

Regional Mombasa Port Access Road

Complaints SG/E/2017/27, SG/E/2017/41 and SG/E/2018/44

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

25 November 2019

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The EIB Complaints Mechanism

The EIB Complaints Mechanism is intended to provide the public with a tool enabling alternative and pre-emptive resolution of disputes in cases where the public feels that the EIB Group has done something wrong, i.e. if a member of the public considers that the EIB has committed an act of maladministration. When exercising the right to lodge a complaint against the EIB, any member of the public has access to a two-tier procedure, one internal – the Complaints Mechanism Division (EIB-CM) – and one external – the European Ombudsman (EO). Complainants who are not satisfied with the outcome of the procedure before the EIB-CM have the right to lodge a complaint of maladministration against the EIB with the European Ombudsman.

The EO was “created” by the Maastricht Treaty of 1992 as an EU institution to which any EU citizen or entity may appeal to investigate any EU institution or body on the grounds of maladministration. Maladministration means poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Some examples, as cited by the European Ombudsman, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal to provide information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group's activities and to project cycle-related policies and other applicable policies of the EIB.

The EIB Complaints Mechanism is intended not only to address non-compliance by the EIB with its policies and procedures but also to endeavour to solve the problem(s) raised by complainants such as those regarding the implementation of projects.

For further and more detailed information regarding the EIB Complaints Mechanism please visit our website: <http://www.eib.org/about/accountability/complaints/index.htm>

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EXECUTIVE SUMMARY

Between June 2017 and October 2019, the EIB Complaints Mechanism (EIB-CM) received emails from more than 200 individuals complaining about the implementation of the Resettlement Action Plan (RAP) for the Regional Mombasa Port Access Road project in Kenya.

The project concerns the rehabilitation of a 41.64 km-long road section, 40.31 km of which is included in the project.

The total project value is estimated at EUR 250m and is divided into two lots:

- Lot 1, fully financed by African Development Bank (AfDB) and Government of Kenya (GoK) and governed by the AfDB's social safeguard policies – currently under implementation;
- Lot 2, co-financed by KfW and the European Investment Bank (EIB) – construction not yet commenced – and governed by the EIB Social and Environmental Standards.

Mirroring the fact that both Lot 1 and 2 fall under a single project definition, the lenders agreed with the promoter to issue a single RAP. The implementation will follow the respective lenders' standards in each lot, to encourage equivalent resettlement impact management measures across the two lots.

The EIB-CM reviewed the applicable regulatory framework and relevant documents, including documents provided by the Bank's services and the complainants. The EIB-CM liaised with the complainants and the Bank's services. The EIB-CM initially met the complainants in December 2018. In September 2019, the EIB-CM undertook a mission to Kenya as part of the compliance review in relation to the complaints. The EIB-CM has continuously liaised with the complaints handling mechanisms of the KfW and the AfDB.

The EIB-CM grouped the different allegations into the following categories:

- Failure to compensate PAPs promptly for affected assets;
- Inability to detail compensation awards reflecting the full replacement cost;
- Failure to cover all PAPs in the project corridor and avoid forced eviction;
- Failure to conduct a transparent and inclusive stakeholder engagement process throughout all phases of the project and provide a functioning grievance mechanism.

The information gathered during the compliance review enabled the EIB-CM to reach the following findings and conclusions.

The EIB-CM recognises that although the vast majority of the complaints are related to the RAP implementation in Lot 1, and thus are under the AfDB's responsibility, the likelihood of replication of the same issues in Lot 2 may be high if the current risks in Lot 1 are not fully addressed. The EIB-CM understands from the EIB services that they will continue to cooperate to the extent possible with the other lenders and the promoter to work towards the resolution of these issues via an agreed action plan.

The EIB-CM will monitor the implementation of the action plan together with the EIB's operational services until all pending issues for Lot 2 have been resolved.

CONCLUSIONS REPORT

Complainant:

Date received: More than 200 complaints from communities located around the Right of Way (RoW) between 30 June 2017, 9 November 2017 and different dates in 2018 and 2019. The vast majority of the complaints are related to Lot 1, governed by the AfDB social safeguards.

Confidential: Yes

Subject of complaint: Allegations concerning the planning phase and implementation of the Resettlement Action Plan (RAP)

Project Status: Signed, not disbursed

Contract amount: EUR 50m

1. THE COMPLAINT

Between June 2017 and October 2019, the EIB Complaints Mechanism (EIB-CM) received several complaints from project-affected persons (hereinafter PAPs or the Complainants) regarding the implementation of the Resettlement Action Plan (RAP) for the Regional Mombasa Port Access Road project located in Mombasa, Kenya. The complainants requested that their complaints be treated as confidential. These complaints mostly refer to Lot 1, financed by the AfDB as the implementation of the Land Acquisition process has not started in Lot 2.

A summary of the different types of allegations is outlined in Table 1 below.

Table 1 - Allegations

SUMMARY OF ALLEGATIONS
MAIN ALLEGATIONS IN LOT 1
<ul style="list-style-type: none"> • PAPs were not compensated according to the real value of their respective assets. They expressed their wish to receive fair compensation; • Impacts of the lack of compensation or inadequate compensation on the lives of the complainants – living next to the project uncompensated, businesses not functioning, no income from rentals, deteriorating health conditions of residents living and working along the stretch of road, reduced income for schooling and medication; • PAPs are pressured to move away for road works to continue while compensation has not yet been paid; • Lack of information as to when exactly demolition or removal of structures will take place; • Disturbance from the road-building site flooding due to a broken pipe. During the EIB-CM site visit, PAPs also complained about measures to mitigate dust and noise.

MAIN ALLEGATION IN BOTH LOT 1 AND LOT 2

PAPs have not received their compensation awards and there is a delay in delivering compensation, although valuations were completed a long time ago;

The breakdown of individual awards has not been disclosed to the individual PAPs and there is no explanation of how the award figure was arrived at;

- Certain PAPs are missing from the compensation lists and fear that they will remain uncompensated;
- Fear of forced evictions;
- Lack of information concerning the resettlement process and that people had not been properly considered, informed and consulted;
- Delay in handling grievances lodged locally with the Kenya National Highways Authority (KeNHA), the National Lands Commission (NLC) and the project-based grievance redress mechanism (GRM).

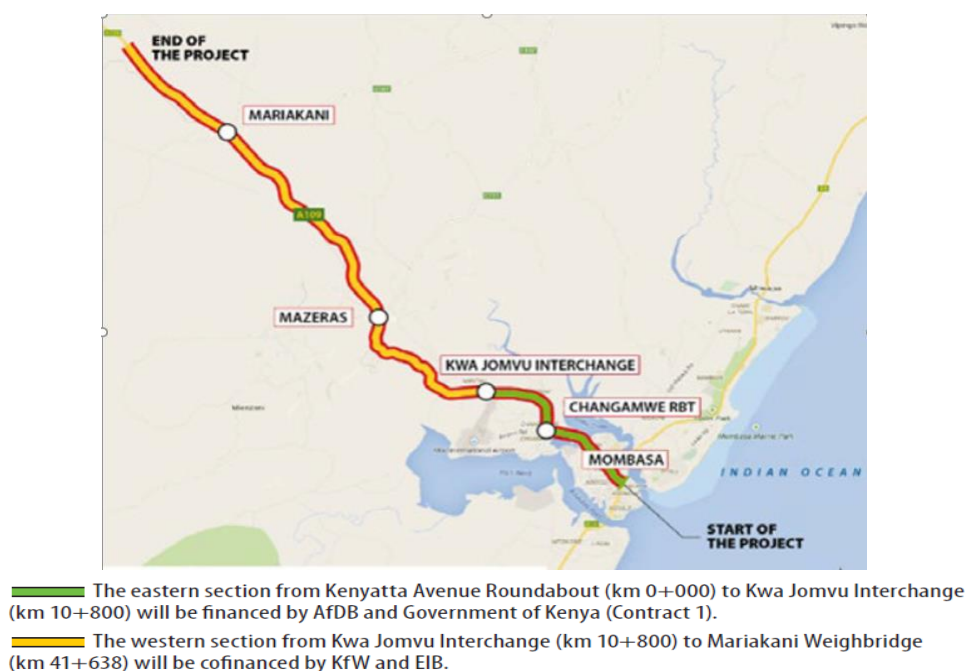
EIB-CM recognises that majority of the complaints are related to the implementation of the RAP in Lot 1, under the governance of the AfDB social safeguards. As one affected village lies on the border of the Lots and due to the proximity between the two, the EIB-CM decided to handle all complaints related to the RAP and to make recommendations to ensure compliance with the EIB Social and Environmental Standards in Lot 2.

2. **BACKGROUND INFORMATION**

2.1 *The project*

2.1.1 The project involves the rehabilitation and widening of about 41 km of the existing road between the port of Mombasa and the town of Mariakani in south-eastern Kenya. The road forms the main axis to Nairobi and is part of the Northern Corridor, which links the port of Mombasa with the land-locked eastern and central African countries of Uganda, Rwanda, Burundi and Democratic Republic of Congo (DRC).

Figure 1: Proposed Right of Way (RoW) of the project



- 2.1.2 The borrower of the loan is the Republic of Kenya and the beneficiary and promoter is the Kenya National Highways Authority (KeNHA).
- 2.1.3 The European Investment Bank (EIB) is providing an investment loan for one section of the project. The EIB Board of Directors approved the loan on 21 July 2015. The project is divided into two separate parts called Lot 1 (11.35 km in length) and Lot 2 (28.96 km in length). Lot 1 – from Kenyatta Avenue Roundabout (Km+000) to Kwa Jomvu Interchange (Km11+350) – is financed by the African Development Bank (AfDB) and the Government of Kenya (GoK). Lot 2 – from west of Kwa Jomvu Interchange to Mariakani Weighbridge – is co-financed by KfW and the EIB. The EIB has taken lead responsibility for environmental and social aspects in Lot 2.
- 2.1.4 In 2014, KeNHA prepared a RAP for the Proposed Dualling of Mombasa - Mariakani A109 Road under the African Development Bank (AfDB) and Republic of Kenya social safeguard principles. The RAP was approved by the AfDB and disclosed in 2014 as part of preparatory initiatives to secure project financing for Lot 1. When the EIB and KfW decided to finance Lot 2, the RAP was updated to encourage equivalent resettlement impact management measures across the two lots. It was agreed that Lot 2 should be governed by the EIB's Environmental and Social Standards only. This is the object of the review by EIB-CM.
- 2.1.5 The Bank's appraisal of the project recognises that the road reserve features substantial encroachment along certain sections by income-generating activities – such as informal produce stands and street hawkers – and that the road project will trigger resettlement affecting a number of people, most of whom are economically vulnerable. In an aide memoire from January 2015, the EIB stated that forced evictions would be a red line. The social assessment of the project further notes that the 2014 Resettlement Action Plan (RAP) already drawn up by the promoter would need to be improved to be in line with EIB standards, specifically with reference to the issues of eligibility/entitlement, effective and sustainable livelihood restoration, governance, representativeness, stakeholder engagement in the implementation of the RAP, and access to information, grievance and meaningful consultation. An update of the RAP was completed in November 2016 and further revised in February 2017 with respect to further measures on livelihood restoration.

3. APPLICABLE REGULATORY FRAMEWORK

3.1. *The EIB Complaints Mechanism*

- 3.1.1 The EIB Group Complaints Mechanism Policy and Procedures apply to complaints of alleged maladministration lodged against the EIB Group (Article 1.1 of the EIB Group Complaints Mechanism Policy). The concept of maladministration includes failure by the EIB Group to comply with human rights, with applicable law, or with the principles of good administration. Maladministration may also relate to the environmental or social impacts of the EIB Group's activities, and to project cycle-related policies and other applicable policies of the EIB Group (Articles 3.2-3.3 of the Policy).¹
- 3.1.2 When discharging its functions and pursuant to Article 5.3.2 of its Policy, the EIB-CM, among other tasks, assesses concerns of maladministration raised by complainant(s); evaluates and reports on compliance with the EIB Group's relevant regulatory framework; provides advice and recommendations to EIB management; and follows up and reports on efforts to take corrective actions, whenever applicable. The EIB-CM functions independently of operational activities in order to ensure that each complaint is dealt with by applying the highest standards of

¹ While some complaints were received under the old EIB CM policy, due to the significant amount of complaints received thereafter EIB-CM is treating all complaints under the new EIB-CM policy that came into force in November 2018.

objectiveness while safeguarding the interests of all internal and external stakeholders of the EIB Group according to Article 5.1.4 of the Policy.

3.2 *EIB's Environmental and Social Standards*

- 3.2.1 The applicable standards are set out in the Statement of Environmental and Social Principles and Standards (2009) and the Environmental and Social Practices Handbook (2013). The Handbook provides a typology of EIB operations, and establishes E&S standards for each project type. Against this backdrop, it is appropriate to differentiate the standards applicable to the project vis-à-vis those governing the Bank's internal processes.

EIB standards applicable to the project

- 3.2.2 Projects requiring land acquisition and/or restrictions on land used, resulting in temporary or permanent resettlement of people, are covered under Standard 6 – Involuntary Resettlement.
- 3.2.3 Standard 6 on Involuntary Resettlement in the 2013 Handbook specifically addresses involuntary resettlement. In particular, one of the objectives of Standard 6 is to “avoid and/or prevent forced evictions and provide effective remedy to minimise their negative impacts should prevention fail” (paragraph 4, Chapter 6, Volume I of the Handbook). Other goals include ensuring that “any eviction which may be exceptionally required is carried out lawfully, respects the rights to life, dignity, liberty and security of those affected who must have access to an effective remedy against arbitrary evictions;” “respect individuals’, groups’ and communities’ right to adequate housing and to an adequate standard of living, as well as other rights that may be impacted by resettlement” and ensuring that “resettlement measures are designed and implemented through the informed and meaningful consultation and participation of the project-affected people throughout the resettlement process.”
- 3.2.4 Standard 6 applies to “...affected persons, groups and communities subjected to involuntary resettlement as well as host communities at relocation sites. It applies to all such persons, whether or not they hold a legal title to their home or property under domestic law. To ensure respect for this right in practice, certain procedural safeguards must be in place, such as involvement of affected persons in decision-making processes and access to grievance mechanisms, as further described in this Standard” (paragraph 23, Chapter 6).
- 3.2.5 Regarding compensation and income restoration, Standard 6, paragraph 39 et al. “all affected persons will be paid fair compensation in good time for expropriated assets, Compensation should be provided for any loss of personal, real or other property, goods or assets, including rights or interests in property, for instance, land plots and house structures, contents, infrastructure, mortgage or other debt penalties.” Furthermore “... Monetary compensation shall take into account full replacement cost based on market value, productive potential or equivalent residential quality, including any administrative charges, title fees, or other legal transaction costs...” (paragraph 41).
- 3.2.6 Standard 6 draws a distinction between compulsory possession and forced evictions. Under the standard compulsory possession is defined as “the process whereby the promoter is entitled to take possession of property required for the realisation of the project and duly designated as such, although there may be outstanding grievances and/or pending court judgments concerning the involuntary acquisition or valuation of such asset.” On the other hand, forced evictions are defined as “acts and/or omissions involving the coerced or involuntary resettlement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection.”

Paragraph 54 of Standard 6 requires that “...evictions shall be undertaken in full respect of human rights. In rare cases where the promoter is compelled to proceed with compulsory possession, the rationale justifying this action needs to be provided to the EIB in advance” (paragraph 54).

- 3.2.7 According to Standard 6 “[a]ny person negatively affected by the project is eligible for compensation, livelihood restoration and/or other resettlement assistance” (paragraph 33, Chapter 6). Furthermore, “ ...all relevant stakeholders must be given the opportunity for informed participation in resettlement planning with the goal that the mitigation of adverse impacts is appropriate and the potential benefits of resettlement are sustainable. Consultation will continue in accordance with Standard 10 on Stakeholder Engagement and during implementation and monitoring of the resettlement process” (paragraph 50).
- 3.2.8 As set out in Standard 10, consultations are crucial and should be integrated at each stage of project preparation and implementation. Standard 10 “affirms the EIB’s expectation that promoters uphold an open, transparent and accountable dialogue with all relevant stakeholders at the local level...The Standard stresses the value of public participation in the decision-making process throughout the preparation, implementation and monitoring phases of a project” (paragraph 3).
- 3.2.9 Under Standard 10, “[t]he promoter should be aware of and responsive to stakeholders’ concerns related to the project in a timely manner. A grievance mechanism, process or procedure at the project level constitutes a critical means for the early identification and remedy of undesirable or unforeseen impacts and other concerns arising out of the execution of the project. Its establishment promotes the affected persons’ access to remedy and may facilitate resolution of such concerns and grievances linked to the promoter’s environmental and social performance” (paragraph 45).
- 3.2.10 Paragraph 51 of Standard 10 requires that promoters monitor the implementation of the stakeholder engagement plan and the performance of the grievance redress mechanism and report on both.

3.3 *Kenyan Applicable Framework*

2009 National Land Policy

- 3.3.1 The Kenyan Parliament adopted the National Land Policy (NLP) in December 2009. The policy identifies the critical land issues facing the country, and presents a set of proposals for administrative reforms and legislative action to bring about the desired land reforms.
- 3.3.2 The NLP decentralises the administrative structures around land administration and management to improve efficiency, reduce opportunities for graft and improve the involvement of the public in decision-making². The NLP removes powers from the Ministry of Lands, the Commissioner of Lands Office, the Director of Physical Planning, as well as from district administrations and county councils. The National Land Commission (NLC) is designed to be a constitutionally created independent commission taking on many of the functions associated with the Ministry of Lands.³
- 3.3.3 The NLP highlighted the problems with the previous land law regime in Kenya with respect to compulsory acquisition and resettlement. The policy proposed the following changes related to land acquisition:

² Section 1.4, National Land Policy, Sessional Paper N.3 of 2009.

³ Section 4.2, National Land Policy, Sessional Paper N.3 of 2009.

- The review of the previous land laws on land acquisition to be aligned with the new land tenures;
- Harmonisation of the institutional framework for compulsory acquisition to avoid mandate overlap;
- Development of compulsory land acquisition processes that are efficient, transparent and accountable;
- Compulsory land acquisition be done through the National Land Commission;
- Resettlement be carried out in a transparent and accountable manner ;
- Establishment of a land bank to implement resettlement;
- The government resettles all internally displaced persons;⁴
- The government develops mechanisms to remove squatters from informal settlements for their resettlement.⁵

2010 Constitution of Kenya

- 3.3.4 The Constitution adopted several, but not all, of the recommendations laid out in the 2009 National Land Policy. As envisioned in the NLP, public land is to be administered by a newly created body called the National Land Commission (NLC). The 2010 Constitution protects the right to private property but also makes certain provisions for compulsory land acquisition.
- 3.3.5 While it does not define the term “compulsory acquisition” it provides for instances where the State can deprive a person of private property rights for a public purpose or in the public interest. This provision acts as the basis upon which the exercise of the power to compulsorily acquire property is exercised. There are constitutional safeguards against the State taking private property arbitrarily; the compulsory acquisition of land must be for a public purpose and accompanied by prompt and fair compensation.⁶

Land Acts of Kenya

- 3.3.6 Kenya does not have a single policy or legislative act on compulsory land acquisition and resettlement. The legal and regulatory framework governing compulsory land acquisition and resettlement are scattered across different pieces of legislation including: the Constitution of Kenya (2010), National Land Commission Act (2012), Land Act (2012), Land Registration Act (2012), Land Control Act (1989/2010), Environment and Land Court Act (2012), Physical Planning Act (1996), Magistrates Court Act (1989/2007), Urban Areas and Cities Act (2011), Community Land Act (2016), Energy Act (2015), Environment Management and Coordination Act (2003), Public Private Partnership Act (2012), repealed Land Acquisition Act (1983/2010), Public Funds Management Act (2013/2015) and Land Laws (Amendments) Act (2016).
- 3.3.7 The 2012 Land Act is the substantive land law dealing with matters of compulsory acquisition. The term “compulsory acquisition” is defined as “the power of the State to deprive or acquire any title or other interest in land for a public purpose subject to prompt payment of compensation.”⁷
- 3.3.8 As already mentioned, the NLC has the mandate to carry out compulsory land acquisition. It has the constitutional authority to develop criteria and guidelines to guide the process of land acquisition and resettlement in Kenya. When the national government, county governments and acquiring government bodies intend to acquire private land, the Cabinet Secretary of the

⁴ Section 3.6, National Land Policy, Sessional Paper N.3 of 2009.

⁵ Section 3.6, National Land Policy, Sessional Paper N.3 of 2009.

⁶ Art. 40, Constitution of Kenya, 2010.

⁷ Section 8 (2), Kenya Land Act n.6, 2012.

ministry in charge of lands or the County Executive Committee member is required to submit a request to the NLC to acquire land on its behalf.⁸

- 3.3.9 Under its mandate for compulsory acquisition, the NLC is empowered to develop criteria and guidelines to which public bodies intending to acquire land must adhere. The NLC has developed a guiding document outlining the preliminary information it needs in order to assess a land acquisition request⁹. The guiding document includes, as one preliminary requirement, the preparation of a Relocation Action Plan¹⁰
- 3.3.10 Part II section 8 of the Land Act provides guidelines on management of public land by the NLC on behalf of both national and county government. It also stipulates that the compensation for land is required to be just and paid promptly in full before access (emphasis added). The acquiring body/promoter should deposit compensation funds and all related costs before the acquisition is undertaken.
- 3.3.11 However, the Land Act also give powers to the NLC to acquire land before compensation has been paid where there is an urgent necessity for land acquisition and where it would be contrary to the public interest to delay acquisition.¹¹

The Prevention, Protection and Assistance to Internally Displaced and Affected Communities Act, 2012

- 3.3.12 The provisions of this Act apply to all internally displaced persons as a result of calamities, social conflict or development projects, and is guided by the Bill of Rights under the Constitution of Kenya. The Act also lists development projects among the displacement factors and outlines involvement of the affected persons through awareness, sensitisation, training and education on causes, impact, consequences and prevention measures.
- 3.3.13 The Act also lists the procedures to follow in case of development or infrastructure projects to include:
- Justification as to why the displacement is unavoidable and there is no other feasible alternative;
 - Seeking free and informed consent from the affected person;
 - Holding public hearing on project planning;
 - Provision of reasonable notice time to enable the affected persons review and react to the displacement conditions; and
 - Displacement process should respect human rights.
- 3.3.14 Section 114 states that development of nationally significant development projects within counties shall be preceded by mandatory public hearings. Public participation is mandatory and shall be facilitated through:
- Clear environmental impact assessment reports;
 - Expected development outcomes;
 - Development options and their cost implications¹²

⁸ Section 12, Kenya Land Act, 2012.

⁹ Section 8, Kenya Land Act, 2012.

¹⁰ Section 8, Kenya Land Act, 2012.

¹¹ Section 12, Kenya Land Act 2012.

¹² Section 114, The Prevention, Protection and Assistance to Internally Displaced and Affected Communities Act, 2012.

Access to Information Act, 2016

- 3.3.15 This Act and its provisions play a key role in guiding what information held by a public or private body can or may be accessed, also in the case of projects for common interest.

4. WORK PERFORMED BY THE EIB-CM

- 4.1 In order to address the complainants' allegations, the EIB-CM reviewed the applicable regulatory framework and relevant documents, including documents provided by the Bank's services and the complainants. The EIB-CM liaised with the complainants and the Bank's services. In December 2018, the EIB-CM held a meeting with the complainants in Mombasa.
- 4.2 In September 2019, the EIB-CM took part in a mission to Kenya as part of the compliance review in relation to the complaints. The EIB-CM initially held a meeting with affected communities in Mombasa. The purpose of the meeting was to further investigate the causes of the complaints and to invite community members to nominate representatives who will liaise with the EIB-CM in the future.
- 4.3 Subsequently, the EIB-CM joined the EIB operational services and the promoter in a site visit along the entire project footprint and held a meeting with the promoter and the NLC in Nairobi. During that meeting, the EIB-CM presented an action plan that was agreed with the promoter to close gaps of non-compliance in anticipation of the implementation of the RAP process for Lot 2.
- 4.4 The EIB-CM has continuously liaised with the complaints handling mechanisms of the KfW and the AfDB. The information gathered during the investigation enabled the EIB-CM to reach findings and conclusions on the allegations as presented in the sections below.

5. FINDINGS

The complainants challenged the compliance of the RAP planning and implementation phases in relation to the lenders' standards, mainly regarding Lot 1. Initially, EIB-CM reviewed the promoter's documents and activities during the RAP process; furthermore, the assessment focused on whether the EIB operational services undertook due diligence in accordance with the applicable standards (§§ 3.2-3.3) for Lot 2.

Due to the high number of complaints¹³, EIB-CM categorised the allegations and findings into the following structure:

- Allegation 1: Failure to compensate PAPs promptly for all affected assets;
- Allegation 2: Inability to detail compensation awards reflecting full replacement value;
- Allegation 3: Failure to cover all PAPs in the project corridor and avoid forced eviction;
- Allegation 4: Failure to conduct a transparent and inclusive stakeholder engagement process throughout all phases of the project and provide a functioning grievance mechanism.

¹³ More than 200 complaints related to the project (of which X% is related to Lot 1 and y% to Lot 2).)

5.1. *Allegation 1: Failure to compensate PAPs promptly for all affected assets*

5.1.1 A vast majority of the complaints pertain to delays from NLC in delivering compensation to PAPs after issuance of the notification of compensation awards. In particular, two main sub-categories can be identified within the same allegation:

- Claim 1: PAPs still expecting compensation in sections where the contractor is currently undertaking works in Lot 1;
- Claim 2: PAPs claiming delays of compensation in sections where construction works have not yet started, in Lot 2.

5.1.2 Regarding PAPs included in the first set of claims, based on the project update information documents provided to the EIB-CM and accessed in September 2019, almost 70% of PAPs in the Lot 1 section have been compensated by NLC. The remaining 30% of the cases included i) PAPs still waiting for compensation; ii) court cases over ownerships and entitlement; and iii) cases of PAPs claiming to have been missed out from the process.¹⁴

5.1.3 The EIB-CM notes that since the award of the construction contract, the promoter has been delivering payments in *batches* to NLC for compensation delivery. In August 2018, the promoter informed the lenders that priority was given to payments to vulnerable people and PAPs whose compensation was less than KES 1m.¹⁵

5.1.4 On the current delays, the EIB-CM found that main causes were attributed to:

- Incorrect documentation provided by PAPs enabling compensation payment;
- Recent reorganisation of the NLC, including the appointment of a new Chairman; and
- Vetting process of the new Commission, in parliament at the time EIB-CM's mission took place.

5.1.5 Regarding the second allegation, during the review of the project information, the EIB-CM observed that issuance of compensation awards by NLC along the entire project footprint ended in April 2018. In a lenders' mission in August 2018, the promoter informed the lenders that it had adopted an approach prioritising compensation for the Kenyatta Avenue Roundabout to Kwa Jomvu Interchange (also referred to as Lot 1) where the construction contract was awarded.

5.1.6 The compensation process for the remaining western section, from Kwa Jomvu Interchange – Mariakani Weighbridge (Lot 2) will start only once the construction contract has been awarded.¹⁶

5.1.7 The EIB-CM recognises that it is good practice in land acquisition processes for linear infrastructures, such as roads, to compensate and issue notice to vacate according to the construction schedule as it enables PAPs to continue with their livelihoods until notice is handed. However, it is important to reinforce the existing engagement platforms with regular updates on the project and compensation schedule. This is particularly important for PAPs yet to be impacted by construction, such as PAPs living in Lot 2, to prevent any risk of influx in the area.

¹⁴ Power point presentation made by the promoter on 13 September.

¹⁵ Equivalent to around EUR 8 730 8730. Accessed on 15 October 2019.

¹⁶ Due to the long land acquisition process, project tendering for Lot 2 is experiencing considerable delays (tendering would have started in 2016).

- 5.1.8 Throughout the course of the planning and implementation process, the promoter regularly updated the lenders through project information briefs. Additional updates to lenders were also provided during supervision missions. The EIB-CM notes that a Monitoring and Evaluation (M&E) consultant has also been assigned in Lot 1 to provide quarterly updates on the RAP.
- 5.1.9 According to EIB Environmental and Social Standards 6 – Involuntary Resettlement, paragraph 39, all affected persons are entitled to fair compensation in good time for expropriated assets. The EIB-CM understands that KeNHA promptly informed the lenders about the NLC compensation issue in a project communication update in Q2 2019. Furthermore, in September 2019, the promoter informed the EIB-CM that one of its Directors had been assigned to establish weekly engagement meetings with NLC to expedite the delivery of the remaining compensation. Regarding the court cases, the promoter also wrote to the Solicitor General to expedite the resolution and is currently awaiting a ruling.
- 5.1.10 The promoter confirmed that delays in compensation are also affecting the construction schedule for Lot 2 and that no forced eviction has taken place in the project area. In a communication exchange with the EIB at the end of August 2019, the promoter provided minutes of the meetings, attendance sheets and status on notices to vacate for PAPs compensated in the project area.
- 5.1.11 On the EIB side, both the EIB local office in Nairobi and EIB operational services have also made considerable efforts to support the addressing of the issue by means of regular engagement with the Ministry of Transport, Infrastructure, Housing and Urban Development (MoTIHUD), the National Treasury and the Ministry of Lands.
- 5.1.12 In a meeting with National Treasury in September 2019, the EIB operational services were informed that the budget for land acquisition for the Mombasa –Mariakani road project was prioritised within the national budget in order to expedite the completion of the project.
- 5.1.13 Based on the field assessment and documents reviewed, the EIB-CM recognises that the promoter – with the guidance of the EIB operational services – is making considerable efforts to avoid the current situation arising again when implementation of the RAP for Lot 2 commences. With a new NLC now in place since October 2019, the EIB-CM expects that the promoter will ensure that delivery of remaining compensation for Lot 1 is expedited and will closely monitor the process for Lot 2 with the support of the EIB operational services.
- 5.2 *Allegation 2: Inability to detail compensation awards reflecting full replacement value*
- 5.2.1 With regards to the second allegation, PAPs alleged that:
- The NLC did not disclose a detailed breakdown of impacted assets in the individual compensation awards; and
 - Valuation and compensation for some categories of assets – such as informal or mobile businesses – is considered insufficient to restore previous livelihoods.
- 5.2.2 The review of the project documents indicates that an entitlement matrix (EM) was drafted and disclosed to the public as part of the RAP. The EIB-CM understands that the EM sets the different eligibility criteria and corresponding entitlements for each category of impact based on the lenders' standards. When applying EIB standards to the EIB-KfW Lot 2, if PAPs' preference is for cash compensation, the promoter shall ensure that compensation takes into account the full replacement cost.¹⁷

¹⁷ Paragraph 41, Standard 6.

- 5.2.3 In Kenya, the assessment and valuation of impacts are performed by the NLC using the EM as a reference instrument for the issuance of the awards. In reviewing the individual award forms issued by NLC, the EIB-CM noticed that compensation awards are presented as a lump sum without details of valuation for each type of impacted asset. The EIB-CM notes that a detailed breakdown of the individual valuation will be needed for compensation awards to be made under the RAP for Lot 2 in order to assess compliance with the full replacement cost principle.
- 5.2.4 Furthermore, the EIB-CM found that the EIB operational services addressed this issue with the promoter since 2017. As a result, the promoter and NLC agreed with the EIB to include a valuation breakdown in each individual compensation award for Lot 2.¹⁸ The agreement was officially formalised in an aide memoire shared with EIB in Q3 2019. During the field mission of September 2019, the promoter and NLC reiterated their commitment to issuing a detailed breakdown for Lot 2, and agreed on a deadline for delivery.
- 5.2.5 Regarding the second allegation, valuation practice in Kenya includes compensation for disturbance, also known as solarium, equivalent to a 15% uplift.¹⁹ In the specific case of movable structures such as kiosks or stalls, the EIB-CM understands that, based on the Bank's standards, "...comparable replacement sites should be offered. A good practice is to calculate replacement cost for such structures as the cost of alternative sites, the cost of replacing improvements (such as foundations) and relocation expenses or other transaction costs..."²⁰
- 5.2.6 The EIB-CM reviewed the RAP entitlement matrix and noted that criteria for compensation of assets, including informal movable businesses, are compliant with the replacement value approach of Standard 6. However, in the implementation by NLC, the absence of a detailed breakdown of the valuation assessment in the individual awards makes it extremely difficult to ascertain if the rationale of the calculation complies with the full resettlement cost principle.
- 5.2.7 The EIB-CM recognises the efforts of the EIB operational services in addressing the issues continuously with the promoter and ensuring that details will be shared before compensation in Lot 2. The EIB-CM urges the promoter and the relevant national authorities to step up their efforts in providing the detailed individual explanation based on the RAP entitlement matrix and as agreed with the lenders. Furthermore, details of individual awards for Lot 2 will enhance the transparency of the process in line with the principles included in the EIB's Standard 10.²¹
- 5.3 *Allegation 3: Failure to cover all PAPs in the Project corridor and avoid forced eviction*
- 5.3.1 Regarding this set of allegations, some PAPs expressed concerns about the risks of repeated forced evictions in the area of interest. In detail, the PAPs claim that the promoter did not respect the 30-day notice period before expropriation, as required by Kenyan law. Other PAPs claim to have been forcibly evicted from the project site. PAPs did not provide any supporting evidence of forced eviction, however.
- 5.3.2 By reviewing the available documentation, the EIB-CM noted that the gap analysis of the RAP explicitly mentions that "no further forced evictions, as defined under Lenders standard, will occur."²² During the site visit in September 2019, the promoter informed the EIB-CM that no forced eviction had taken place and provided evidence that for most cases, 30-day notices have

¹⁸ Breakdown could not be provided for Lot 1 as compensation was ongoing by the time of the agreement of the aide memoire. However, NLC and the promoter agreed to provide a session on methodology and principles for Lot 1.

¹⁹ Typical disturbance costs include relocation costs, legal costs and valuation fees incurred in connection with the acquisition, stamp duty paid when purchasing land for relocation, etc.

²⁰ Paragraph 45, Standard 6.

²¹ KeNHA does not take a final decision on whether PAPs are eligible and for that KeNHA always asks the National Land Commission to conduct a valuation clinic for the individual case, hearing evidence from all the PAPs that complain of being left out. The final report on the specific issues of each individual complainant is then drawn up and it is on that basis that the ineligibility of some PAPs is defined.

²² Gap Analysis between EIB, KfW and AfDB policies and standards vs. Kenyan law, Resettlement Action Plan, page 37.

been issued to PAPs only after they have received compensation awards. In some cases, the notice period was not respected due to delays in payment and people are expected to leave as soon as payment has been delivered.

- 5.3.3 Furthermore, the promoter also agreed to deliver regular updates on the continuation of the compensation process to the lenders as part of the current monitoring programme set up for the project.
- 5.3.4 The promoter also provided evidence that in several instances, complaints were raised by people with opportunistic behaviour who settled in the project area after the gazettment of enquiries. In other instances, cases regard people who occupied houses left vacant by PAPs who received previous compensation. In the review of the RAP, the EIB-CM notes that people settling in the project area after the cut-off²³ date are not eligible for compensation or resettlement assistance.
- 5.3.5 The EIB-CM also noted that the second version of the RAP highlighted encroachment as a key risk for the project. In order to mitigate the impacts of this risk, the promoter put in place a monitoring system to collect information on newcomers with the support of local authorities (i.e. at county and village level). In the meeting in September 2019, the promoter however acknowledged that four PAPs that were not in the initial census were identified as legitimate absentees during the time of the socio-economic census. The information of these PAPs was shared with NLC with the request to assess the PAPs and include them in the current compensation schedule.
- 5.3.6 For other cases claiming being omitted by the process, the promoter agreed to provide the EIB-CM with the list of newcomers who settled in the Right of Way (RoW) after the official cut-off dates.
- 5.3.7 In conclusion, the EIB-CM welcomes the promoter's efforts in ensuring that the risk of forced eviction is avoided and monitored throughout all phases of the project. The EIB-CM also recognises that encroachment is one of the key risks in resettlement process in urban areas and it requires a holistic approach with all stakeholders to reinforce cut-off date and eligibility.
- 5.3.8 During the planning phase of the RAP, EIB-CM recognises that the promoter, with the support of the EIB operational services, took the necessary actions to clearly set a transparent cut-off date, including publication in the official Kenyan Gazette. Furthermore, all changes and add-ons in design were followed by revised cut-off dates with the inclusion of new PAP entrants (with or without legal entitlement to the land they occupy).
- 5.3.9 In order to prevent further grievances on the matter that can affect the construction schedule, it is advisable for the promoter to reinforce the dissemination of information about the existing cut-off date and entitlements in the project area. Once in place, this additional effort would prevent – or more realistically discourage – the arrival of newcomers within the project area. The EIB-CM invites the promoter to monitor the issue of new/opportunistic arrivals via KPIs where these issues and their courses of action will be shared regularly with the EIB-CM.

²³ For a full definition of cut-off date, please refer to Environmental and Social Standards, Volume I, Standard 6, paragraph 68.

5.4 *Allegation 4: Failure to conduct a transparent and inclusive stakeholder engagement process throughout all phases of the project and provide a functioning grievance mechanism*

- 5.4.1 With regard to the allegation concerning public participation and availability of documentation and information of the resettlement process, the EIB-CM assessed the due diligence process of the EIB operational services for closing gaps in the promoter's stakeholder engagement and participation in the second review of the RAP.
- 5.4.2 The EIB-CM noted that, under the guidance of EIB operational services, the promoter made considerable efforts to expand the engagement and consultation practices during the planning phase of the RAP. According to the RAP document, several public hearings took place throughout the entire project footprint. The promoter also identified and engaged six civil society organisations (CSOs) who assisted in managing PAP expectations in relation to compensation.
- 5.4.3 To ensure the community is included in the implementation process, the promoter created five (5) local committees that will support the NLC during compensation delivery. Furthermore, the EIB operational services will support the provision of specific training on engagement practices for committee members.
- 5.4.4 The EIB-CM also observed that the promoter has put in place initiatives to mitigate impacts on community health and safety.²⁴ The EIB-CM understands that such initiatives play a key role to reinforce the inclusion of affected communities with the project.
- 5.4.5 The EIB-CM also noted that the promoter prepared a stakeholder engagement plan (SEP) specifically for Lot 2, still in draft form. After revision of the document, the EIB-CM acknowledges that adequate material, such as project brief, project leaflet, brochure and posters, have been prepared and shared with the affected communities. EIB-CM noted that the EIB services asked the promoter to include a "lessons learnt" section in the document drawn from the experience in Lot 1. This section will support the promoter to avoid the repetition of the issues in Lot 2.
- 5.4.6 In terms of internal capacity to support community engagement, the promoter hired a Social Development Specialist and a Community Liaison Officer (CLO) for the project. Additional support is provided by the CLO of the supervision engineer, currently working on Lot 1.
- 5.4.7 As reported in the SEP, the EIB-CM noted that PAPs raised some issues related to the compensation process and implementation for Lot 1. Based on the available documentation, the EIB-CM considers that it is unclear if any actions have been undertaken to address these issues. In addition, the EIB-CM learnt that limited information was delivered to PAPs explaining the causes of delays to the compensation awards. The EIB operational services supported the promoter to review the current grievance management process and develop a new mechanism for Lot 1 in view to replicate the same for Lot 2. The EIB-CM understands that the current mechanism will be adapted to the specific conditions of Lot 2 and implemented before construction awards. The EIB-CM and EIB operational services will monitor its implementation in the field.
- 5.4.8 The current grievance procedure is intended to put in place and facilitate accessible, prompt and cost-effective handling of grievances at the nearest points of service to community members, via a multi-stakeholder grievance committee that includes 2 local CSO representatives and the Kenya National Commission of Human Rights. The grievances will be

²⁴ The following initiatives have started in Lot 1 - HIV awareness, roadRoad safety campaign and youth vocational sYouth Vocational kills scholarships.

brought to the attention of the PAPs committee, Community Liaison Officer (CLO), or Resident engineer, whose Sociology is responsible for logging and processing the complaints and ensure the coordination between the different committees and institutions. The PAPs elect committee members amongst themselves including a Chairperson and representatives of men, women, youth and people with disabilities.

- 5.4.9 In conclusion, the EIB-CM acknowledges that considerable efforts have been made by the promoter in terms of increasing stakeholder engagement and community participation throughout all phases of the project. However, the current grievance management system for Lot 1 seems to fail to address complaint issues.
- 5.4.10 The EIB-CM noted that the lenders identified the issue and asked the promoter to update the mechanism for Lot 1 and implement it for Lot 2. However, due to the complexity of the project and the contextual issues that are affecting it, the EIB-CM would expect that the implementation of a new grievance mechanism will be accompanied by project resources, as planned, that guarantee inclusive participation in line with the principles stated in Standard 10.
- 5.5 *Other issues*
 - 5.5.1 At the time that the field mission was undertaken (September 2019), PAPs raised issues to the EIB-CM concerning the impact of dust and noise management in the project. Furthermore, other complaints were raised on the issues of damage to the drainage system in the road reserve. All these complaints are related to Lot 1.
 - 5.5.2 The EIB-CM understands from the promoter that the issues were known and an investigation report was currently being drafted on the matter. The EIB-CM informed the AfDB Independent Review Mechanism (IRM) of the issue for follow-up.

6. CONCLUSIONS AND WAY FORWARD

- 6.1 Based on the EIB-CM inquiry, it could be concluded that all parties agreed that there are shortcomings in the implementation of the resettlement process. The EIB-CM notes that the promoter, supported by the EIB operational services and the other lenders, is putting in place considerable efforts to address these challenges.
- 6.2 In order to ensure the compliance of Lot 2, the EIB-CM, the EIB operational services, the promoter and the NLC agreed on an action plan including monitoring for Lot 1 and concrete steps to be taken for Lot 2. The EIB-CM considers that the successful implementation of the steps for Lot 2 will address the allegations analysed in this report.
- 6.3 For Lot 2, the EIB-CM will monitor the implementation of the action plan together with EIB operational services until all steps have been completed. This will be done through regular communication and site visits before and during the construction of Lot 2.
- 6.4 The EIB services will continue to cooperate to the extent possible with the other lenders and the promoter to address the current issues with Lot 1 and to avoid the likelihood of repetition when construction works start in Lot 2.

LIST OF ACRONYMS

AfDB	African Development Bank
CLO	Community Liaison Officer
EIB	European Investment Bank
EIB-CM	EIB Complaints Mechanism
EM	Entitlement Matrix
GRM	Grievance Redress Mechanism
KeNHA	Kenya National Highways Authority
MoTIHUD	Ministry of Transport, Infrastructure, Housing and Urban Development
NLC	National Land Commission
NLP	National Land Policy
PAP	Project-Affected Person
RAP	Resettlement Action Plan
SEP	Stakeholder Engagement Plan

ANNEX I - ACTION PLAN

ACTION PLAN - KENHA - EIB-CM				
#	CATEGORY	TOPIC	ACTION	PROPOSED TIMEFRAME
1	COMPENSATION	Valuation methodology	NLC to prepare guidance note on valuation methodology to be shared with PAPs in English and Kiswahili	End of March 2020 to provide lenders with a copy of a compensation methodology leaflet to be disclosed
2	COMPENSATION	Delays in project compensation	NLC to implement compensation process for the remaining sections and update KeNHA and lenders with a revised schedule on a quarterly basis	Ongoing process monitored on a quarterly basis by lenders
3	COMPENSATION	Project compensation and entitlements	NLC will engage PAPs and present each PAP with a breakdown of individual assets that will be compensated for Lot 2 (in English and Kiswahili, if the case)	Engagement will start before compensation payment for Lot 2 - i.e. tentatively in June 2020
4	COMPENSATION	Missing information on project entitlement	KeNHA to share compensation progress status and updated database with lenders on a regular basis, including with respect to missing PAPs	Shared with lenders and to be updated on a monthly basis
5	COMPENSATION	Compensation amount	KeNHA to ensure that funds for compensation of Lot 2 are available before the works.	Before commencement of construction works
6	MISSING PAPs	Missing PAPs during the process	KeNHA to prepare a database of eligible PAPs that were previously missed in the process. KeNHA will ensure that PAPs will be assessed, awarded and compensated.	Shared with lenders and to be update to lenders on a monthly basis.
7	RAP PROCESS	Stakeholder engagement	KeNHA to update lenders regularly on engagement and communication activities in the area of the project.	Ongoing - KeNHA to share minutes of meetings, communication material on a quarterly basis
8	RAP PROCESS	Request for Cadastral Maps	Promoter will ensure that cadastral maps of the projects are available for consultation in KeNHA's offices	Completed during the EIB-CM assessment
9	RAP PROCESS	Stakeholder engagement	KeNHA will share engagement material (in English and Kiswahili) with lenders for approval	Completed during the EIB-CM assessment