and Herzegovina

Dear [REDACTED],

Reference is made to the request for internal review that you submitted on 14 May 2024 on behalf of the CEE Bankwatch Network (hereinafter "Bankwatch") to the Civil Society Division within the EIB General Secretariat, Corporate Responsibility Department, in accordance with Article 10 of the Aarhus Regulation (hereinafter "the request" or "Bankwatch's request").

Bankwatch's request for internal review concerns the decision of the EIB Board of Directors of 6 February 2024 (hereinafter "the EIB Board approval of the financing proposal") approving the financing proposal of the Poklecani Wind Farm in Bosnia and Herzegovina (hereinafter "the Project").

We also refer to the email sent on 1st July 2024 by the EIB Transparency and Civil Society Unit, informing Bankwatch that, because of the complexity of the issues raised in the request and the need to carry out extensive inter-service consultations in a period of frequent absences due to the summer holidays, the EIB would not be able to send its response before the beginning of October 2024. This letter constitutes the EIB's response to your request for internal review.

Before entering into the substance of your concerns regarding the Poklecani Wind Farm, we would like to make the following remarks on the admissibility of your request.

Firstly, the EIB does not contest that Bankwatch is a non-governmental organisation that meets the criteria of Article 11 of the Aarhus Regulation and is thus entitled to lodge a request for internal review pursuant to that regulation.

Secondly, allow us to point out that the definition of 'administrative act' that you quote in paragraph 1.5 of the request is no longer in force. Following the amendment of Regulation 1367/2006 by virtue of Regulation 2021/1767, Article 2(1)(g) of the Aarhus Regulation now reads "(g) 'administrative act' means any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1)".



In any case, in light of the principles established by the judgment of the Court of Justice of the EU in joined cases C-212/21 P and C-223/21 P, the EIB is not contesting that, for the purposes of the Aarhus Regulation, the EIB Board approval of the financing proposal for the Poklecani Wind Farm constitutes an administrative act amenable to a request for internal review. Therefore, no position is taken on the arguments you develop in paragraphs 1.5.1 to 1.5.4 of the request.

Lastly, the EIB wishes to point out that in accordance with Article 10.1 of the Aarhus Regulation, a request for internal review “[...] shall be made in writing and within a time limit not exceeding eight weeks after the administrative act was adopted, notified or published, whichever is the latest [...]”. The EIB Board approved the Poklecani Wind Farm project on 6 February 2024. On the same day, the Project entry on the EIB website was updated to “approved”, the ESDS was published on the EIB’s Public Register and a press release was issued referencing the Project. Therefore, the eight-week deadline to submit the request for internal review expired on 2 April 2024. Bankwatch’s request, received by the EIB on 14 May 2024 could therefore be considered as being untimely.

Notwithstanding, the EIB has decided to accept your request which has been submitted within eight-weeks from the publication of the minutes of the relevant Board meeting i.e., 21 March 2024.

Based on the analysis that you will find in annex hereto, the EIB concludes that the elements provided in the request for internal review do not justify the need for any additional actions by the Bank with regard to the financing of the Poklecani Wind Farm in Bosnia and Herzegovina.

We would like to thank you for your feedback and constructive engagement, which can indeed help the EIB to continuously improve its financing activities.

Yours faithfully,

EUROPEAN INVESTMENT BANK

Laura Piovesan
Director General
Projects Directorate

Emer Falvey
Director, Legal Department, Corporate
Legal Directorate

Annex:

Assessment of the claims in Bankwatch’s request for internal review of the EIB Board approval of the financing proposal for the Poklecani Wind Farm in Bosnia and Herzegovina



ASSESSMENT OF THE CLAIMS IN BANKWATCH'S REQUEST FOR INTERNAL REVIEW OF THE EIB BOARD APPROVAL OF THE FINANCING PROPOSAL FOR THE POKLECANI WIND FARM IN BOSNIA AND HERZEGOVINA

Bankwatch requests the internal review of the EIB Board's approval of the financing proposal for the Poklecani Wind Farm forwarding the following four grounds for review:

1. Obligation for the Project to comply with the EU Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment – hereinafter, the “EIA Directive”;
2. Obligation for the Project to comply with the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora – hereinafter, the “Habitats Directive”;
3. Breach of the EIA Directive and Habitats Directive;
4. Breach of the Treaty on EU, Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument (hereinafter, the “NDICI” Regulation) and the Environmental and Social Policy of the EIB adopted in 2022 (hereinafter, the “Policy”).

The EIB assesses the claims as follows:

1. Obligation for the Project to comply with the EU Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

In section 3.1 of the internal review request, Bankwatch claims that the Project should comply with the EIA Directive. In doing so, Bankwatch notes that the Project is located in Bosnia and Herzegovina (hereinafter, “BiH”) which, as party to the Treaty establishing the Energy Community (hereinafter, “Energy Community Treaty” or “ECT”), was obliged to transpose and implement Directive 2011/92/EU by 14 October 2016 and Directive 2014/52/EU by 1 January 2019. Bankwatch also claims that since the Project has been supported by a guarantee from NDICI, appropriate environmental screening was required including for climate change and biodiversity impacts in accordance with the applicable legislative acts of the Union, including the EIA Directive.

It is agreed that BiH is party to the ECT. Furthermore, from a combined reading of Articles 12 and 16 and of Annexes I and II of the Energy Community Treaty, it results that BiH shall implement the *acquis communautaire* on environment, as defined in Article 16 of the ECT, which includes the EIA Directive 2011/92/EU, as amended by Directive 2014/52/EU, by the dates referenced by Bankwatch in its request.

Therefore, the EIB does not contest that the EIA Directive applies to the Project.

Regarding Bankwatch's claim on the requirement of the appropriate environmental screening, owing to the NDICI guarantee, it is noted that an adequate environmental screening was conducted in the context of the project appraisal by the EIB. Based on the review of the available documentation, the EIB assessed the relevant environmental and social risks, and concluded in requiring additional assessments and other surveys and documents, as mentioned in the ESDS.

2. Obligation for the Project to comply with the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

Bankwatch, in section 3.2 of the internal review request, claims that the EIB's Environmental and Social Policy and the accompanying Environmental and Social Standards create an obligation for the Project to comply with the Habitats Directive. More specifically, Bankwatch claims that said Policy commits to



integrate biodiversity considerations into all of the Group's activities via its Standard 4, which sets out that all projects located in EU, EFTA, Candidate and potential Candidate countries shall comply with applicable national and EU environmental legislation. In addition, Bankwatch claims that Standard 4 specifies that all projects likely to have significant effects on a Natura 2000 site, a protected and/or Key

Biodiversity Area shall be subject to an Appropriate Assessment. Finally, Bankwatch repeats that since the Project has been supported by a guarantee from NDICI, appropriate environmental screening was required including for climate change and biodiversity impacts in accordance with the applicable legislative acts of the Union, including the EIA Directive.

By way of preliminary remark, it is noted that the Bank has already responded above to Bankwatch's position regarding the NDICI Regulation. Since Bankwatch does not further elaborate its reiterated argument (which, in fact, only relates to the EIA Directive), the Bank is unable to take further position.

It is not contested that Standard 4 recognises that “[t]he EIB supports projects that are comparable with maintaining the integrity of areas important for biodiversity as well as the core natural functions, processes, and resilience of ecosystems to halt and reverse biodiversity loss, increase biodiversity and ecosystem benefits and, where required, achieve a Net Positive Impact [...] on biodiversity”. It is also not contested that the same Standard 4 provides that “all projects located in EU, EFTA, Candidate and potential Candidate countries shall comply with applicable national and EU environmental legislation.” However, importantly, Standard 4 also provides that “[f]or projects located in Candidate and potential Candidate countries, the promoter shall consider any timeframe for achieving compliance with specific EU environmental legislation as arranged with the European Union through bilateral agreements and/or action programmes”. Therefore, said timeframes for achieving compliance with specific EU environmental legislation must be considered appropriately.

In this context, it must be pointed out that the EU accession negotiations for BiH only commenced in March 2024. Consequently, at the time of the appraisal process and Board approval of the financing proposal for the Project, BiH was a potential Candidate Country and the accession negotiations had not yet started. Accordingly, no specific timeframes had been arranged between BiH and the European Union, neither through bilateral agreements nor action plans to align its legislation with EU *acquis* and to achieve compliance with EU *acquis*, including the Habitats Directive.

Therefore, taking into account the specific provisions contained in Standard 4, it must be concluded that, at the time of the Project appraisal and of Board approval of the financing proposal, the question of Project's compliance with the provisions of the Habitats Directive was irrelevant.

Similarly, with regard to Bankwatch's claim that an Appropriate Assessment in accordance with the Habitats Directive should have been carried out on the Project, it is not contested that Standard 4 indeed provides that “[a]ll projects likely to have significant effects on a Natura 2000 site [...], a protected [...] and/or Key Biodiversity Area [...] shall be subject to an assessment according to the EU Habitats Directive (i.e. an Appropriate Assessment [...] which will evaluate the project's implications for the site in view of the site's conservation objectives, either individually or in combination with other projects, and identify relevant measures to avoid, prevent and reduce any significant impact).”

However, again, Bankwatch fails to take into account the specificity that follows that “for projects located in Candidate and potential Candidate countries, any timeframes arranged with the European Union through bilateral agreements and/or action plans to achieve compliance with the mentioned Directives shall be considered”. As it is contended that, at the time of its appraisal, the question of Project's compliance with the Habitats Directive was irrelevant, and since the obligation to conduct an Appropriate Assessment stems from that Directive, it must be concluded that Bankwatch's claims in this regard are unjustified.

In addition, and as developed below, it must also be noted that, for the time being, the list of Natura 2000 sites and implementing legislation (including the establishment of Site Specific Conservation Objectives) still needs to be adopted by BiH. Consequently, for the proposed Natura 2000 site in



question, any Appropriate Assessment could not have been carried out in line with the requirements of the said Directive.

In consideration of the above, it must be concluded that Bankwatch's reading of the EIB's Environmental and Social Standards, and notably any obligations for Project's compliance with the Habitats Directive, is incomplete and incorrect.

3. Breach of the EIA Directive and Habitat Directive

In section 3.3 of the internal review request, Bankwatch seems to claim that both the EIA Directive and the Habitats Directive have been breached, most notably by the national authorities. These allegations, although lacking a concise development in the internal review request, will be dealt with separately as follows:

A. Breach of the EIA Directive

At the core of Bankwatch's allegation in this section is the claim that the EIB Board's approval of the financing proposal for the Poklecani Wind Farm breaches EU environmental law in that it relies on an alleged incorrect assessment made by the competent national authorities that screened out the Project from an Environmental Impact Assessment (hereinafter, "EIA"). Bankwatch considers that the Project required a full EIA and that the competent national authorities decided not to require an EIA by misapplying the criteria contained in the EIA Directive.

In claiming this, Bankwatch argues that the national competent authority incorrectly took into account the relevant criteria indicated in Annex III of the EIA Directive, notably:

1. the characteristics of the project, having regard to its size and overall design;
2. the location of the project, i.e. the environmental sensitivity of the geographical areas likely to be affected by the project considered having regard to
 - a. the existing and approved land use;
 - b. the absorption capacity of the natural environment, in particular in relation to mountain and forest areas, nature reserves and parks, areas classified or protected under national legislation, landscapes and sites of historical, cultural or archaeological significance.

Bankwatch claims essentially that the decision of the national competent authorities to screen out the project from the EIA is vitiated by a manifest error of assessment. Consequently, the EIB Board's approval of the financing proposal for the Project would be in breach of the EIA Directive in that it does not verify whether the national competent authorities made their assessment in line with the applicable provisions.

However, the EIB notes the following:

It is not disputed that wind farms are among the categories of projects listed in Annex II to the EIA Directive (under section 3 "Energy Industry") for which an EIA may be necessary. However, Article 4(2) of the EIA Directive leaves to the relevant Member State (or relevant national competent authority of BiH in the case at hand) the discretion to determine whether the project should undergo an EIA. In making said determination, the Member State (or relevant national competent authority of BiH in the case at hand) must take into account the relevant selection criteria set out in Annex III to the EIA Directive. The discretionary decision of the Member State (or relevant competent authority of BiH in the case at hand) is not without control since decisions to screen out projects can be challenged before national courts.



In light of the foregoing, the claim expressed by Bankwatch that the EIB Board's approval of the financing proposal for the Poklecani Wind Farm contravenes the provisions of the EIA Directive insofar as it did not verify whether the national competent authorities made their assessment in line with the applicable provisions must be regarded as ungrounded. The EIB has no mandate to verify the assessment of the national authorities, as Bankwatch seems to suggest, and, given its statutory prerogatives, cannot control the work of national competent authorities.

In any event, it is noted that the EIB conducted its due diligence in line with its Policy and Standards. Based on the review of the information made available by the promoter, including but not limited to a draft environmental and social impact assessment report and draft biodiversity studies, to determine the potential environmental and social impacts and risks. The EIB assessed the relevant environmental and social risks, and concluded in requiring additional assessments and other surveys and documents as mentioned in the ESDS. This due diligence led to specific contractual conditions, as listed in the ESDS to ensure compliance with the Policy.

B. Breach of the Habitats Directive

Although it is not elaborated in Section 3.3 of the internal review request, a combined reading of the internal review request, notably sections 3.2, 3.3 and 3.4, implies that Bankwatch also claims that the EIB Board's approval of the financing proposal for the Project contravenes provisions of environmental law and notably of the Habitats Directive in that it accepted, without further verification, the position of the national authorities, which did not carry out an Appropriate Assessment in accordance with the Habitats Directive for the Poklecani Wind Farm.

It is understood that Bankwatch contends that the EIB would have breached its own Standard 4 on Biodiversity and Ecosystems, which provides that *"all projects likely to have significant effects on a Natura 2000 site, a protected and/or Key Biodiversity Area shall be subject to an assessment according to the EU Habitats Directive (i.e. an Appropriate Assessment which will evaluate the project's implications for the site in view of the site's conservation objectives, either individually or in combination with other projects, and identify relevant measures to avoid, prevent and reduce any significant impact)."* As already noted above, Bankwatch errs in its reading concerning the applicability of the Habitats Directive to the Project.

In any case, it is noted that Article 6 paragraph 3 of the Habitats Directive states that: *"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site **in view of the site's conservation objectives**. In the light of the conclusions of the assessment of the implications for the site [...], the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."* (emphasis added). As noted above, the Project could not have been subject to an Appropriate Assessment within the meaning of the Habitats Directive, considering that BiH had not yet set the Site Specific Conservation Objectives for the two proposed Natura 2000 sites that are close to the location of the Poklecani Wind Farm.

With regard therefore to Bankwatch's claim that the EIB would have trusted, without further verification, the assessment made by the authorities of BiH, it must be reiterated that the EIB cannot control how the national competent authorities carry out their duties. The allegation must therefore be considered as unfounded.

The EIB takes the opportunity to highlight that it conducted its own due diligence of the Project in line with its Policy and Standards, the conclusions of which are presented in the ESDS for the Project. Said due diligence led to specific contractual conditions so to ensure that the Project complies with the Policy.



Moreover, the ESDS for the Poklecani Wind Farm contains a detailed list of the environmental issues that have been identified in the course of the Bank's due-diligence.¹ It also reports the specific studies that have been carried out in relation to those aspects (e.g. environmental studies, avifauna survey, specific surveys to identify breeding locations of raptors in the wider landscape, species-specific surveys for nocturnal bird species, transects for bats, desk studies and field studies on fauna and flora). Finally, contrary to Bankwatch's allegations, it appears from the ESDS that, the EIB was well aware, during the due diligence as well as at the time of the Board approval of the financing proposal for the Project, of the status of advancement of the alignment by BiH with the EU legislation on nature conservation, i.e. the Habitats Directive, as can be inferred from the following section in the ESDS: *"Considering the status of alignment with the EU acquis on nature protection [as per European Commission Staff working Document Bosnia and Herzegovina 2022 Report, "there is no progress on alignment with the EU acquis on nature protection. The list of potential Natura 2000 sites and implementing legislation still needs to be adopted. ([EUR-Lex - 52022SC0336 - EN - EUR-Lex \(europa.eu\)](#))]], and in view of the presence of those biodiversity features and potential Natura 2000 sites, the promoter is engaging in further pre-construction detailed botanical and biodiversity surveys to determine more precisely if areas of high-value biodiversity could be impacted by the project. A biodiversity management plan will be established accordingly, with the corresponding mitigation strategy to achieve the related biodiversity protection objectives."*

Considering the above elements, the claims made by Bankwatch cannot thus be upheld.

4. Breach of the Treaty on EU, Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument and the Environmental and Social Policy of the EIB adopted in 2022

In section 3.4 of the request for internal review, Bankwatch, with reference to the Treaty on EU and the NDICI Regulation, makes various claims that will be dealt with in turn as follows:

Firstly, Bankwatch claims that the EIB Board approved the financing proposal for the Project without an *ex-ante* evaluation to determine the Project's potential implications and risks.

However, in the context of the project's appraisal, the EIB reviewed information made available by the promoter, including, but not limited to, a draft environmental and social impact assessment (ESIA) report and draft biodiversity studies, to determine the potential environmental and social impacts and risks. The outcome of this assessment resulted in setting the contractual conditions and undertakings, as mentioned in the ESDS, published in February 2024. Such conditions include, but are not limited to, a biodiversity management plan, aimed at achieving the related biodiversity protection objectives. In light of the above, this claim is unfounded.

Secondly, according to Bankwatch, the EIB Board's approval of the financing proposal for the Project failed to apply the precautionary principle in deciding to finance the Poklecani Wind Farm. In support of this claim, Bankwatch notes that the Project description indicates that the wind farm may have a

¹ From the ESDS of the Poklecani Wind Farm: *"The main environmental and social (E&S) issues associated with the project include: (i) biodiversity (flora, fauna, avifauna), (ii) increased noise pollution, and vibrations during construction, (iii) negative visual impact including shadow flickers, (v) increase of dust emissions during the construction phase (air quality), (vi) impact on water, (vii) generation of waste and (viii) general workplace and community safety (e.g. traffic). The environmental studies detailed the baseline conditions, the likely environmental and social impacts, assessed the significance of the impacts through specific studies and modelling and proposed mitigation measures to be put in place in accordance with the mitigation hierarchy. The environmental approval contains requirements to mitigate environmental impacts from noise and shadow flickering. It further details the requirements for precautionary mitigation measures during construction regarding nesting locations for birds, and the monitoring programme for birds and bats during construction and operation. With the mitigation measures in place, the competent authority concluded that the project will not have significant negative residual environmental impacts."*



significant impact on the environment and on the biodiversity of the area. In this respect, as already explained above, it must be noted that, in the context of the Project's appraisal, the EIB reviewed information made available by the promoter, including but not limited to a draft environmental and social impact assessment report and draft biodiversity studies, in order to determine the potential environmental and social impacts and risks. The outcome of this assessment resulted in setting the contractual conditions and undertakings, as mentioned in the ESDS. Based on the review of this documentation, the EIB adequately assessed the relevant environmental and social risks. By applying the precautionary principle, the EIB consequently asked for additional assessments, other surveys and documents, as mentioned in the ESDS. This claim must also therefore be considered as unfounded.

Thirdly, Bankwatch further claims that the approval by the EIB Board of the financing proposal for the Project does not reflect on the evidence of non-alignment of the national legislation with the applicable EU *acquis*. However, as is clear from the ESDS, a document submitted to the EIB Board in the context of seeking approval of the financing proposal for the Project, the EIB's due diligence did take into account the lack of alignment of BiH with the EU legislation.

Fourthly, Bankwatch makes various statements essentially repeating its argument that the EIB did not undertake any critical verification of the decision of the national authorities and that it did not have any grounds to trust the accuracy and credibility of decisions taken at national level. As already noted above, however, not only do the actions and decision-making processes of the national competent authorities fall outside any control and mandate of the EIB, but the EIB in any case, as evidenced above, carried out its own environmental due diligence on the Project. The claims therefore that the Board's approval of the financing proposal for the Project manifestly breaches the application of environmental legislation must be dismissed as unfounded.

Fifthly, Bankwatch claims that the Board's approval of the financing proposal for the Project "failed to properly categorise the project as required by the Bank's Environmental and Social Policy and failed to establish accurate environmental conditions including the requirement for an EIA and an Appropriate Assessment".

As a preliminary point, it is noted that the claims on the EIA and the Appropriate Assessment have already been extensively dealt with in the foregoing sections and so will not be re-elaborated here.

With regard to the risk categorisation of the project, it is noted that Article 4.18 of the Policy states that: "During the pre-appraisal stage, the EIB shall categorise all projects into one of the following categories". Therefore, it is not for the governing bodies of the EIB to categorise the projects that it approves, as Bankwatch seems to claim. The EIB's environmental and social due diligence procedures are currently being revised in order to take into account the implementation of the new EIB Group Environmental and Social Sustainability Framework (ESSF). Upon finalisation of the procedures, the ESDSs that are published in the Public Register on the Bank's website will include the risk categorisation of projects financed by the EIB. Owing to the ongoing review of the relevant procedures, the ESDS for the Project did not explicitly mention its risk categorisation. This, however, did not affect the due diligence carried out on the Project, had no material influence on its appraisal and, consequently, had no material influence on the decision of the Board to approve the financing proposal for the Project.

Finally, Bankwatch concludes by stating that the approval of the financing proposal for the Poklecani Wind Farm:

- is in manifest breach of the EIB's environmental principle of Protecting, Preserving, Restoring and Valuing biodiversity and ecosystems;
- fails to include appropriate biodiversity considerations which would lead to the conclusion that the Project should be subject to an EIA and Appropriate Assessment;
- is evidently internally inconsistent and approves the financing of a project that might have significant impacts on the proposed Natura 2000 sites in the absence of an Appropriate Assessment.



The EIB has already responded to these claims in the foregoing but would reiterate that, in the context of its appraisal, the EIB reviewed the results of a biodiversity survey conducted by the promoter, as stated in the ESDS, and requested a further assessment of the potential impacts of the project on high value biodiversity areas. A draft of this assessment was reviewed in the context of the project's appraisal and the final version is awaited in the forthcoming months. A biodiversity management plan has been requested with the corresponding mitigation strategy to achieve the related biodiversity protection objectives. All the above were presented in the ESDS annexed to the report provided to EIB's Board of Directors for its decision-making. Therefore, these concluding claims concerning the approval of the financing proposal for the Project must be rejected as unfounded.