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Request for Internal Review under Title IV of the Aarhus Regulation

Of the Decision of the Board of Directors of the European Investment Bank of 6 February 2024, approving the financing proposal for the Poklecani Wind Farm in Bosnia and Herzegovina

Submitted by:

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To:

the European Investment Bank
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According to Article 11 of Regulation 1367/2006¹ and Commission Decision 2008/50/EC of 13 December 2007.²

1. Admissibility

1.1 On 6 February 2024, the Board of Directors of the European Investment Bank (the "Board") approved the financing proposal for the construction of the Poklecani Wind Farm in Bosnia and Herzegovina for a maximum amount of EUR 103.05 million. The Decision, contained in the Minutes of the meeting of the Board (the "Board Minutes") was published on 21 March 2024 on the website of the EIB.

1.2 Article 10 of 1367/2006 (the "Aarhus Regulation") states as follows:

1. *Any non-governmental organisation or other members of the public that meet the criteria set out in Article 11 shall be entitled to make a request for internal review to the Union institution or body that adopted the administrative act or, in the case of an alleged*

administrative omission, should have adopted such an act, on the grounds that such an act or omission contravenes environmental law within the meaning of point (f) of Article 2(1).

Such requests 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, or, in the case of an alleged administrative omission, eight weeks after the date when the administrative act was required. The request shall state the grounds for the review.

2. The Union institution or body referred to in paragraph 1 shall consider any such request, unless it is manifestly unfounded or clearly unsubstantiated. In the event that a Union institution or body receives multiple requests for review of the same administrative act or administrative omission, the institution or body may combine the requests and treat them as one. The Union institution or body shall state its reasons in a written reply as soon as possible, but no later than 16 weeks after the expiry of the eight weeks deadline set forth in the second subparagraph of paragraph 1.

3. Where the Union institution or body is unable, despite exercising due diligence, to act in accordance with paragraph 2, it shall inform the non-governmental organisation which made the request as soon as possible and at the latest within the period mentioned in that paragraph, of the reasons for its failure to act and when it intends to do so.

In any event, the Union institution or body shall act within 22 weeks of the expiry of the eight weeks deadline set out in the second subparagraph of paragraph 1.

1.3 Article 11(1) of the Aarhus Regulation states as follows:

1. A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that:

(a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;

(b) it has the primary stated objective of promoting environmental protection in the context of environmental law;

(c) it has existed for more than two years and is actively pursuing the objective referred to under (b);

(d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

1.4 CEE Bankwatch Network z. s. ("CEE Bankwatch Network") fulfils the criteria of Articles 10 and 11 of Regulation 1367/2006:

- It is an independent non-profit-making legal as defined by the laws and regulations of the Czech Republic. CEE Bankwatch Network is an association of legally recognized, non-profit environmental associations.
- CEE Bankwatch Network is a legal entity as defined by the laws and regulations of the Czech Republic.
- CEE Bankwatch Network's Statute demonstrates that its primary stated objective is promoting environmental and social protection and to promote the involvement of the public in decision-making. According to Article III (6) of the Statute of the association "the mission and purpose of CEE Bankwatch Network is to prevent environmentally and socially harmful impacts of international development financing and to promote

alternative solutions and involvement of the public”.¹ The Article III (7) of the Statute further specifies that the objective of CEE Bankwatch Network is to support improvement of the environment, promote and undertake charitable, expert and educational activities improving the state of the environment and to support such activities undertaken by other non-profit organizations, (...).

- An official extract from the Register of Associations, administered by the Municipal Court in Prague, Section L, File No. 9452., dated 10 November 2023 proves CEE Bankwatch Network’s incorporation as a legal person under Czech law and that it has existed for more than two years.²
- The activity reports from 2021 and 2022 provide evidence that CEE Bankwatch Network is actively pursuing the objectives mentioned above.³ Bankwatch has also two decades of experience working with partner non-governmental organisations in Bosnia and Herzegovina on preventing public finance for harmful investments such as coal power plants such as Tuzla 7 and Ugljevik III and hydropower plants in environmentally sensitive areas such as Buk Bijela, Ulog and the Upper Horizons scheme. We have also worked to improve other EU-backed investments such as the Corridor Vc motorway, promoting public participation and more sustainable alternatives.
- This Request aims to ensure that the EU’s much-needed acceleration of renewable energy is carried out in line with existing EU environmental law and strikes a careful balance between increasing the EU’s share of renewable energy and ensuring nature protection. This objective is fully in line with CEE Bankwatch Network’s statutory purpose described above, as the mitigation of climate change and the prevention of harm to nature fall within the organisation’s mission and objectives.
- This is also reflected in the organisation’s entry in the EU’s Transparency Register, which also gives an overview of EU legislation that CEE Bankwatch Network is interested in, as well as an overview of which EU public consultations the organisation has contributed to in recent years.⁴

CEE Bankwatch Network has previously been a co-applicant for an internal review request under the Aarhus Regulation which was found to be admissible, namely the request submitted by ClientEarth on 3 June 2022 to the European Commission requesting an internal review of the Commission Delegated Regulation (EU) 2022/564 of 19 November 2021 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (the 5th Union list of projects of common interest), registered on 8 June 2022.

In the Commission’s reply to ClientEarth, dated 7 November 2022, the Commission confirmed that ‘After examining your application, the Commission concludes that the applicants fulfil the entitlement criteria under Article 11 of the Aarhus Regulation and are thus entitled to make a request for internal review.’

¹ Statute of CEE Bankwatch Network is attached in Annex 1 to this Request

² An Extract from the Czech Register of Associations is attached in Annex 2 to this Request.

³ CEE Bankwatch Network, [Annual Report 2020](#) and [Annual Report 2021](#). Evidence of CEE Bankwatch Network’s work in Bosnia and Herzegovina can be found [here](#) and [here](#) and [here](#).

⁴ EU Transparency Register, [CEE Bankwatch Network, ID 93834493808-49](#).

In addition, on 20 February 2023, CEE Bankwatch and Oekobuero submitted a request for internal review to the Council on Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy.

In its reply of 13 June, although the Council responded that the contested act was not a non-legislative act in the sense of the Aarhus Regulation, it confirmed that 'The Council does not contest the admissibility of the requests as regards your quality as non-governmental organisations under Article 11 of the Aarhus Regulation.'

1.5 The Contested Decision falls within the scope of an administrative act as described in Article 2(1)(g) of the Aarhus Regulation, i.e. "any measure of individual scope under environmental law, taken by the Community institution or body, and having legally binding and external effect", as detailed below.

1.5.1 The Contested Decision is an "administrative act" in the sense of the Aarhus Regulation

- CJEU case law, the legal text of the Statute and previous decisions taken by EU bodies concerning internal reviews all lead to the conclusion that the Contested Decision is of "individual scope" in the sense of Article 2(1)(g) of the Aarhus Regulation.
- The Contested Decision falls within the scope of an administrative act as described in Article 2(1)(g) of the Aarhus Regulation, i.e. "any measure of individual scope under environmental law, taken by the Community institution or body, and having legally binding and external effect", as detailed below.
- The purpose of the Contested Decision is clearly to provide finance to an individual project, promoted by an individual operator, having immediate legal consequences not generally, or for categories of persons, but for that individual operator. Therefore, in light of the purpose and content of the Contested Decision, this administrative act can only be considered as being of "individual scope".

1.5.2 The Contested Decision was issued "under environmental law"

- The Contested Decision falls within the scope of environmental law as defined by Article 2(1)(f) of the Aarhus Regulation, i.e. "legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems".
- The Contested Decision was purportedly issued under the power of Article 7 point 3 and Article 16 of the EIB Statute in reference to Article 309 of the Treaty on the Functioning of the European Union (the "TFEU").
- The financing for this project is to be provided under the Guarantee under the EFSD+. As such, the Contested Decision has a second legal basis in Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU)

2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009 (NDICI - Global Europe Regulation).

- It is clear that the (NDICI - Global Europe Regulation) falls within the definition of legislation that “contributes to the pursuit of the objectives of Community Policy on the environment” both by seeking to ensure the prudent and rational utilisation of natural resources (e.g. expanding the use and supply of renewable energy) and by promoting measures at international level to deal with regional or worldwide environmental problems: *The general objective of the Neighbourhood, Development and International Cooperation Instrument – Global Europe (the ‘Instrument’), which is a programme for the purpose of the multiannual financial framework, should be to uphold and promote the Union’s values, principles and fundamental interests worldwide in order to pursue the objectives and principles of the Union’s external action, as laid down in Article 3(5) and Articles 8 and 21 of the Treaty on European Union (TEU). (...) (11) (...). In doing so, the Union should use an integrated approach and comply with, and promote, the principles of respect for high social, labour and environmental standards, including with regard to climate change, for the rule of law and for international law, including in respect of humanitarian and international human rights law.*
- The Contested Decision is based on the reasoning contained in the summary of the Bank’s environmental and social appraisal Environmental and Social Data Sheet. It is clear that the Contested Decision seeks to rely heavily on environmental justifications for investment contained in this document.
- The power of the Board of Directors to make decisions in respect of granting finance is enshrined in Article 9 of the Statute of the European Investment Bank (the “Statute”) which also requires the Board of Directors to ensure that the Bank is managed in accordance with the provisions of the Treaties.

1.5.3 The Contested Decision was taken by a Community institution or body

- As required by Article 10(1) of the Aarhus Regulation, this request for internal review is directed to the European Investment Bank, the institution or body that adopted the Contested Decision. The minutes of the Meeting of the Board of Directors held on 6 February 2024 records that *“The Chairperson recorded that the Board of Directors approved the financing proposal.”*
- The Contested Decision was taken under the powers contained in Article 9(1) of the Statute, which requires the Board of Directors to take decisions with regard to the granting of finance.
- In light of the above, the Contested Decision meets the criteria of an administrative act according to Article 2(1)(g) of the Aarhus Regulation. The Request must therefore be held to be admissible.

1.5.4 The Contested decision has a legally binding and external effect.

- The Contested Decision was made under Article 9 of the Statute and represents the formal decision by the EIB to approve financing of the Project. As such it represents a legally binding decision of the Board, which authorises the Management Committee to enter into a contract negotiation with the Project promoter and is the final decision of the Board before completion of that contract.

Finally, the European Court of Justice (In Joined Cases C-212/21 P and C-223/21 P) provided a judgement in which it confirmed that the decision of the EIB Board of Directors with regard to the granting of finance falls within the scope of an administrative act as described in Article 2(1)(g) of the Aarhus Regulation, i.e. “any measure of individual scope under environmental law, taken by the Community institution or body, and having legally binding and external effect”.

2. Legal Framework

2.1 Treaty on European Union

CHAPTER 1 - GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION

Article 21

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(...)

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

2.2 Treaty establishing the Energy Community

DECISION OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

D/2016/12/MC-EnC adapting and implementing Directive 2011/92/EU of the European Parliament and of the Council, and amending the Treaty establishing the Energy Community

Article 1

The Treaty establishing the Energy Community is amended as follows:

(1) in Article 16, point (i) is replaced by the following: “(i) Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU,”

(2) in Annex II, point 1 is replaced by the following: “1. Each Contracting Party shall implement Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment by 14 October 2016. Each Contracting Party shall implement Directive

2014/52/EU by 1 January 2019, with the exception of the provisions referring to Directives not covered by Article 16 of this Treaty."

2.3 Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe

Article 25

Adoption of action plans and measures

(...)

5. *Appropriate environmental screening, including for climate change and biodiversity impacts, shall be undertaken at the level of actions, in accordance with the applicable legislative acts of the Union, including Directive 2011/92/EU of the European Parliament and of the Council ⁽⁴²⁾ and Council Directive 85/337/EEC ⁽⁴³⁾, comprising, where applicable, an environmental impact assessment, including the impact on climate change, ecosystems and biodiversity, for environmentally sensitive actions, in particular for major new infrastructure. Other appropriate ex ante assessments which are proportionate to the objectives and amounts of the envisaged actions and measures shall be carried out, to determine the possible implications and risks of those actions and measures with regard to human rights, access to natural resources such as land, and social standards including in the form of impact assessments for major actions and measures that are expected to have a significant impact on those areas.*

Where relevant, strategic environmental assessments, including the impact on climate change, shall be used in the implementation of sectoral programmes. The involvement of interested stakeholders in environmental assessments and public access to the results of such assessments shall be ensured.

Article 35

Eligibility and selection of operations and counterparts for the External Action Guarantee under the EFSD+

(...)

2. *The External Action Guarantee shall support financing and investment operations which comply with the conditions set out in points (a) to (e) of Article 209(2) of the Financial Regulation concerning in particular the need to achieve additionality, including by addressing market failures or sub-optimal investment situations, alignment of interest of the eligible counterparts, avoiding the distortion of competition, and, where appropriate, maximising private investment, and which:*

- (a) *undergo, in line with Article 34 of the Financial Regulation, ex ante evaluations which shall be proportionate to the objectives and amounts of the envisaged operations to determine the possible implications and risks of these operations with regard to human rights, environmental, labour and social standards including in the form of impact assessments for major programmes that are expected to have a significant impact on these areas, in line with the purpose of the EFSD+ laid down in Article 31(2) of this Regulation and taking due account of the principle of free and prior informed consent of affected communities in land related investments;*
- (d) *are technically viable and are sustainable from an environmental and social point of view and maximise development impact;*
- (f) *are implemented in accordance with the policy framework referred to in Article 7, applicable environmental, social and labour law obligations and standards and internationally agreed guidelines, principles and conventions on investments, in particular those adopted by the UN and the OECD, with full respect for international human rights law as well as in accordance with the objectives and general principles laid down in Articles 3 and 8.*

2.4 EIB Environmental and Social Policy

(...)

PROTECTING, PRESERVING, RESTORING AND VALUING BIODIVERSITY AND ECOSYSTEM SERVICES

2.5 The Group recognises that protecting/preserving and restoring biodiversity and well functioning ecosystems are key to boosting our resilience, preventing the emergence and spread of future diseases as well as fighting climate change. In order to contribute to the long term goal of “Living in harmony with nature by 2050” the Group supports the path to recovery of global biodiversity by: (i) addressing the main drivers of biodiversity loss through better integration of biodiversity considerations into all of the Group’s activities; and (ii) enhancing and valuing natural capital to maximise the synergies with climate action and increase resilience to climate change and other environmental risks.

(...)

EIB ENVIRONMENTAL, CLIMATE AND SOCIAL DUE DILIGENCE AND MONITORING Pre-appraisal and Appraisal

(...)

4.18 During the pre-appraisal stage, the EIB shall categorise all projects into one of the following categories, using as a benchmark the EU legal framework:

- i. High Risk: projects that are likely to have significant environmental, climate and/or social impacts and risks and require the preparation of an Environmental Impact Assessment (EIA)/Environmental and Social Impact Assessment (ESIA) report and/or any relevant report pertaining to specific topics that may required particular attention due to: ii) national and/or EU Law requirements; or ii) determination made by the competent authorities in the host*

country and/or by EIB based on a case-by case analysis that takes into account the nature, scale and location of the project;

ii. *Medium Risk: projects that are likely to have moderate/limited adverse environmental, climate and/or social impacts and risks that might be addressed through the application of mitigation hierarchy and for which either the competent authorities in the host country and/or the EIB have determined that the preparation of an EIA/ESIA report is not required;*

iii. *Low Risk: projects that are likely to result in minor or no adverse environmental, climate and/or social impacts and risks.*

3. GROUNDS FOR REVIEW

The Applicant asserts that the provisions of the Contested Decision contravene existing, applicable EU environmental law explained in the section above. The Applicant requests that the Contested Decision be reviewed on the basis of the following grounds:

3.1 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

There are no doubts that the project which was approved by the contested Decision should comply with Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment and Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

The project is located in Bosnia and Herzegovina which, as a party to the Treaty establishing the Energy Community, was obliged to transpose and implement Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment by 14 October 2016 and Directive 2014/52/EU by 1 January 2019.

The project has also been supported by a guarantee from the Neighbourhood, Development and International Cooperation Instrument which also requires undertaking appropriate environmental screening, including for climate change and biodiversity impacts in accordance with the applicable legislative acts of the Union, including Directive 2011/92/EU of the European Parliament, comprising, where applicable, an environmental impact assessment, including the impact on climate change, ecosystems and biodiversity, for environmentally sensitive actions, in particular for major new infrastructure.

3.2 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.

The project which was approved by the contested Decision should also comply with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. This obligation can be derived from the EIB's own Environmental and Social Policy and the accompanying Environmental and Social Standards. The Bank's Policy commits to integrate biodiversity considerations into all of the Group's activities, which was operationalised in Standard 4 Biodiversity and Ecosystems, which specified that all projects located in EU, EFTA, Candidate and potential Candidate countries shall comply with applicable national and EU environmental legislation.

Furthermore the Standard 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 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). No specific time frames were arranged with the European Union through bilateral agreements and/or action plans to achieve compliance with the mentioned Directive.

The project has been supported by the guarantee from the Neighbourhood, Development and International Cooperation Instrument, which also requires undertaking an appropriate environmental screening, including for climate change and biodiversity impacts in accordance with the applicable legislative acts of the Union, including Directive 2011/92/EU of the European Parliament and of the Council, comprising, where applicable, an environmental impact assessment, including the impact on climate change, ecosystems and biodiversity, for environmentally sensitive actions, in particular for major new infrastructure.

3.3 Breach of the EIA Directive and Habitat Directive

According to the Environmental and Social Data Sheet: *the competent authority determined that it was not necessary to carry out an environmental impact assessment (screen-out decision). As per the national legislation, this determination is based on a list of criteria consistent with the Annex III of the EIA Directive.*

(...)

*The project is located nearby two protected areas, which are both overlapping with proposed Natura 2000 sites. The project is bordering to Blidinje Nature Park, which would correspond/overlap with the proposed Natura 2000 site Prenj-Čvrsnica-Čabulja (Site Code - BA8300064). The main conservation objectives of Blidinje are to protect one of the few glacial lakes in BiH (Blidinje⁵ Lake) and to protect habitats specific to the Alpine region, in particular to protect the largest population of Bosnian pine (*Pinus Heldreichii*), with also the Alpine and subalpine calcareous grasslands habitat mentioned in the draft standard data form. The project is also located 6-7km away from the IBA Duvanjsko polje (BA006), which would correspond/overlap with the proposed Natura 2000 site Duvanjsko polje (Site Code - BA8300022). The Duvanjsko polje is in the valley, northwest from the mountain where the wind farm is located, and is an important area for some migratory birds, of which only two*

⁵ Sic, should be Blidinje.

species of interest were recorded in the project area during the surveys (Circus aeruginosus - Marsh Harrier - and Circus pygargus - Montagu's harrier – both LC as per the IUCN Redlist). The Alectoris graeca (Rock Partridge - NT) is another species of interest that is also listed in the draft standard data form of the proposed Duvanjsko polje Natura 2000 and that was observed during the avifauna study. Considering the status of alignment with the EU acquis on nature protection, 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.

The contested Decision is based on a manifest error of assessment committed by the national environmental authority and therefore the Decision itself which corresponds to the decision of this authority is in breach of applicable EU environmental law: EU Directive 2011/92/EU and the Council Directive 92/43/EEC of 21 May 1992. The project should have carried out a full EIA because of at least the following criteria from Annex III of the EIA Directive:

1. *Characteristics of projects*

- (a) *the size and design of the whole project* - the project is a large wind project (132 MW) and according to the ESDS is expected to include one of the largest turbines in on-shore wind projects in Europe with a unit capacity of around 6.6 MW with a hub height of 122.5m and diameter of 155m. The project will consist of 20 wind turbines and will cover dozens of plots and private properties in such a way that real estate will have to be expropriated for its construction. A part of the state forest will have to be cut down for the purpose of the project construction.

It is important to state that according to the Extract from the Spatial Plan of the County of West Herzegovina, number: 06-02-23-8-257-2/21 dated August 6, 2021, certain wind turbines will also enter the Blidinje Nature Park itself, while the final unit power capacity and the choice of wind turbine will be known only after the implementation of the public tender for the procurement of wind turbines and the contracting of their delivery.

The ESDS describes other components of the project: *the project will also include the construction of a 33/220 kV substation and connection to the nearby 220 kV line Rama-Posušje through a ca. 200 m overhead line, civil works for access roads and transformer station as well as the provision of installation equipment (cranes) and transportation of turbines. The project will also include a new ca. 3.5 km section of the service road Crvenice – Rakitno (outside of the concession perimeter) to facilitate the transportation of equipment and materials to the area of the project. (...)*

2. *Location of projects*

- (a) *the existing and approved land use* - the project would include logging of state forests and use of pasture land and meadows.

(b) *the absorption capacity of the natural environment, paying particular attention to the following areas:*

(iii) *mountain and forest areas* - according to the ESDS, the project is located in a mountainous region and may impact the subalpine forest present in the area. The project area also includes two habitats of community interest: Alpine and subalpine calcareous grasslands and Eastern sub-Mediterranean dry grasslands.

(iv) *nature reserves and parks* - according to the ESDS the project is bordering the Blidinje Nature Park, which would correspond/overlap with the proposed Natura 2000 site Prenj-Čvrsnica-Čabulja (Site Code - BA8300064).

(v) *areas classified or protected under national legislation* - see above

(viii) *landscapes and sites of historical, cultural or archaeological significance* - the project is located in a mountainous landscape and the traditional houses are of cultural significance.

The national authority breached applicable legislation by issuing a decision which determined that an environmental impact assessment was not required as this determination was based on a manifest error of assessment. The contested Decision is thus in breach with the aforementioned law as it does not include any evidence of verification of the assessment of the national authority in reference to its compliance with the applicable legislation.

3.4 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.

The European Investment Bank is obliged by the Treaty on EU, by Regulation (EU) 2021/947 of the European Parliament and of the Council and by its own Environmental and Social Policy to verify project compliance with the applicable legislation to ensure that the EU policy objectives are effectively implemented.

The EIB's financed projects and projects guaranteed by the Neighbourhood, Development and International Cooperation Instrument represent the EU's external action which should help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development in line with the provisions of the Treaty on EU and other EU legislation (such as the Treaty establishing the Energy Community).

Regulation (EU) 2021/947 establishing the Neighbourhood, Development and International Cooperation Instrument requires appropriate environmental screening, including for climate change and biodiversity impacts, that shall be undertaken at the level of actions, in accordance with the applicable legislative acts of the Union, including Directive 2011/92/EU of the European Parliament and of the Council, comprising, where applicable, an environmental impact assessment, including the impact on climate change, ecosystems and biodiversity, for environmentally sensitive actions, in particular for major new infrastructure.

The EIB, under this legislation, is obliged to conduct an ex-ante evaluation to determine the possible implications and risks of the operation with regard environmental and social standards in order to ensure that the operation is sustainable from an environmental and social point of view and in line with the applicable environmental and social law obligations and standards.

The contested Decision is in breach of the above legal acts and it fails to include the required evaluations and confirmation as to the project compliance with the EU's environmental legislation.

The contested Decision should apply the precautionary principle in the context of the proposed project. The project description indicates that the project may significantly impact the environment and biodiversity. The project ESDS states that:

(...) The project, if located in the EU, would fall under Annex II of the EIA-Directive 2011/92/EU, (as amended by Directive 2014/52/EU), requiring the competent authorities to determine whether an EIA is required or not. (...)
The project is bordering to Blidinje Nature Park, which would correspond/overlap with the proposed Natura 2000 site Prenj-Čvrsnica-Čabulja (Site Code - BA8300064). (...) The project is also located 6-7km away from the IBA Duvanjsko polje (BA006), which would correspond/overlap with the proposed Natura 2000 site Duvanjsko polje (Site Code - BA8300022). (...) 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.

The ESDS refers to the Commission Staff Working Document Bosnia and Herzegovina 2022 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Communication on EU Enlargement policy⁶: *'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.'*

This document also concludes: *'Investments in renewable energy need to comply with all relevant EU acquis, including nature one (see chapter 15 - Energy).'* (...)

Environment

(...)

Bosnia and Herzegovina needs to adopt a countrywide environmental protection strategy. The provisions of environmental impact assessment (EIA) and strategic environmental assessment (SEA) needs to be aligned in the legislation at all levels of government and across relevant sectors. It needs to be enforced and strengthened together with the necessary improvements in the access to information and the participation of the public in

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022SC0336>

the decision-making process on planned investments. A strategy on gathering, transferring and reporting of environmental data still needs to be adopted. The legal framework regulating environmental inspections and its enforcement needs to be improved in line with the EU acquis. Progress in aligning with a number of horizontal environmental directives such as the directive on environmental liability, the directive on infrastructure for spatial information (INSPIRE) and the directive on environmental crime is still necessary.

These conclusions are repeated in the following Commission Staff Working Document Bosnia and Herzegovina 2023 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement policy.⁷ This suggests that Bosnia and Herzegovina does not undertake enough efforts to harmonise its environmental legislation with the EU acquis.

The Applicant alleges that the Bank during the environmental and social due diligence has committed a manifest error of assessment of the project's environmental risks and impacts and its compliance with the environmental legislation. The contested Decision does not reflect on the evidence of non-alignment of the national legislation with the applicable EU acquis. The contested Decision does not provide any evidence of critical verification of the decision of national environmental authority which determined that the project should not be subject to Environmental Impact Assessment (and Appropriate Assessment) despite existing clear evidence that the project may significantly impact the environment and that national legislation is not aligned with the applicable law, including on EIA. The Bank did not have any grounds and evidence to trust the assessment conducted by the promoter and by the national environmental authority. The contested Decision merely acknowledges the decision of the national authority and agrees with it without the required verification of its accuracy and credibility. Therefore the contested Decision manifestly breaches applicable environmental legislation as it fails to be based on the Bank's ex-ante evaluation to determine the possible implications and risks of the operation with regard to environmental and social standards in order to ensure that the operation is sustainable from an environmental and social point of view and in line with the applicable environmental and social law obligations and standards.

Additionally, the contested Decision 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 the Environmental Impact Assessment and Appropriate Assessment.

The role of the EIB during the due diligence process is to verify information coming from the client and to adequately categorise all projects in line with the point 4.18 of the Policy. Project categorisation includes determination whether the project requires preparation of an Environmental Impact Assessment (EIA)/Environmental and Social Impact Assessment (ESIA) due to a determination made by the competent authorities in the host country and/or

⁷ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52023SC0691>

by the EIB based on a case-by case analysis that takes into account the nature, scale and location of the project. The contested Decision does not include any information referring to the Bank's determination of the project environmental and social risk categorisation and subsequently the requirement as to Environmental Impact Assessment and the Appropriate Assessment and application of the relevant environmental and social standards. The contested Decision, which is the only document on the Bank's environmental and social due diligence, does not include the Bank's own analysis, evaluation, project categorisation and relevant conclusions which it should include.

The contested Decision is therefore in manifest breach of the EIB's environmental principle of Protecting, Preserving, Restoring and Valuing biodiversity and ecosystems services, in particular its commitment to addressing the main drivers of biodiversity loss through better integration of biodiversity considerations into all of the Group's activities. The Decision fails to include appropriate biodiversity consideration which should lead to the conclusion that the project shall be subject to Environmental Impact Assessment and Appropriate Assessment. The Decision is also evidently internally inconsistent. It acknowledges and accepts the conclusion of the Competent Authority that *"the project will not have significant negative residual environmental impacts"* and *"the assessment concluded that the impact of the project on the biodiversity of birds and bats is considered relatively small"* and simultaneously it acknowledges that *"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"*.

The Bank was aware that the project might have significant impacts on the proposed Natura 2000 sites, but no Appropriate Assessment, according to Art.6.3 of the Habitats Directive was carried out or required by the Bank. This is in violation of the 2022 EIB's Policy (Standard 4 Biodiversity and Ecosystems, point 23) not to carry out an appropriate assessment in Candidate or potential Candidate countries: *'Areas that have been proposed for protection by a competent authority and for which the process of admission is on-going are to be treated as designated areas and the appropriate assessment applies (candidate Natura 2000 sites candidate Emerald Sites, candidate UNESCO World Natural Heritage Sites)'*.

Taking the above into account, the contested Decision is in breach with the Bank's Environmental and Social Policy and the EU's environmental law.

Prague, 15.05.2024