

Kharkiv Metro Extension Project

Complaints SG/E/2019/01

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

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(With information received from EIB services up to 31 March 2020)

Prepared by

Complaints Mechanism

Laurence Levaque
Complaints Officer

Omar El Sabeel Larrañaga
Senior Complaints Officer

Acknowledgments to Alfredo Abad
Former Deputy Head of Division

Sonja Derkum
Head of Division
EIB Complaints Mechanism

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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 or with the EIB Group's response have the right to lodge a complaint of maladministration against the EIB with the EO.

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 EO, 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: <https://www.eib.org/en/about/accountability/complaints/index.htm>

GLOSSARY

CM	Complaints Mechanism
EBRD	European Bank for Reconstruction and Development
EIB	European Investment Bank
E&S	Environmental and Social
ESAP	Environmental and Social Action Plan
ESDS	Environmental and Social Data Sheet
EU	European Union
GRM	Grievance Redress Mechanism
IAR	Initial Assessment Report
KMC	Kharkiv Metro Company
PAP(s)	Project Affected Person (People)
PIU	Project Implementation Unit
RAP	Resettlement Action Plan and Livelihood Restoration Plan
SEBS	Socio-Economic Baseline Survey
SEP	Stakeholder Engagement Plan
UAH	Ukrainian Hryvnia

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EXECUTIVE SUMMARY

The complaint

In January, February and April 2019, the EIB Complaints Mechanism (EIB-CM) received complaints from five different individuals (hereafter the “Complainants”). All five complaints relate to the involuntary resettlement process taking place in the context of the construction of a metro line extension and associated stations as part of the Kharkiv Metro Extension project in Ukraine.

The allegations made by the Complainants can be characterised as falling under three main groups of issues, which relate to: (i) adequacy of monetary compensation (Complainants No. 1, 2, 3, and 5 – all owners) and alleged exclusion from compensation and assistance (Complainant No. 4 – a user); (ii) availability of an effective grievance redress mechanism; and (iii) stakeholder engagement, in particular meaningful engagement and adequate consultation with Project Affected People (PAPs) regarding resettlement. In its Initial Assessment Report (IAR) issued in May 2019, the EIB-CM already made conclusions concerning the latter two groups of issues. This Conclusions Report therefore focuses on the allegations related to compensation.

Findings

As far as the valuation methodology is concerned, overall the total compensation package was found to include important aspects of fair compensation; it also includes specific elements that can be considered good practice in the context of involuntary resettlement (application of an involuntary resettlement compensation factor and application of an inflation factor).

Nevertheless, the EIB-CM identified specific issues related to the determination of the total compensation package. First, there is an indication that the market value of the affected property for Complainants No. 2, 3 and 5 was underestimated by the valuation company (AS-TERRA). The estimated market value of the property constitutes the basis for all further calculations made to determine the total compensation package.

Moreover, in view of the EIB environmental and social (E&S) standards, compensation for certain types of losses/impacts was found to be missing or inadequate in the total compensation package calculated by AS-TERRA for Complainants No. 2, 3 and 5. This is the case with regard to compensation for the loss of perennial plants that are located on their land for Complainants No. 2 and 3, as well as for certain types of losses (other than land and residential building) for Complainants No. 3 and 5.

For Complainant No. 1 – who already signed the purchase agreement with the City Council – the City Council requested a list of items and repairs that he considered important for improving the living conditions at his new residence.

Following issuance of its IAR in May 2019, the EIB-CM followed up with the services regarding its recommendation about the need to address the situation of Complainant No. 4 as soon as possible. During the EIB-CM’s mission, the City Council confirmed its commitment to address the concerns of Complainant No. 4 related to her loss of housing. To date (March 2020), the EIB-CM takes note that the situation of Complainant No. 4 has not been fully resolved yet.

As part of its in-depth assessment of the issues raised in the complaints, the EIB-CM’s review identified some areas for improvement in relation to the Resettlement Action Plan and Livelihood Restoration Plan (RAP) preparation and implementation processes from the perspective of the EIB E&S standards. These include: (i) difficulty to get a clear, consistent and complete picture on the impacts of the Project in terms of resettlement, especially the total number of PAPs; (ii) limited attention given to PAPs who are users during the resettlement process; (iii) lack of specific and detailed information in terms of compensation entitlements for certain types of impacts and certain categories of PAPs, and about the valuation methodology and the process for determining the compensation package; and (iv) the

identification of vulnerable people or groups. These areas for improvement are considered as having a direct link with the allegations and concerns raised by the Complainants.

Conclusions and recommendations

The EIB-CM concludes that the determination of the total compensation package of the Complainants is not fully in line with the EIB E&S standards. The EIB-CM recommends that the Bank continue following up with the City Council (in collaboration with the Promoter) to ensure that the monetary compensation (total compensation package) provided to the Complainants is fair and at full replacement cost. It is advised that the services and the City Council (and the Promoter) work together to prepare a list of concrete actions for addressing the concerns of the Complainants, which take into account the EIB-CM's findings presented in this Conclusions Report and the EIB E&S standards more generally. The EIB-CM made concrete suggestions in this respect, which were discussed internally during the consultation process with the services. The EIB-CM will follow up with the services and the Complainants within the next 12 months from the issuance of this report.

With regard to Complainant No. 4, the EIB-CM recommends the services to continue working closely with the City Council (in collaboration with the Promoter) and agree on the way forward, taking into account the concerns of the Complainant about the degree of security and legal protection offered with the alternative accommodation proposed by the City Council, as well as the need to ensure that the standard of living of the Complainant is at least restored to a level existing prior to the Project. The EIB-CM will follow up with the services and Complainant No. 4 about the proposed solution within the next three months from the issuance of this report.

Finally, the EIB-CM made few suggestions for improvement. It is important for the RAP to be as clear and comprehensive as possible, especially when it comes to identifying the different types of impacts and the different categories of PAPs, and determining the compensation entitlements and valuation methodology. If this is not the case and/or all required information is not yet available at the time of project approval, an update of the RAP must be requested before the start of the resettlement process. Potential issues need to be raised with the Promoter/local authorities from the very beginning. The capacity of the entity responsible for implementing resettlement in compliance with EIB standards (and not only the capacity of the Promoter) needs to be adequately assessed and documented, and technical assistance resources in the area of social development need to be mobilised if needed. The provision of close guidance and strengthened monitoring by the Bank are essential before and throughout the resettlement process, especially in the absence of technical assistance.

CONCLUSIONS REPORT

Complainants:

Date received by the EIB-CM: 23 January 2019, 29 January 2019, 20 February 2019, 15 April 2019

Confidentiality requested: No

Main subject of complaints: Adequacy or lack of compensation

1. THE COMPLAINT

- 1.1 In January, February and April 2019, the EIB Complaints Mechanism (EIB-CM) received complaints from five different individuals (hereafter the “Complainants”) that were jointly registered under the reference SG/E/2019/01. All five complaints relate to the involuntary resettlement process taking place in the context of the construction of a metro line extension and associated stations as part of the Kharkiv Metro Extension project in Ukraine (hereafter the "Project"). The allegations mainly concern the adequacy of the monetary compensation received/proposed (Complainants No. 1, 2, 3 and 5), and the lack of compensation (Complainant No. 4). Complainants No. 1, 2, 3 and 5 are owners while Complainant No. 4 is a user. The allegations are further outlined in Table 1 below.¹ All five Complainants waived confidentiality regarding their complaint.

Table 1 Allegations

The allegations raised by the Complainants relate to the adequacy/absence of compensation as well as the effectiveness of the grievance mechanism and the stakeholder engagement. The main issues are the following:

- 1) Four of the five Complainants who are owners are questioning the **adequacy of the compensation** that was paid/proposed to them. The Complainants state that with the paid/proposed compensation, they **cannot purchase alternative housing of equal or better quality**;
- 2) More specifically, Complainants No. 2 and 3 allege that the **proposed compensation does not take into account the current market price** of comparable properties. They also argue that (i) the **value of the land plot**; (ii) the **value of perennial plants** located on it; and (iii) **other losses** such as loss of entitlement to **housing subsidy** and loss of **yield from fruit-bearing plantations** yielding fruits annually have **not been estimated and included** in the proposed compensation package. Complainant No. 5 argues that the valuation did not take into account numerous factors and refers to a valuation carried out by an alternative expert that resulted in a sum that was 40% higher. During the EIB-CM mission, Complainant No. 5 shared information on **assets that were not considered** for compensation and/or during the negotiation process (one garage box and another garage/storage room used by the family);
- 3) Complainants No. 2 and 3 are questioning the **independence and objectivity of the private company AS-TERRA**, which was contracted to undertake the valuation. Amongst others, they highlight the fact that the company did not have a legal basis to undertake the valuation at the time the appraisers inspected their premises (the inspection took place on 15 May 2018 while Contract No. 295 for property valuation services was concluded on 21 May 2018);

¹ The description of the allegations is based on the information contained in the written complaints as well as information shared by the Complainants via subsequent emails and during telephone conversations with the EIB-CM, and during the EIB-CM mission in September 2019. Some of these allegations were already assessed in the initial assessment phase and the findings were reported in the EIB-CM’s Initial Assessment Report, which is available online. An overview of the key findings and recommendations in relation to those allegations is provided in §4.4 and 4.5 of this report.

- 4) All Complainants claim to experience stress resulting from the involuntary resettlement process, not only themselves but also other members of their household such as their elderly parents. Complainant No. 1 was very specific about the **stress** caused by (indirect) threats of court action and eviction, and physical displacement (especially for his elderly mother who is living with him and needs to adjust to a new place and area after 18 years of living in their apartment). The same Complainant raised other (related) concerns: i) **lack of assistance** by the City Council; ii) **hotline ignoring his calls**; and, iii) **lack of information, misinformation, and poor communication**. He is claiming compensation for **moral damage** of UAH 100,000, which he says was not considered in the compensation. Similarly, Complainant No. 5 refers to the lack of real dialogue and to threats of court action and forced eviction;
- 5) Complainants No. 1, 2 and 3 point to **possible corruption**;
- 6) All four Complainants express their **wish to receive adequate compensation**. Complainants No. 2 and 3 are asking for an **audit of AS-TERRA's valuation report and a revaluation if needed**;
- 7) Complainant No. 4 (who is a user) complains about **not having received any compensation and/or any assistance from the City Council**. She was told by the City Council that she has no rights. She has been living in the apartment of members of her extended family (who are co-owners and are those who received monetary compensation from the City) for more than 40 years. With her small pension, she cannot afford to rent or buy other accommodation and has no place to go. She is claiming her **right to adequate housing, and in-kind or monetary compensation from the City Council**. She is complaining about the **lack of information and consultation** about the resettlement process.
- 8) In addition, the Complainants share **(possible) negative impacts of inadequate and absent compensation**: Complainant No. 1 argues that his **housing and living conditions have deteriorated** as a result of resettlement (including the fact that the new apartment is smaller and that he had to take out a loan to renovate it because the compensation was inadequate, which worsened his already bad financial situation); and, Complainant No. 4 states that **if she cannot register at a new location** (she felt she had to leave the house but she does not have another place to stay on a long-term/permanent basis), this **may have an impact on her rights and entitlements**.
- 9) Complainants No. 2, 3 and 4 sent a letter to the Mayor with their grievances prior to submitting their complaint to the EIB-CM. Four Complainants told the EIB-CM that they **were not aware of a mechanism established at project level to address grievances**.

- 1.2 Complainants No. 1, 2 and 3 sent the same initial complaint to the European Bank for Reconstruction and Development (EBRD), which deals with them at the operational level.
- 1.3 In accordance with Article 4.3.7 of the EIB Group Complaints Mechanism Policy, the EIB-CM cannot handle allegations of prohibited conduct (in this case, possible corruption); these have been handed over to the competent EIB services.

2. BACKGROUND INFORMATION

- 2.1 The Bank is providing a loan of EUR 160 million to finance the Kharkiv Metro Extension project, which involves financing of the following components:
 - construction of a 3.5 km extension of the existing Green Metro Line in the southern part of the City of Kharkiv, including construction of two new underground metro stations (Derzhavinska and Odeska);
 - construction of a new metro wagon depot for the Green Metro Line; and
 - procurement of 85 new rolling stock units for the Green Metro Line.
- 2.2 The Borrower for the Bank's loan is Ukraine. The Communal Enterprise "Kharkivskyi Metropolitan" (Kharkiv Metro Company – KMC; the Promoter) will implement the Project,

with financial assistance from the Borrower and support from the Kharkiv City Council. The Project is co-financed by the EBRD.

- 2.3 The construction and operation of the Green Metro Line extension involves involuntary resettlement. As part of the Project preparation stage, an environmental and social impact assessment was completed. The following documents were prepared: Environmental and Social Analysis Report², Environmental and Social Action Plan (hereafter called the “ESAP”)³, Resettlement Action Plan and Livelihood Restoration Plan (hereafter called the “RAP”)⁴, and Stakeholder Engagement Plan (hereafter called the “SEP”)⁵. The ESAP, RAP and SEP were approved by the City Council in June 2017. The RAP, SEP and the Non-Technical Summary⁶ are available on the EIB website.

3. APPLICABLE REGULATORY FRAMEWORK

3.1 The EIB-CM mandate

- 3.1.1 The EIB-CM Policy and Procedures⁷ approved in November 2018 apply to complaints of alleged maladministration lodged against the EIB Group (Article 1.1 of the EIB Group Complaints Mechanism Policy, hereafter called the “Policy”). Complaints may concern any alleged maladministration by the EIB Group in its decisions, actions and/or omissions (Article 4.3.1 of the 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 and 3.3 of the Policy).

- 3.1.2 In connection with the handling of admissible complaints and pursuant to Article 6.1.1 of the Policy, the EIB-CM gathers and reviews existing information on the subject under complaint, and endeavours to resolve the issues giving rise to complaints in cooperation with internal and external stakeholders. It also conducts appropriate inquiries with a view to assessing whether the EIB Group is complying with the applicable regulatory framework, including its own policies, procedures or standards. The EIB-CM is independent from operational activities in order to ensure that each complaint is dealt with by applying the highest standards of objectiveness whilst safeguarding the interests of all internal and external stakeholders of the EIB Group (Articles 2.2 and 5.1.4 of the Policy). The EIB-CM assists the EIB Group by advising on possible improvements to the implementation of its activities for the common purpose of good administration (Article 5.1.9 of the Policy).

3.2 EIB Environmental and Social Standards

- 3.2.1 The EIB Statement of Environmental and Social Principles and Standards (2009)⁸ requires that financed projects be acceptable in environmental and social terms (§1). In line with §2: *“Promoters are responsible for preparing, implementing and operating projects financed by the Bank; they are also responsible for the fulfilment of Bank requirements, especially for legal compliance. The Bank will assist the promoter to fulfil these responsibilities.”*

² Revision 02 of 18 August 2017. <https://www.eib.org/attachments/registers/77797384.pdf>

³ Revision 02 of 24 April 2017.

⁴ Revision 03 of 28 April 2017. <https://www.eib.org/attachments/registers/77663332.pdf>

⁵ <https://www.eib.org/attachments/registers/77674115.pdf>

⁶ Of 7 July 2017. <https://www.eib.org/attachments/registers/76892801.pdf>

⁷ <https://www.eib.org/en/infocentre/publications/all/complaints-mechanism-policy.htm>;
https://www.eib.org/attachments/consultations/eib_complaints_mech_procedures_en.pdf

⁸ http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf

- 3.2.2 The EIB's Environmental and Social Handbook (2013 version)⁹ (hereafter called the "Handbook") requires all operations to comply with national legislation and regulations and obligations and standards set out in the relevant international conventions and multilateral agreements to which the host country is party. Projects outside the EU will also be subject to an environmental and social impact assessment if, among other things, they may interfere with human rights. For projects that are co-financed, adequate implementation of co-financiers' environmental and social policies may prove enough to meet the EIB's standards; however, this does not relinquish the EIB's own environmental and social due diligence duty and any gaps between that and other lenders' shall be duly accounted for (§7-12, Chapter 1, Volume I of the Handbook).
- 3.2.3 The EIB environmental and social (E&S) standards relevant to this complaint are, in particular, Standards 6, 7 and 10. The objectives of Standard 6 on Involuntary Resettlement are, amongst others, to: *"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; Ensure that resettlement measures are designed and implemented through the informed and meaningful consultation and participation of the project-affected people throughout the resettlement process; and, Give particular attention to vulnerable groups, including women and minorities, who may require special assistance and whose participation should be vigilantly promoted"*. "Resettlement" is defined as *"a process to assist those displaced to replace their housing, assets, livelihoods, land, access to resources and services and to improve or at least restore their socioeconomic and cultural conditions to those levels existing prior to the project"*.¹⁰
- 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"* (§23, Chapter 6, Volume I of the Handbook).
- 3.2.5 Paragraph 16 defines Project Affected People (PAPs) as *"all persons impacted by the involuntary resettlement, including all members of a household (women, men, girls, boys, incl. several generations in the case of extended households); the owner and employees of a business; members of an ethnic minority group; tenants; land owners and sharecroppers; informal settlers (i.e. lacking formal titles); holders of customary land-rights; informal business-operators and their employees/assistants. Eligible PAPs may be in any of the following situations: (i) have formal legal rights to the land/structure they occupy; (ii) do not have formal legal rights to land, but have a claim to land that is recognised or recognisable under the national laws (e.g. ancestral, traditional lands); (iii) are dependent on the impacted land for their livelihood by way of customary access to natural resources; (iv) have no recognisable legal right or claim to the land or structure they occupy; and/or (v) economically displaced persons who face loss of assets or access to assets. It is important to note that PAPs are not household units or merely heads of households and different individuals will be differently impacted by the resettlement. For example, gender dynamics need to be duly observed and taken into account throughout the process."* (Chapter 6, Volume I of the Handbook). Paragraph 33 further states that *"[a]ny person negatively affected by the project is eligible for compensation, livelihood restoration and/or other resettlement assistance"* (Chapter 6, Volume I of the Handbook).

⁹ The 2013 version is available in hard copy. A revised version of October 2018 is available online at: http://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf

¹⁰ Paragraphs 3 and 4, Chapter 6, Volume I of the Handbook.

- 3.2.6 The Handbook refers to Standard 6 as being of particular relevance where *“(a) there are identified gaps between national land-acquisition, expropriation and compensation standards and practices and the present Standard; (b) the institutional responsibilities regarding resettlement are complex with several different governmental or non-governmental agencies involved in the process; and (c) there is a risk of underestimating the scope of the required resettlement.”*¹¹
- 3.2.7 Standard 7 sets out to avoid or minimise, or otherwise mitigate and remedy, potential harmful effects of EIB operations on vulnerable individuals and groups whilst seeking to ensure that these populations duly benefit from such operations. *“Within the context of EIB operations, individuals and/or groups who are at a higher risk of being unable to anticipate, cope with, resist and recover from project-related risks and/or adverse impacts are considered vulnerable. Vulnerable individuals or groups may include women, children, the elderly, the poor, ethnic, religious, cultural or linguistic minorities, or indigenous groups”* (§1 and §4, Chapter 7, Volume I of the Handbook).
- 3.2.8 Because resettlement is often a complex process, consultation with all persons and communities involved in the resettlement process is crucial. *“All relevant stakeholders must be given the opportunity for informed participation in resettlement planning with the goal that the mitigation of the adverse project impacts is appropriate and the potential benefits of resettlement are sustainable. Consultation will continue in accordance with Standard 10 on Stakeholder Engagement and during the implementation and monitoring of the resettlement process.”* Moreover, *“[w]ide consultation within each household unit is critical in cases of extended families, if conflicts are to be effectively mitigated”* (§50 and §52, Chapter 6, Volume I of the Handbook). As per Standard 10, *“[w]here communities are, or are likely to be, affected by adverse impacts from a project, the promoter will undertake a process of meaningful consultation in a manner that provides the affected parties with opportunities to identify and express their views on project risks, impacts, and mitigation measures, and engage in a collaborative process with the project in responding to, and addressing considerations raised”* (§35, Chapter 10, Volume I of the Handbook).
- 3.2.9 Standards 6 and 10 refer to the obligation for the Promoter to set up and maintain a grievance mechanism at project level that is independent and free. They outline the major characteristics of such a mechanism, which aims to identify and remedy undesirable or unforeseen impacts and other concerns arising out of the execution of the project in a timely manner.

3.3 **National legislation and standards**

- 3.3.1 National legislation and standards that are relevant to the case under review include:
- the Constitution of Ukraine (1996 with amendments);
 - Law of Ukraine on Alienation of Land Plots and Other Objects of Immovable Property located on them in Private Ownership for Social Needs and on the Grounds of Social Necessity (No 1559-VI, 2009);
 - Law of Ukraine on Appraisal of Property, Property Rights and Professional Appraisal Activity in Ukraine (No. 2658-III, 2001);
 - Civil Code of Ukraine (No. 435-IV, 2003);
 - Housing Code of Ukraine (No. 5464-X, 1983);
 - Code of Administrative Procedure of Ukraine (No. 2747-IV, 2005 with subsequent amendments);
 - The Family Code of Ukraine (No. 2947-III, 2002);
 - The Land Code of Ukraine (2001);

¹¹ Paragraph 22, Chapter 6, Volume I of the Handbook.

- Law of Ukraine on Land Valuation (1378-IV, amended by Law No. 959-VI, 2009);
- National Standard No. 1 "*General Principles of Valuation of Property and Property Rights*" (Resolution of the Cabinet Ministers of Ukraine approved on 10 September 2003 No. 1440);
- National Standard No. 2 "*Valuation of Real Estate*" (Resolution of the Cabinet Ministers of Ukraine approved on 28 October 2004 No. 1442); and
- Resolution of the Cabinet Ministers of Ukraine "*On Simplifying the Procedure of Granting Subsidies to the Population to Compensate the Costs of Housing and Communal Services, purchase of liquefied gas, solid and liquid domestic fuel*" (approved on 21 October 1995 No. 848).

3.4 **Finance contract**

- 3.4.1 The finance contract between the EIB and Ukraine establishes the obligation for Ukraine to ensure that the Promoter has to implement the Project in compliance with "*Environmental and Social Standards*", and more particularly to implement the ESAP and the RAP. It also states that "*The Borrower shall procure through the Kharkiv City Council that the Promoter shall: ...*" ensure that the Project Implementation Unit (PIU) has sufficient and suitably qualified staff, including environmental and social experts required to implement the ESAP and the RAP.¹²
- 3.4.2 Furthermore, the finance contract sets out conditions of disbursement. Conditions of the first loan disbursement include the submission of (i) a copy of the ESAP, and (ii) a copy of the RAP (for both documents, the Kharkiv City Council is indicated as the responsible entity), as well as the confirmation that the PIU for the Project has been established, with the staff and terms of reference acceptable and satisfactory to the Bank, including, among others, environmental and social experts to implement the ESAP and the RAP (with the Promoter as responsible entity).¹³
- 3.4.3 The following are conditions of loan disbursement for all tranches: (i) confirmation that the PIU and the Project Implementation Consultant are in place on terms of reference acceptable and satisfactory to the Bank; (ii) a document explaining, to an extent satisfactory to the Bank for each section of the ESAP, what actions the Promoter has executed to implement the ESAP and what further actions are planned for this; and (iii) a document explaining, to an extent satisfactory to the Bank for each section of the RAP, what actions the Promoter has executed to implement the RAP and what further actions are planned for this (for all three conditions, the Promoter is indicated as the responsible entity).¹⁴ The mid- and end of term evaluations of the RAP implementation are also items that are included in the list of Project information to be sent to the Bank.^{15 16}

4. **THE INQUIRY OF THE EIB-CM**

- 4.1 On 6 February, 5 March and 3 May 2019, the EIB-CM acknowledged receipt of the complaints and informed the Complainants that it was carrying out a review of their cases and notified them of the date by which they could expect a formal reply.
- 4.2 The EIB-CM issued an Initial Assessment Report (IAR), which was finalised in May 2019. Based on its IAR and in line with §2.4.4 of the EIB Group CM Procedures, the EIB-CM engaged external

¹² Article 6.5 (e) and (g) of the finance contract, which was signed on 11 December 2017.

¹³ Schedule B, B.1, (j), (k) and (m) of the finance contract.

¹⁴ Schedule B, B.2, (m), (n) and (o) of the finance contract.

¹⁵ Schedule A, A.2, 2, of the finance contract.

¹⁶ Note that no disbursement has been made so far. A disbursement of EUR 10 million is scheduled for March 2020.

expertise¹⁷ in August 2019 to get support with an in-depth assessment of the allegations related to the adequacy of the monetary compensation.

- 4.3 In the course of its inquiry, the EIB-CM conducted a desk review of Project-related documentation, information and documents available from the Complainants, the Bank's services and the public domain, and the relevant regulatory framework. The EIB-CM had various telephone calls and email exchanges with all Complainants and the services. In addition, EIB-CM staff together with the external experts went to Kharkiv on a mission in September 2019 to talk to the Complainants and other stakeholders (including the City Council, Promoter, property valuation company and RAP monitoring consultant). After gathering and analysing additional information, and further communication with the Complainants and the services following its mission, the EIB-CM finalised its Conclusions Report. This Conclusions Report focuses on presenting the findings with regard to the alleged issues related to compensation.

Key findings and recommendations of the EIB-CM Initial Assessment Report¹⁸

- 4.4 The allegations made by the Complainants can be characterised as falling under three main groups of issues, which relate to: (i) adequacy of monetary compensation and alleged exclusion from compensation and assistance; (ii) availability of an effective GRM; and (iii) stakeholder engagement, in particular meaningful engagement and adequate consultation with PAPs regarding resettlement. The EIB-CM's IAR already made conclusions concerning the latter two groups of issues. It underlined the need for the services to provide continuous technical guidance to the City Council/Promoter, particularly in relation to the process for receiving and resolving concerns and grievances raised by the PAPs, and communication, consultation and involvement of the PAPs in decision-making about and monitoring of the resettlement process.
- 4.5 The EIB-CM issued conclusions with regard to the alleged exclusion from compensation and assistance by Complainant No. 4. The EIB-CM found that Complainant No. 4 is a person who is negatively affected by the Project and as such *"is eligible for compensation, livelihood restoration and/or other resettlement assistance"* as per Standard 6. In addition, the EIB-CM considered Standard 7 (that requires the Promoter to take appropriate measures and provide assistance as may be necessary to vulnerable persons) to be most likely applicable in her case. The EIB-CM recommended that the Bank closely guide the Promoter/City Council in redressing the situation for Complainant No. 4 in line with EIB Standards 6 and 7 as soon as possible.
- 4.6 With regard to the allegations related to the adequacy of the compensation (Complainants No. 1, 2, 3 and 5), the initial assessment identifies some gaps related to compensation. It indicates the need to further clarify some aspects related to the valuation method(s) and how they were applied to the individual cases concerned. The EIB-CM proposed mobilising external expertise to support the EIB-CM in its in-depth assessment of the issues related to compensation.

¹⁷ The team consisted of an international social expert and a national lawyer.

¹⁸ The English version of the IAR is accessible at: <https://www.eib.org/attachments/complaints/sg-e-2019-01-kharkiv-metro-extension-project-iar-eng-13-05-20191.pdf>

The Ukrainian translation of the IAR is accessible at: <https://www.eib.org/attachments/complaints/sg-e-2019-01-kharkiv-metro-extension-project-iar-ukr-13-05-2019.pdf>

5. **FINDINGS**

5.1 ***RAP preparation and implementation process***

Status of RAP implementation

- 5.1.1 A RAP was prepared in 2016-2017, finalised in April 2017 and approved by the City Council in June 2017. Decision No. 1034/18 *“On Buyout of Land Plots, Other Real Estate Located on Them, Which are Owned by Individuals/Legal Entities, for Public Needs”* for the purpose of the metro construction under the Project was approved by the Kharkiv City Council in its 18th session on 21 February 2018. This decision includes an Appendix with a list of 88 land plots and other property located on them owned by individuals or legal entities to be bought for public needs. The list refers to the affected properties of the Complainants. In accordance with the Decision, the City Council notified the owners of the properties affected by the Project.¹⁹ They were asked to inform the City Council regarding their consent to enter into *“negotiations”* or their refusal to do so. A total of 138 of 144 affected owners provided their consent.
- 5.1.2 In line with the RAP, the City Council commissioned the valuation of the affected properties to two companies. On the basis of the valuation reports, the City Council approved the amounts of the compensation package, which were then proposed to the Project affected property owners. Since adoption of Decision No. 1034/18 on 21 February 2018, the City Council has held 318 official *“negotiations”* meetings with individual owners; some of them were attended by very high-level officials such as the Mayor and/or Vice-Mayor. As of August 2019, 130 of 144 affected owners (90%) had signed a purchase agreement with the City Council, which means they agreed with the acquisition of their property for the proposed compensation amount. As of January 2020, the City Council was able to acquire the property of two additional owners following a Court decision. Of these 132 owners whose property has already been purchased, 77% (101) purchased alternative property.²⁰ There are on-going Court cases against 12 owners.²¹ Complainants No. 2, 3 and 5 are among these 12 owners.²²
- 5.1.3 In general, the EIB-CM would like to acknowledge the efforts made by the City Council in the implementation of resettlement and for achieving good results regarding the purchase of Project affected properties. The EIB-CM is aware that the City Council made conscious efforts to ensure compliance of the process with national legislation, and take into account the lenders standards. Similarly, the EIB-CM appreciates the commitment and openness shown by the City Council to find solutions for resolving the issues brought by the Complainants to the EIB-CM.

Review of certain aspects of the RAP preparation and implementation processes in view of the EIB E&S standards

- 5.1.4 As part of its in-depth assessment of the issues raised in the complaints, the EIB-CM reviewed certain aspects of the RAP preparation and implementation processes from the perspective of the EIB E&S standards. The review identified some areas for improvement, which are considered having a direct link with the issues raised in the complaints.

¹⁹ For example, Complainants No. 1, 2 and 3 received such notice dated 23 February 2018.

²⁰ There are 24 owners who will not purchase alternative property, and seven owners who are searching alternative property.

²¹ One of them is expected to be resolved amicably. Initially, the City Council filed a Court case against 25 owners with whom it was not able to reach an agreement within one year from the date of Decision No. 1034/18 (in line with point 4 of the decision). During the Court proceedings, 11 of them gave their consent and signed purchase agreements.

²² This is based on information provided by the City Council to the EIB-CM during its mission in September 2019, and by the services in January 2020.

- 5.1.5 As per the EIB E&S standards²³, the Promoter is required to carry out a census and a socio-economic baseline survey (SEBS) to establish the number of people to be displaced, livelihoods affected, and property to be compensated. The census should include an inventory of losses (assets, access to resources or services, etc.), a detailed measurement survey and valuation of lost assets, and it covers the total affected population.
- 5.1.6 The EIB-CM found it difficult to get a **clear, consistent and complete picture on the impacts of the Project in terms of resettlement, especially the total number of PAPs**. A large amount of information has been collected at various stages of project preparation and implementation through various sources²⁴. A number of documents and tables have been produced that are public and/or were made available to the EIB-CM.²⁵ Nevertheless, it seems that the data have not been consolidated into one single document including detailed records on all PAPs (private households: owners and users, and their family members, and businesses: owners and employees) and lost assets. Such a document would allow the implementers and key stakeholders to get a clear and comprehensive picture about compensation entitlements, and proper monitoring and evaluation of the resettlement process.
- 5.1.7 **Limited attention** has been **given to PAPs who are users** and employees during the resettlement process. There is limited information made available on the progress of resettlement and status of compensation/assistance/income restoration with regard to these categories of PAPs. According to the City Council, Ukrainian law recognises only persons with formal legal rights or claims as eligible to compensation; hence, the focus of their efforts on owners affected by the Project during implementation of the resettlement process.
- 5.1.8 In this respect, the RAP highlights the existence of a gap between the national legislation and EBRD/EIB requirements, which refer to much broader eligibility criteria (§33 and 34 of Chapter 6, Volume I of the Handbook).²⁶ Unfortunately, the RAP did not identify concrete measures to bridge this gap and deal with users (other than tenants registered in the municipality-owned flats who are recognized as the only “*formal users*”). The proposed measure to compensate the loss of housing for “*informal users*” is stated as follows: “*The interests and needs for housing and assistance of people who have no recognized legal property right will be considered during the negotiation procedure*”. The RAP further states: “*The client will provide relocation assistance suited to the needs of each group of displaced persons, with particular attention paid to the needs of the poor and the vulnerable*”. The only concrete entitlement for informal users affected by loss of housing that is included in the entitlements matrix is the provision of moving assistance.²⁷ With this, the identification of further concrete and appropriate measures was in fact postponed to the time of RAP implementation, and more particularly the time of “*negotiations*” with the City Council. This is the situation in which Complainant No. 4 is currently in: she is not an owner, yet a person affected by loss of housing (who does not fall in the category of “*formal users*” as defined in the entitlements matrix and) who did not receive any compensation or resettlement assistance so far. It is at the time of negotiation with the owners of the affected property that the City Council started to pay

²³ Paragraphs 30 and 31 of Chapter 6, Volume I of the Handbook.

²⁴ Data was collected at several occasions during the RAP preparation process: initial stage of the SEBS carried out by the Street Committees and the City District Administrations (Osnovyanska and Slobidska) in July 2016; and further surveys by the Project group (included representatives of the Street Committees, Osnovyanska and Slobidska District Administrations, Executive Committee of the City Council and Metro Construction Company) to specify the SEBS information in January-February 2017 through a standard questionnaire provided by EBRD (adapted and translated into Ukrainian). Data collection continued after the decision No. 1034/18 dated 21 February 2018: the City Council again collected information on socio-economic aspects of PAP using a standard form (forms mostly completed in September-November 2018).

²⁵ RAP; Cumulative data census and SEBS results (In excel file called RAP Annex 1 SEBS results 20-06-2017 ENG); Copy of purchased property (name of the Excel file); Composition of purchase price for each property (hard copy provided by the City Council to the CM during its mission); info sheet with status of RAP implementation.

²⁶ Gap analysis table, Table 3, pages 18 to 22 of the RAP (Revision 03 as of 28 April 2017).

²⁷ Pages 18, 19, 20, 27 and 30 of the RAP (Revision 03 as of 28 April 2017).

attention and give consideration to her needs. In the meantime, the monetary compensation was paid to the owners of the affected property. As can be seen in section 5.3, the City Council confirmed its commitment to address the concerns of Complainant No. 4. Her situation is not yet fully resolved to date.

- 5.1.9 Paragraphs 67 and 68 of Chapter 6, Volume I of the Handbook, describe in details what minimum information and types of measures the RAP should contain. At a minimum it should include the following information: identify all people to be displaced, paying special attention to vulnerable groups; carry out a census to establish the number of people to be displaced, livelihoods affected, property to be compensated and the cut-off date for eligibility claims; include an analysis of applicable national legislation, highlighting gaps with EIB requirements; propose how to fill the gaps between national law and EIB requirements; establish the eligibility criteria and describe the entitlements for all categories of displaced people and types of impacts suffered; include valuation of and compensation for lost assets and loss of income and demonstrate that these rates are adequate, i.e. at least equal to the replacement cost of lost assets/income or meeting minimum average wage thresholds. It is important for the RAP to contain information that is as concrete as possible since the document is meant to assure that the rights and interests of PAPs are well respected and protected in line with EIB E&S standards.
- 5.1.10 In EIB-CM's view, some of the minimum information required in a RAP is found missing and/or not precise enough. This is due to the fact that the RAP needed to be finalized at a time when the collection of all relevant and needed information was not completed yet. To the EIB-CM's knowledge, the RAP has not been updated with additional information that became available after its approval by the City Council. The report provides specific illustrations of information that is missing and/or not precise enough in the RAP for the Project, focusing on examples that have a direct link with the allegations:
- Lack of specific and detailed information in terms of compensation entitlements for certain types of impacts and certain categories of PAPs: refer to §5.1.8 above, and §5.2.5.11, 5.2.6.6, and 5.2.8.4 below.
 - Limited information about the valuation methodology and the process for determining the compensation package (allegations of Complainants mainly relate to the methodology and composition of compensation package).
- 5.1.11 The EIB-CM observes that the understanding of 'vulnerability' and **identification of vulnerable people or groups appears to have been a weak area from the start**. This is also a reflection of the limited engagement that took place with the PAPs as part of the RAP preparation process and before the start of the resettlement process, as identified in the EIB-CM's initial assessment.²⁸
- 5.1.12 The RAP identifies six individuals (out of the at least 246 affected residents) with special needs as vulnerable people: two disabled persons and two seriously ill persons with physical accessibility needs, and two single mothers with the need of access to childcare. For Complainant No. 4, the records show the following information: officially registered there; ex-daughter in law; pensioner; low income; co-owners of the affected property not registered there.²⁹ The EIB-CM takes note that her particular situation was not considered as a cause of potential vulnerability. As per §50 to 52 of EIB Standard 6, adequate consultation with all PAPs is crucial. Paragraph 52 states that *"Wide consultation within each household unit is critical in cases of extended families, if conflicts are to be effectively mitigated"*.

²⁸ <https://www.eib.org/attachments/complaints/sg-e-2019-01-kharkiv-metro-extension-project-iar-eng-13-05-20191.pdf>

²⁹ See document in Excel called "RAP Annex 1 SEBS results 20-06-2017 ENG", which was shared by the services with the CM when asking for the census and socio-economic survey data.

5.1.13 The City Council shared with the EIB-CM that the individual “negotiations” meetings held with the owners and their family members/representatives helped in becoming aware of certain issues and the identification of vulnerable people. Nevertheless, at that time, there was less than one year to finalise the “negotiations” process. According to the services, despite the absence of criteria and a systematic method for identifying vulnerable people, the City Council provided credible examples of identification (based on obvious vulnerabilities) and support provided during the negotiations process for vulnerable people.

5.1.14 The issues presented in the section above are inter-connected and they are also related to the limitations identified by the EIB-CM in its IAR with regard to the GRM and stakeholder engagement³⁰.

5.2 ***Allegations related to the adequacy of the compensation by Complainants No. 1, 2, 3 and 5***

5.2.1 The City Council filed a Court case against Complainants 2, 3 and 5, which is on-going. The Court assigned the Hon. Prof. M.S. Bokarius Kharkiv Research Institute of Forensic Examinations to conduct an expert examination and determine the “buy-out price” of the concerned properties. The Court will ensure compliance with national legislation. It is not clear whether the Court will also take into account the obligations stipulated in the finance contract between the EIB and Ukraine for the Project for determining compensation, including the obligation to comply with EIB E&S standards. Therefore, the EIB-CM found it necessary to undertake the below in-depth assessment of the issues raised by the Complainants, particularly in view of the EIB E&S standards.

5.2.2 General overview of the methodology applied by AS-TERRA PE to determine the total compensation package

5.2.2.1 The procedure for determining the “buy-out price” is stipulated in Article 5 of the Law of Ukraine on Alienation of Land Plots and Other Objects of Immovable Property located on them in Private Ownership for Social Needs and on the Grounds of Social Necessity (No 1559-VI, 2009). As per this article, *“The buy-out price shall include the cost of the land plot (part of it), residential house, other buildings, structures, perennial plants, which are located on it, taking into account the losses incurred by the owner as a result of the land acquisition, including losses incurred by the owner in connection with the premature termination of his/her obligations to third parties, in particular the lost profit, in full. The size of the redemption price shall be approved by a decision of the executive body or local self-government body that carries out the redemption of the land plot, or shall be established by a court decision.”*

5.2.2.2 AS-TERRA PE (hereafter “AS-TERRA”) is a company that was commissioned by the Kharkiv City Council to undertake the valuation of a number of Project affected properties; these include the properties of all Complainants.³¹ The methodology used to determine the “buy-out price” (total compensation package) is described in the individual valuation reports of the affected properties and also in a separate document for residential buildings (or parts of buildings) that was provided to the EIB services by the City Council³².

5.2.2.3 The total compensation package determined by AS-TERRA consists of the estimated market value of the affected property, adding an amount of compensation for involuntary resettlement, and taking into account the inflation risks and certain losses incurred by the owner due to the buy-out of his/her property and purchase of an alternative property. More specifically, the total compensation package consists of the following elements:

³⁰ <https://www.eib.org/attachments/complaints/sg-e-2019-01-kharkiv-metro-extension-project-iar-eng-13-05-20191.pdf>

³¹ Refer to the Property Valuation Services Contract No. 295 dated 21 May 2018 and its Appendix 1. Also Contract No. 150 dated 13 April 2018.

³² The title of this document that was prepared by AS-TERRA is as follows: *“Generalized methodology of calculation of property value: Residential buildings (or parts of buildings) located on the land plots that are not in private ownership”*.

1. Estimated cost of property based on market data and calculated using the sales comparison approach. It is important to note that this constitutes the basis for all further calculations;
2. Application of an involuntary resettlement compensation factor ranging from 1.25 to 1.84;
3. Application of a factor related to inflation expectations (11.5% of the cost including the involuntary resettlement compensation);
4. Calculation of the following losses as a result of purchase of alternative property and relocation:
 - Payment of real estate agent's services (5% of the cost including the involuntary resettlement compensation and inflation);
 - State duty (1% of the cost including the involuntary resettlement compensation and inflation);
 - Levy for compulsory state pension insurance (1% of the cost including the involuntary resettlement compensation and inflation);
 - Payment of notary's services (1% of the cost including the involuntary resettlement compensation and inflation);
 - Fixed costs that are not tied to the amount of the property purchase agreement (UAH 478);
 - Cost of moving, which is minimum UAH 2 900 (it can be higher depending on the total area of the affected property).

The break-down of the total compensation package for the Complainants is provided in Annex 1.³³

5.2.3 EIB-CM general observations about the methodology

5.2.3.1 The EIB-CM notes that AS-TERRA makes explicit mention of existing gaps and inconsistencies within the national legal and regulatory framework relevant to involuntary resettlement, determination of compensation and property valuation. AS-TERRA highlights uncertainties about the term "*buy-out price*" and issues regarding the determination of the compensation amount in the case of forced alienation of property for public needs (mark-up to the estimated market value of the affected property). It clearly states that resolving these issues cannot be considered the competence of the appraiser, and in the absence of further clarifications from the client (City Council), the appraiser expresses his/her professional opinion on the issues.

5.2.3.2 Given the gaps in the national legal and regulatory framework and the absence of a well-established valuation methodology for cases of involuntary resettlement³⁴, AS-TERRA needed to develop a methodology to determine the "*buy-out price*" of the affected properties (while ensuring the methodology was in line with current legislation).

5.2.3.3 Despite these challenges, it appears to the EIB-CM that overall the total compensation package does include important aspects of fair compensation such as compensation for the affected housing, removal costs, fees and other transaction costs. Moreover, the EIB-CM would like to highlight the inclusion of specific elements that can be considered good practice: (i) the application of an involuntary resettlement compensation factor that takes into account the compulsory nature of the sales transaction (alienation of the property for public needs) and (ii) the application of an inflation factor that takes into account inflation risks.

³³ Annex 1 will be removed in the version of the Conclusions Report that will be made available to the public as it contains personal data.

³⁴ This was also confirmed by the City Council during the EIB-CM mission.

5.2.3.4 Nevertheless, as further outlined below (sections 5.2.4 to 5.2.9), the EIB-CM identified specific issues related to the approach used to determine the value of certain elements. Moreover, it was found that compensation for some components is missing or inadequate in the total compensation package for Complainants No. 2, 3 and 5.

5.2.3.5 As per the EIB E&S standards, in cases where an in-kind compensation is not possible, adequate compensation needs to be provided. The standards further state that *“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.”* (§41, Chapter 6, Volume I of the Handbook). *“Replacement cost”* refers to: *“the value determined to be fair compensation for: (i) land, based on its productive potential; (ii) houses and structures, based on the current market price of building materials and labor without depreciation or deductions for salvaged building material, and (iii) residential land, crops, trees, and other commodities, based on their market value. Such cost needs to further account for any removal costs, utility connection costs, taxation costs imposed on new housing/re-established businesses etc. Where markets do not exist, surrogate values must be determined.”* (§17, Chapter 6, Volume I of the Handbook).

5.2.4 Alleged under-estimation of market value of affected property (Complainants No. 1, 2, 3 and 5)³⁵

5.2.4.1 In accordance with the RAP and national legislation, Complainants No. 2, 3 and 5 commissioned an alternative valuation of their property. In all cases, the estimated market value of the property was much higher (from 42% to 64% higher) than the one in AS-TERRA valuation reports. Table 3 in Annex 2 provides an overview of the differences.³⁶

5.2.4.2 There is no disagreement with regard to the approach chosen to estimate the market value of the affected property, namely the sales comparison approach. AS-TERRA justifies the use of this approach based on the fact that the residential real estate market in Kharkiv can be considered as active and open, and information on the prices of the supply of residential real estate is available and complete. The review reports of the valuation reports by AS-TERRA confirm that the methodical approach selected meets the requirements set forth in the regulatory acts on property valuation. The alternative valuation reports for Complainants No. 2, 3 and 5 do not argue about, and also use, the sales comparison approach.

5.2.4.3 The RAP refers to the possibility for the affected owners to engage another valuation company for conducting a new appraisal or reviewing the valuation report, and to *“negotiations”* as part of the land-acquisition process. Moreover, the GRM included in the SEP refers to the possibility of amicable resolution. In reality, there seems to be no scope for real negotiations even though the individual meetings with the owners are so-called *“negotiations meetings”*. In case of disagreement between the City Council and the owners on the amount of the proposed compensation, as is the case for Complainants No. 2, 3 and 5, the City Council is obliged to file a Court case. The Court can then take into account the alternative valuations commissioned by the affected owners.

5.2.4.4 It is challenging to assess the allegation of under-estimation of the market value of the affected properties by AS-TERRA. The valuation reports of AS-TERRA were subject to review by the All-Ukrainian Association NGO, Ukrainian Society of Appraisers, and by the Kyiv Scientific Research Institute of Forensic Expertise of the Ministry of Justice of Ukraine.³⁷ On the other hand, the alternative valuation reports for Complainants No. 2 and 3 were also

³⁵ This is component no. 1 in the total compensation package. See above §5.2.2.3

³⁶ Annex 2 will be removed in the version of the Conclusions Report that will be made available to the public as it contains personal data.

³⁷ The review by these two entities was requested by the City Council.

subject to a review by a competent and certified appraiser.³⁸ The review reports of the AS-TERRA valuation reports on one hand and of the alternative valuation reports on the other hand come to the same conclusion: *“The report generally meets the requirements of the regulatory acts on property valuation but has minor shortcomings which did not affect the reliability of the valuation”*.

5.2.4.5 According to the expert hired by the EIB-CM, appraisers in general find that differences of 15-20% between the estimated market value of the property and its real market value are considered acceptable. However, as table 3 in Annex 2 shows, the discrepancies between the estimation by AS-TERRA and the alternative valuator are significantly larger in all cases.

5.2.4.6 Based on its assessment, the EIB-CM found that there is indication that the market value of the affected property for Complainants No. 2, 3 and 5 was under-estimated by AS-TERRA. Refer to Annex 2 for more details about the EIB-CM assessment in this respect. This finding is important given that the estimated market value of the property constitutes the basis for all further calculations made to determine the total compensation package. The EIB-CM takes note that the issue of possible under-estimation of the market value of the property will be resolved in Court.

5.2.4.7 For Complainant No. 1, the situation is different as he already signed the purchase agreement with the City Council, received the compensation, and purchased a new apartment. Nevertheless, he claims that the amount of compensation he received was not sufficient to purchase alternative housing that is of equal or better quality than the place where he and his mother used to live. He provides various reasons to support his claim: his new apartment is in buildings that were supposed to be temporary constructions, it is smaller, has lower ceilings, is located further from the metro (5 km vs. 3,5 km from his old apartment), and a number of repairs and improvements need to be made. According to the Complainant, he had to make extra costs to renovate the interior of his new apartment to make it livable. In his previous apartment, he had two separate rooms and a more open view from the window (vs. view on apartment blocks from his new apartment). The Complainant informed the City Council about his dissatisfaction with the new situation and his living conditions after physical displacement, and was asked by the City Council to make a list of repairs and improvements he thinks are necessary at his new home. Annex 3 presents the list of items requested by Complainant No. 1 and the response by the City Council so far.³⁹ According to the Complainant, the City Council started to bring some improvements but not yet to his satisfaction.

5.2.4.8 According to the Bank’s services, the old apartment of Complainant No. 1 was not in very good state, with the kitchen and toilets being in very poor conditions. The building was also supposed to be a temporary building.

5.2.4.9 The EIB-CM was not able to visit the Complainant’s previous apartment, but visited the building and surroundings. The EIB-CM also visited the new apartment of the Complainant. Its observations are as follows: the surface area of the new apartment is smaller (total area 6.2 sqm smaller, residential area 1 sqm smaller), the new apartment has two walk-through rooms, it does not have high ceilings, and it has been renovated with heating system. Where the building of his old apartment is located, there is a yard that is greener and more spacious, compared to the public area that exists between the blocks of flats where his new apartment is located.

5.2.4.10 Apart from the observations made above and the general findings in relation to the estimation of the market value of the affected properties (§5.2.4.6) and the adequacy of the

³⁸ This review was requested by the Complainants who commissioned the alternative valuation of their property.

³⁹ Annex 3 will be removed in the version of the Conclusions Report that will be made available to the public as it concerns the City Council and the Complainant No. 1 only.

compensation (section 5.2.9), the EIB-CM is not in a position to assess whether the new apartment purchased by the Complainant is of at least equivalent quality and value as his previous place. The EIB-CM takes note that a RAP evaluation/completion audit is planned to assess the outcomes of the resettlement process, whether the living standards of PAPs have been restored or improved following physical displacement, and compliance with the lenders' standards. The EIB has confirmed that an assessment of the particular situation of Complainant No. 1 will be carried out as part of the RAP evaluation/completion audit to determine: (i) whether the total amount of compensation he received is fair and at full replacement cost in line with EIB E&S standards, and (ii) whether/to what extent the living standards of his household have been improved or at least restored.

5.2.4.11 As mentioned in §5.2.4.7, Complainant No. 1 requested a number of items, most of which concern improvements in/near the compound of the building where his new apartment is located. By requesting this list, the City Council engaged with the Complainant and demonstrated willingness to address his concerns. In EIB-CM's view, this is part of the process to ensure that the living conditions of all displaced persons are improved or at least restored, and to assist them to this effect. Therefore, it would be preferable that this engagement between Complainant No. 1 and the City Council continues. Any improvements and repairs made in the context of this engagement are expected to be taken into account in the above mentioned assessment at a later stage.

5.2.5 Alleged lack of valuation and compensation for land plot (Complainants No. 2 and 3)

5.2.5.1 Complainants No. 2 and 3 do not have the land plot (on which their residential buildings are located) in private ownership. However, they claim that the land has been in use by their family for the last 134 years. The Complainants provided documents to the EIB-CM to support their claim, including about the initial purchase of the land plot in 1886 by the great-grandfather of Complainant No. 2 and of Complainant No. 3's mother, and inheritance of the property since then.

5.2.5.2 According to the Complainants, they did not privatize their land because of practical and financial reasons, which have been explained to the services by the EIB-CM during the consultation process. According to the services, the Complainants could not have privatized their land because it was reserved for the metro project already 30 years ago. In any case, the EIB-CM considers that the land plot of Complainants No. 2 and 3 has not been privatised for objective reasons.

5.2.5.3 The Law of Ukraine on Alienation of Land Plots and Other Objects of Immovable Property located on them in Private Ownership for Social Needs and on the Grounds of Social Necessity does not specifically provide for the case where the residential building is owned by natural persons but not the land plot on which it is located.

5.2.5.4 With regard to the EIB E&S standards (see §3.2.5 above), PAPs refers to all persons impacted by the involuntary resettlement, including informal settlers (i.e. lacking formal titles) and holders of customary land-rights. Eligible PAPs may include PAPs who do not have formal legal rights to land, but have a claim to land that is recognised or recognisable under the national laws (e.g. ancestral, traditional lands), and PAPs who have no recognisable legal right or claim to the land or structure they occupy (§16, Chapter 6, Volume I of the Handbook).

5.2.5.5 Paragraph 34 of Chapter 6, Volume I of the Handbook, further specifies that *"People with formal land title, land use rights, customary or traditional rights to the land as well as those who occupy/use the land but have no formal title for objective reasons are eligible for compensation for land."*

5.2.5.6 The EIB-CM and the services agree that, according to EIB E&S standards, Complainants No. 2 and 3 are eligible for compensation for land.

- 5.2.5.7 Other relevant provisions from EIB E&S standards include §40 and §41: Where land has been taken, affected persons should be compensated with land of commensurate quality, size and value, or better. 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. Furthermore, §17 of Chapter 6, Volume I of the Handbook, defines what is to be understood by “replacement cost” (see also §5.2.3.5 above).
- 5.2.5.8 The compensation for the affected property (house and land plot) that was offered to the Complainants is monetary compensation.⁴⁰ The amount of compensation was calculated based on the methodology developed by AS-TERRA and presented earlier (see §5.2.2.2, 5.2.2.3 and 5.2.4.2 above).⁴¹ In this methodology, the sales comparison approach was applied whereby other properties for sale with similar characteristics are used to determine the market value of the affected property (component no. 1 in the total compensation package). This methodology took the size of the land plot into consideration, which was used as a correction factor⁴²: the market value of the affected property can be adjusted or not depending on the ratio of the total area of the residential building to the area of the land plot on which it is located.
- 5.2.5.9 The valuation company and the City Council consider that there is no need to estimate the market value of and compensation for the land plot separately for those PAPs who do not legally own their land plot. According to them, for this category of PAPs (who do not have formal legal rights to the land), the land is actually considered as part of the valuation process of the affected property, which is comparing the sales prices of similar properties (houses with attached land).
- 5.2.5.10 The services share the same views, i.e. that land was taken into consideration in the determination of the market value of the affected property, and thus was compensated for. Following their monitoring mission, the services found more particularly that:
- “- It was established that in this type of houses normally the house is 20 % of the total size of land, therefore the price;
- Consultants looked at households being sold in this proportion (20%house,80%land) and divided the total by the sq meters of the house – therefore the square metre value of the house includes land in the described percentage.”*
- 5.2.5.11 The RAP refers to “29 households [premises] having land in actual use without formal legal property rights to this land” (out of the 42 private houses and apartments affected).⁴³ However, it does not identify concrete entitlement measures for this category of PAPs with regard to compensation for land.⁴⁴ There is one statement being made in relation to type B affected properties: *“In case when house owners do not have formal legal rights to the land that is in their actual use, their interests and needs for compensation for loss of actual use of the affected part of the land will be considered”*.⁴⁵

⁴⁰ As mentioned in the IAR, compensation in kind has not been offered.

⁴¹ Methodology for determining the purchase price of residential buildings (or parts of buildings) located on land plots that are not in private ownership.

⁴² In the description of the methodology, it is mentioned that this is to take into account the fact that the size of the land plot is a significant factor affecting the value of the property.

⁴³ Page 25 of the RAP (Revision 03 as of 28 April 2017). See also page 15: 147 registered residents, including 21 minors, who are included in the category of households [premises] with no registered property rights for the land. The RAP monitoring consultant reports 26 households without registered property rights for land plots.

⁴⁴ The entitlements matrix does not include this category of PAPs affected by loss of land.

⁴⁵ Page 25 of the RAP (Revision 03 as of 28 April 2017).

5.2.5.12 The EIB-CM agrees that as per AS-TERRA methodology, consideration was given to land in some ways and therefore the estimated market value of the affected property includes indirectly a certain value for the attached land. The EIB-CM makes the following observations:

- In the particular case of Complainants No. 2 and 3, no correction was made to the estimated market value of their affected property for the availability of the land plot. This is because in their case, the estimated area of a typical land plot exceeds the actual area of their share of the land plot.
- The size of the land plot is not the only important factor that affects the value of a property. Its location and its actual use (especially in the context of involuntary resettlement) are also important factors to be considered.
- As outlined in Annex 2, there may be an issue related to the selection of the right comparables (given the use of a very large number of 48 comparables by AS-TERRA, most of them located in other geographical areas). This can lead to a possible under-estimation of the market value of the affected property.
- Another methodology was applied for owners with official title to land.⁴⁶ In this methodology, the market values of (i) the land plot and (ii) the land improvements (residential building, outbuildings, plantings) are determined separately, for both using the sales comparison approach.⁴⁷

5.2.5.13 Moving forward, the Bank will need to ensure that Complainants No. 2 and 3 receive adequate compensation for land (as part of the compensation package that is yet to be determined following the Court's decision), giving due consideration to the particular situation of these Complainants who claim that the land has been in use of their family for almost 150 years. In general, considering the objectives of EIB Standard 6, the Bank will need to ensure that (i) with the amount of compensation determined, Complainants No. 2 and 3 can afford to purchase a house with a plot of land attached that are equivalent or better in terms of size, quality and value, and (ii) with that amount (and other measure, if any), they are able to improve, or at least restore, their former livelihoods and living standards. With the amount of compensation calculated by AS-TERRA (if we consider the estimated market value + application of the involuntary resettlement compensation factor and inflation factor to the estimated market value, i.e. components no. 1, 2 and 3), this is questionable for Complainants No. 2 and 3 as outlined in section 5.2.9.

5.2.6 Alleged lack of valuation and compensation for perennial plants (Complainants No. 2 and 3)

5.2.6.1 The Inspection Act of AS-TERRA dated 15 May 2018 records many perennials on the land of the Complainants, which are listed according to their species and with mention of their approximate age. These include fruit trees. There is not always mention of their number.

5.2.6.2 Also the AS-TERRA valuation reports for Complainants No. 2 and 3 refer explicitly to the existence of perennials, whose market value, however, was not estimated and thus was not included in the total compensation package. AS-TERRA provides a vaguely articulated justification for this in the reports. The company provides further explanation in the description of the methodology applied for calculation of property value of residential buildings located on non-privatised land plots. The major reason appears to be that most of the houses offered for sale on the market have a certain number of green plantings and fruit trees; the selling price sought for the house by the owner is a final price and already includes

⁴⁶ The methodology to determine the monetary compensation for PAPs who are owners of residential buildings that are located on land plots that they own as well was developed by the Institute of Legal Consulting. It consists of (i) a methodology for establishing the purchase price of land plots in private ownership, and (ii) a methodology for determining the purchase price of residential buildings with registered ownership of the land plot.

⁴⁷ With regard to the application of the comparative sales approach: this methodology is using comparable land plots to determine the market value of land plots, and comparable households to determine the market value of houses.

land improvements. Other reasons provided include difficulties in determining the number of plantations, and the fact that the application of the involuntary resettlement compensation factor indirectly covers the loss of perennial plants.

- 5.2.6.3 Thus according to AS-TERRA, with the application of the sales comparison approach – which uses comparables (single family houses, many of them with garden according to the valuation company) to estimate the market value of the affected property – the market value of perennial plants was actually considered as part of the valuation process of the affected housing. Hence, there is no need for a separate appraisal of the perennial plants.
- 5.2.6.4 While this may be true in the context of sales transactions that are of a voluntary nature, practice is different in the context of involuntary resettlement. First, as mentioned in Annex 2, there may be an issue related to the selection of the right comparables (given the use of a very large number of 48 comparables by AS-TERRA). Moreover, the AS-TERRA valuation reports do not include specific records on the existence of a garden and types of plantings for the different analogues, and do not include corrections made in this respect when determining the market value of the affected property.
- 5.2.6.5 Second, Article 5 of the Law of Ukraine on Alienation of Land Plots and Other Objects of Immovable Property located on them in Private Ownership for Social Needs and on the Grounds of Social Necessity makes a specific and separate mention of perennials in the definition of what constitutes the “*buy-out price*” (see also §5.2.2.1 above).
- 5.2.6.6 Similarly, the RAP is explicit about the inclusion of perennial plants as a separate component in the compensation package. It confirms its composition in accordance with national legislation as follows: “*Purchase price (compensation) = land plot + house + other structures + perennial crops + other losses caused by land acquisition.*”⁴⁸ The same is repeated in Section 5.3 of the RAP under valuation methods for affected structures, trees, land.⁴⁹ The EIB-CM takes note that the RAP however lacks details in terms of compensation entitlements and valuation method to determine full replacement cost for perennials.
- 5.2.6.7 Finally, the EIB E&S standards are also clear about the need to consider any improvements to the land separately and that the value of trees, crops and lost income must be compensated (refer to the definition of “*replacement cost*”⁵⁰ in §17 and further details about fair compensation in §42, Chapter 6, Volume I of the Handbook).

5.2.6.8 In view of the above, the EIB-CM is of the opinion that there has been a lack of special consideration, cost estimation and appropriate compensation for crops and trees that are located on the land of Complainants No. 2 and 3 as part of the valuation process and calculation of the compensation by AS-TERRA. The EIB-CM concludes that this is not in line with the EIB E&S standards.

5.2.6.9 The EIB-CM takes note about the discussion that took place between the City Council and the EIB services during their monitoring mission in May 2019 regarding the possibility of providing in-kind compensation to the Complainants for the loss of perennial plants. In this respect, the EIB-CM insists about the need to ensure that Complainants No. 2 and 3 receive fair compensation at full replacement cost for the loss of crops and trees in line with EIB E&S standards.

5.2.6.10 There is sufficient good practice available with regard to valuation and compensation for perennials. In the RAP, perennial plants are usually treated as a separate type of loss for which

⁴⁸ Pages 19 and 20 of the RAP (Revision 03 as of 28 April 2017).

⁴⁹ Pages 22 and 23 of the RAP (Revision 03 as of 28 April 2017). Perennial plants are mentioned as a separate bullet point when describing what the value (purchase price) of the property entails.

⁵⁰ See §5.2.3.5 of this Conclusions Report describing full “*replacement cost*”.

compensation entitlements are foreseen in the entitlement matrix. Different approaches can be used to calculate cash compensation.

5.2.7 Alleged lack of compensation for moral damage and/or stress caused by involuntary resettlement (all Complainants)⁵¹

5.2.7.1 It appears that according to national legislation and jurisprudence, only the Court can decide on non-pecuniary damage and determine the amount of compensation for moral damage. A number of conditions would need to be present: (i) the presence of moral harm; (ii) the unlawfulness of the act of the causer; (iii) the existence of a causal link between the harm and the wrongful act of the causer; and, (iv) the presence of the latter's fault in causing harm. Article 56 of the Constitution of Ukraine also refers to illegal decisions, acts or omissions of state authorities, local self-government bodies, their officials and officials in the exercise of their powers. The resettlement process took place in accordance with the Law of Ukraine on Alienation of Land Plots and Other Objects of Immovable Property located on them in Private Ownership for Social Needs and on the Grounds of Social Necessity (No 1559-VI, 2009). It may be challenging for the Complainants to prove the unlawfulness/illegality of the decision/actions by the City Council.

5.2.7.2 On the other hand, the EIB E&S standards recognise the challenges and difficulties involved in involuntary resettlement: *"The complexity of displacement must be duly appreciated and its impact and remedy carefully analysed, planned and delivered as it may negatively affect the economic and social well-being of affected people..."*⁵² With regard to compensation, §42 of Chapter 6, Volume I of the Handbook states that economically assessable damage including *physical and mental harm, moral damage, and costs required for psychological and social services* must also be compensated.

5.2.7.3 In this respect, the EIB-CM reviewed the involuntary resettlement compensation factor that was applied to the estimated market value of the affected property and constitutes a component in the total compensation package.⁵³ The AS-TERRA valuation reports and the description of their methodology for the calculation of property value includes a long write-up about this factor. Both the write-up and the oral explanation provided during the EIB-CM mission are not fully clear. This makes it difficult to provide clarity over what the involuntary resettlement compensation factor is covering. The company made several statements: it is meant to make purchase of alternative housing possible/affordable for the PAP (which would otherwise not have been the case if the compensation were based only on the estimated market value of their property); on other occasions, it was said to be meant to cover compensation for moral damage and perennials as well.

5.2.7.4 There is a lack of clarity and transparency about the involuntary resettlement compensation factor. The fact that the factor varies – depending on the type of apartment or based on the estimated value of the affected housing (which in turn depends on its condition) – adds to the confusion, especially for the PAPs. There is also a concern among the Complainants that the way the factor was applied is not fair. Finally, the methodology to come up with this factor is questionable.

5.2.7.5 Despite the lack of clarity in the write-up about the involuntary resettlement compensation factor, the description ends by stating the following: *"Indeed, the market valuation base and type of value are derived from the concept of a willing seller, i.e. from such an owner who, firstly, has already decided to get rid of his or her property, and, secondly, thus already decides*

⁵¹ In addition to what is mentioned in Table 1, the Complainants underlined their attachment to their property and the area of location because they have been living there for many years. They claim their right to compensation for moral damage and refer among others to Article 23 of the Civil Code of Ukraine and Article 56 of the Constitution of Ukraine.

⁵² Paragraph 2, Chapter 6, Volume I of the Handbook.

⁵³ Component no. 2. See §5.2.2.3 above.

to additionally take on a whole bunch of non-typical expenses, efforts, circumstances and troubles that clearly accompany the agreement on the purchase of property, especially estate property, and as a result, receives a sum of money that is theoretically equal to the market value of the property. During the time of compulsory purchase of the property, its owner did not intend to voluntarily sell it and, automatically, did not voluntarily take on additional obligations in connection with such purchase, and therefore, has the right to claim compensation additional to the market value.”

5.2.7.6 Based on this and a few more references in the write-up, it appears to the CM that the main purpose of the involuntary resettlement compensation factor is to compensate the Project affected owners for the inconvenience caused by the involuntary nature of the sales transaction and purchase of new property.

5.2.7.7 If this is the case, the CM makes the following observations:

- As mentioned above, the application of an involuntary resettlement compensation factor can be considered good practice in the context of involuntary resettlement.
- It can reasonably be assumed (although this is not clear and explicit in the write-up) that the application of the factor intends to cover compensation for the stress caused by involuntary resettlement.
- In this case, the application of a factor that varies among the affected owners creates confusion.

5.2.7.8 During its mission, the EIB-CM was told by AS-TERRA that the reason for applying an involuntary resettlement compensation factor that varies (between 1.25 and 1.84) was to account for the vulnerability status of certain affected owners. The EIB-CM would like to again acknowledge that the intention is positive and in line with Standards 6 and 7. Vulnerability and the need to improve the living standards of PAPs are certainly key aspects to consider in the context of involuntary resettlement. Nevertheless, it is the EIB-CM’s view that these aspects should have been considered separately in order to enhance clarity and transparency about the compensation package.

5.2.8 Alleged lack of compensation for other losses such as loss of housing subsidy and other assets (Complainant No. 3 and 5)

5.2.8.1 Complainant No. 3 is concerned that she may lose her entitlement to the housing subsidy⁵⁴ following purchase of alternative housing. According to the Regulation on the Procedure of Assigning Housing Subsidies⁵⁵, a housing subsidy shall not be assigned in the event that anyone from among the persons registered on the residential premises (house), who are charged for housing services, within 12 months prior to the application for the housing subsidy, has purchased or otherwise legally obtained the ownership of a land plot, apartment (house), construction materials, other goods of long-term consumption for an amount that exceeds UAH 50 000.

5.2.8.2 The particular situation of the purchase of alternative housing due to involuntary resettlement is not covered. Therefore, Complainant No. 3 would have to apply with relevant documentation providing evidence of these particular circumstances to the Commission, which will then decide whether to grant her or not the housing subsidy. Thus, there is indeed a risk of loss of subsidy for Complainant No. 3; however, the risk is limited to 12 months.⁵⁶

5.2.8.3 With regard to Complainant No. 5, the two facilities (garage box and built garage/storage room) that will be affected as a result of the Project should have been adequately recorded

⁵⁴ This is a government assistance to help disadvantaged households cover the payment for utility services.

⁵⁵ Approved by the resolution of the Cabinet of Ministers of Ukraine No. 848 dated 21 October 1995 (as amended).

⁵⁶ This analysis is based on the application letter of Complainant No. 3 to the Ministry of Social Policy of Ukraine dd. 5 March 2019 and the response of the concerned Ministry to the Complainant dd. 10 May 2019.

and considered for entitlements (after verification of actual use by the Complainant's household).

5.2.8.4 As per EIB E&S standards, the census should include an inventory of losses (assets, access to resources or services, etc.) and a detailed measurement survey and valuation of lost assets, and should cover the total affected population.⁵⁷ The EIB-CM was not provided with a detailed inventory of losses including assets and valuation for all PAPs (in a consolidated manner). The RAP identified major types of losses (land, housing and businesses/commercial premises). However, it misses to identify other types of losses and their corresponding compensation entitlements as is the case for perennials and non-residential structures such as fences, garages and storage facilities.

5.2.8.5 The EIB-CM concludes that PAPs should also be compensated and/or assisted for loss of assets or opportunities – other than land and residential housing. In line with EIB E&S standards (§30, 39, and 42, Chapter 6, Volume I of the Handbook), the types of impact/loss as mentioned above for Complainants No. 3 and 5 need to be given due consideration, adequately assessed and also compensated for.

5.2.9 Alleged inadequacy of the amount of compensation to purchase alternative housing (Complainants No. 1, 2, 3 and 5)

5.2.9.1 The EIB-CM also found it important to look at whether the paid/proposed compensation (based on AS-TERRA valuation reports) enables the Complainants to purchase a new property of at least the same technical condition and quality or better. If we consider the estimated market value of the affected property (component no. 1) only, it does not seem possible. If we consider the estimated market value + application of the involuntary resettlement compensation factor and inflation factor to the estimated market value (components no. 1, 2 and 3), the results are mixed.

5.2.9.2 As far as apartments are concerned, the average cost of a two-room apartment sold in April 2019 is USD 28 000 based on real sale prices (not offer prices).⁵⁸ A search on the internet supports these findings: offer prices of a two-room apartment range in general between USD 27 000 and 36 000 in the Gagarina Avenue area. [REDACTED]

5.2.9.3 [REDACTED] If we look for example at the list of alternative housing that was proposed by the City Council to Complainant No. 2, the price for half (20 out of 41) of the (semi-)detached houses for sale is between USD 30 000 and USD 34 500; many of these are semi-detached houses (not detached). For five of the alternative housing units proposed, the price is equal to or above USD 35 000.

5.2.9.4 In all cases, if we include the involuntary resettlement compensation factor in the equation, there appears to be no amount or a limited amount only that would be left to compensate the affected owners for the involuntary nature of the selling transaction (including the fact that s/he will have additional expenses, effort and trouble that s/he did not want to take on a voluntary basis).⁵⁹ Yet, this seems to have been the very purpose of this involuntary resettlement compensation factor. For more details about this factor, refer above to §5.2.7.3-§5.2.7.8.

⁵⁷ Para 5.1.5 above (and §30, Chapter 6, Volume I of the Handbook).

⁵⁸ Analysis of the Kharkiv residential real estate market, results of April 2019, in the alternative valuation report for Complainant No. 3.

⁵⁹ Based on the figures in Annex 1 and the information provided in paras 5.2.9.2 and 5.2.9.3.

5.3 ***Alleged exclusion from compensation and assistance by Complainant No. 4: Follow-up by the EIB-CM on its recommendation in the IAR***

- 5.3.1 The EIB-CM had already concluded in its IAR about the eligibility of Complainant No. 4 as per Standard 6 (§33, Chapter 6, Volume I of the Handbook), and possible applicability of Standard 7 (see §4.5 above). The EIB-CM recommended in its IAR that the Bank closely guide the Promoter/City Council in redressing the situation for Complainant No. 4 in line with EIB Standards 6 and 7 as soon as possible. The IAR also mentions that the EIB-CM would be following up on the status with the services and the Complainant⁶⁰, and given the urgency of the situation, expects it to be resolved in a satisfactory manner before the preparation of its Conclusions Report.
- 5.3.2 To date (March 2020), the EIB-CM takes note that the situation of Complainant No. 4 has not been fully resolved yet. During the EIB-CM's mission, the City Council confirmed its commitment to address the concerns of Complainant No. 4 related to her loss of housing. In the first instance, the City Council intended to resolve the situation by primarily having the owners of the affected property give part of the compensation they received to Complainant No. 4.⁶¹ They claimed that the purchase agreement with the owners of the affected property includes a special clause about their obligation to provide Complainant No. 4 with alternative housing.
- 5.3.3 The City Council showed clause 5.1 to the EIB-CM. The translated version of this clause reads as follows: *"5.1 Obligations of the "Sellers": - to completely vacate, including persons whose place of residence is registered (or is actual) at the address of the property, alienated shares of dwelling buildings for free use and unimpeded possession by the "Buyer" by 01.07.2019 after the conclusion of the agreement;..."*. In this clause, there is no mention of any specific obligation of the seller towards Complainant No. 4 (except for making sure that she would have vacated the property).
- 5.3.4 According to the Complainant, after the two meetings that took place just after the services' monitoring mission and the issuance of the EIB-CM's IAR in May 2019, the City Council did not get in touch with her between the beginning of June and end of October 2019. During this period, the Complainant did not know whether and how her concerns would be addressed.
- 5.3.5 End of October and in November 2019, a few more initiatives were launched by the City Council to have the co-owner and Complainant agree with the proposed primary solution.⁶² As these were not successful, the City Council has been working on finding another solution end of November/beginning of December 2019. According to the Complainant, she was offered two options (a dormitory room, and a one-bedroom apartment in a hostel). The Complainant used to live in a four-room wooden house (49.8 sqm), which she used to share with other members of the family. Based on information received from the services, the City Council confirmed the offer of the second option.
- 5.3.6 This offer concerns a one-bedroom apartment of about 25-27 sqm. The building in which the apartment is located is an asset on the balance sheet of a municipal enterprise, the Kharkiv Repairs and Construction Enterprise. The City Council proposed Complainant No. 4 to sign a temporary agreement with the municipal enterprise whereby she can use the apartment and pay the utility bills. As per the temporary agreement, the Complainant would not have to pay rent. This temporary arrangement would eventually lead to the signature of an

⁶⁰ The CM enquired about the status with the services via email on many occasions (28 and 29 May, 26 June, 28 August, 13 September, 18 and 28 October 2019) and with the City Council directly during its mission. The CM exchanged numerous emails with the Complainant as well about the status of her situation.

⁶¹ In the EIB-CM's view, this might not have led to a satisfactory outcome for the Complainant given her particular situation.

⁶² According to the Complainant, such meetings took place on 23 October and 14 November 2019. According to the services, the Complainant was offered compensation of USD _____.

accommodation agreement in the hostel in the future, which would then allow the Complainant to register her permanent residence there. According to the City Council, the apartment is in a recently renovated building and in better condition than the house in which the Complainant was living. It is connected to all the necessary utility networks. It is within walking distance to public transport (route taxi and trolley bus) and few shops.

5.3.7 The Complainant refused this offer⁶³ for the following reasons: 1) Her major concern is that the temporary arrangement does not give her any indication and guarantee as to whether and for how long she would be able to stay in the apartment without any disturbances, at what terms and conditions (once the temporary agreement would be converted in an accommodation agreement), and when she would be able to register her permanent residence there; 2) She had other concerns about the location of the place and access to the metro and the City centre through the use of other public transport, which cannot be compared to the place where she used to live.⁶⁴

5.3.8 The EIB-CM acknowledges the efforts made by the City Council in finding a solution to address the loss of housing by Complainant No. 4. In the EIB-CM's view, the offer of the City Council to provide Complainant No. 4 with alternative accommodation given her particular situation is in principle an appropriate solution. The offer of housing in the case of Complainant No. 4 is in line with the objectives of EIB Standard 6 and a statement made in the RAP (page 28, 6.2.3).

5.3.9 Each person has a right to housing and to a place to live as per the Constitution of Ukraine and the Civil Code of Ukraine. Similarly, EIB Standard 6 supports the promotion, respect and fulfilment of the human right to "*adequate housing*" (that applies to affected persons whether or not they hold a legal title to their home or property under domestic law – see §23, Chapter 6, Volume I of the Handbook) and an adequate standard of living (§4, 23 and 24, Chapter 6, Volume I of the Handbook). Paragraph 43 of Standard 6 provides that: "*In cases of loss of housing, replacement housing offers must satisfy criteria of adequate housing, as defined above*". Standard 6 defines what is meant by "*adequate housing*": According to human rights standards, "*adequate housing*" must at a minimum meet certain criteria including security of tenure (i.e. guaranteeing legal protection to occupants against forced evictions, harassment and other threats), availability of basic infrastructure and services, affordability, accessibility, habitability and location (§5, Chapter 6, Volume I of the Handbook). Furthermore, Standard 6 refers to the obligation of the Promoter, as a minimum, to restore the living conditions of those affected by the Project and ideally to work on the continuous improvement of their living conditions (§26, Chapter 6, Volume I of the Handbook).

5.3.10 Moving forward, the EIB-CM would like to underline the importance of ensuring Complainant No. 4 a degree of security to continue living in the place that is being offered and adequate legal protection to this effect. The Bank will need to pay particular attention to this central aspect of "*adequate housing*" as part of its follow-up.

5.3.11 Finally, the EIB-CM considers that Complainant No. 4 is also entitled to a moving assistance. As per the RAP: "*All the groups will be provided the relocation assistance suited to the needs of each group of displaced persons, with particular attention paid to the needs of the poor and the vulnerable*" (page 27, 6.1.4). As per the entitlements matrix in the RAP, all categories of PAPs affected by the loss of housing are entitled to a moving assistance (page 30, 6.3).

⁶³ Through official letter addressed to the City Council and dated of 12 December 2019.

⁶⁴ Some reasons were explicitly mentioned in the letter and some others were shared by the Complainant with the EIB-CM.

5.4 **Role of the Bank**

5.4.1 As per the Handbook, the role of EIB is to support sound operations that have been designed and structured so as to meet EIB E&S standards and requirements as well as international best practice. This includes: (i) assessing the operation against EIB E&S principles and standards; (ii) advising and, if needed, assisting the Promoter in developing measures to manage the E&S impacts and risks of the operation consistent with the EIB's standards; (iii) assessing the capacity of the Promoter to implement all the E&S requirements as well as the E&S institutional capacity of the relevant national authorities and agencies and providing technical assistance if needed; and (iv) monitoring the operation's performance in accordance with the EIB's E&S standards throughout the duration of the loan (§8, Volume II of the Handbook).

5.4.2 **In terms of E&S due diligence**, the Bank satisfied itself that the major social safeguards tasks were undertaken. As mentioned above in §2.3, an environmental and social impact assessment was completed for the Project. An ESAP, RAP and SEP were prepared and approved by the City Council. As part of the appraisal process, the Bank reviewed these documents. The Bank provided comments on the draft RAP during its preparation. The Appraisal Fact Sheet confirms that the ESAP and the RAP have been completed in accordance with the Bank's standards.

5.4.3 In line with the recommendations made at appraisal stage, the finance agreement between the EIB and Ukraine establishes the obligation for the Promoter to implement the Project in compliance with "*Environmental and Social Standards*", and more particularly to implement the ESAP and the RAP and ensure that the PIU has sufficient and suitably qualified staff, including environmental and social experts. The Bank also subjected loan disbursements to certain conditions, including conditions related to the ESAP and RAP implementation (refer to §3.4.2-§3.4.3).

5.4.4 Moreover, it is important to note that several of the due diligence documents refer to external monitoring of the RAP, which is considered good practice for resettlement. As per the Environmental and Social Data Sheet (ESDS)⁶⁵, "*An independent monitoring and evaluation consultant will be commissioned, who will periodically monitor and report on delivery of the ESAP and RAP as well as perform a mid and end of term evaluation of RAP implementation*". The same document states that: "*The EIB will condition its loan disbursements on: (i) implementation of ESAP and the RAP(s) as agreed with the Bank; and (ii) confirmation that the PIU includes environmental and social experts to implement the ESAP and RAP... In addition, the Bank will seek commitments from the Promoter to report regularly on the status of RAP and ESAP implementation; and present mid and end of term evaluation of RAP(s) implementation.*" This is in line with §133 of Volume II of the Handbook that clearly states: "*No involuntary resettlement or forced evictions shall take place before the promoter has addressed the involuntary resettlement in a manner consistent with these Standards and satisfactory to the EIB*".

5.4.5 Therefore, the Bank put key safeguards conditions in place to be able to verify that the Project is implemented in accordance with EIB E&S standards. The EIB-CM found two areas subject to improvement: 1) ensuring the quality and comprehensiveness of the RAP and requesting to update it if needed (in this respect, see findings presented in §5.1.4-§5.1.13), and 2) adequately assessing and documenting the E&S institutional capacity, especially the capacity of the responsible entity for implementing the RAP.

5.4.6 As part of due diligence, it is necessary to carry out an adequate assessment of the capacity of the Promoter and also of the institutional capacity (including that of the entity responsible for implementing and monitoring the RAP) to deal adequately with E&S issues in accordance to the Bank's standards (see §5.4.1 above; see also §90, Volume II of the Handbook). The ESDS

⁶⁵ <https://www.eib.org/attachments/registers/75572829.pdf>

states the following: *“The Promoter will be responsible for overseeing and ensuring implementation of the ESAP and RAP. The Promoter has sufficient qualified staff within the organisation many of whom have gained experience from implementation of previous metro extension project.”* There is no mention about the capacity of other key agencies such as the City Council – which is the entity that is responsible for implementing and monitoring the RAP.

- 5.4.7 The Report on Project Staging and Implementation Plan shared by the services does not include an E&S institutional capacity assessment as such. Nevertheless, it does include a SWOT analysis of an already existing PIU expected to act as Project Steering Committee for this Project, which draws its staff exclusively from the City administration and the Promoter. The SWOT analysis identified the following weaknesses: lack of E&S expertise, and lack of experience of compliance with EBRD requirements, and the following opportunity: ability to improve the PIU through staffing internally or by involving external consultants. The consultant recommends in the report that the PIU for metro extension and depot components contains full-time E&S experts (may be external) to oversee and report on the implementation of the ESAP and SEP. The same report also recommends technical support for monitoring of implementation of the RAP.
- 5.4.8 The services followed all the recommendations made in the above mentioned report (see § 5.4.3 and 5.4.4). According to the services, the capacity of each entity in relation to resettlement has been discussed at the appraisal mission and during conference calls (although not always documented). At the time of appraisal, the Bank did not determine the need for technical assistance to support the City Council in social aspects throughout RAP implementation and ensure compliance of the resettlement process with the EIB E&S standards. It was of the opinion that the safeguards conditions put in place through the finance agreement were sufficient.
- 5.4.9 During the EIB-CM mission, it became clear that the City Council made their best efforts to ensure involuntary resettlement was implemented in line with national legislation and the RAP but could benefit from specialised knowledge and expertise on the Bank’s standards, more particularly what these standards entail and mean in practice. The City Council also shared that despite the achievements realised in a short period of time, it has not been without challenges due to the fact that it was not very familiar with implementing involuntary resettlement in accordance with the new legal framework.
- 5.4.10 The EIB-CM has not been provided with evidence about the availability of staff with expertise specialised in the social aspects of involuntary resettlement within the City Council, nor availability of social experts in the PIU as required in the loan agreement.
- 5.4.11 **In terms of monitoring**, the Bank has strengthened its own monitoring of RAP implementation after submission of the complaints. EBRD and EIB conducted a joint monitoring mission in May 2019, which resulted in a list of actions to be taken and recommendations. There have been several exchanges between the services and the City Council between May 2019 and January 2020 with regard to the follow-up.

5.4.12 Moving forward, it will be essential in CM's view for the services to closely coordinate with the City Council all further steps/actions to be taken, in a manner that would be as concrete as possible. Such detailed information would enable both the EIB services and the CM to adequately assess how the concerns regarding RAP implementation, and more particularly the concerns of the Complainants, are being addressed and to what extent the actions taken are in compliance with the EIB E&S standards.

5.4.13 As mentioned above, the CM would like to reiterate that in general the hiring of an external consultant for monitoring RAP implementation is considered good practice, which was recommended for the Project at appraisal stage and has been implemented. In its IAR, the CM suggests however to critically review the current monitoring arrangements, especially with regard to the RAP evaluation/completion audit. This is to ensure the independence, quality and comprehensiveness of the reporting on RAP implementation at completion stage, as well as its responsiveness to both banks' E&S standards.

Footnote: The local consultancy firm that was hired by EBRD for external RAP monitoring is the same firm that was involved in the project preparation process, including the RAP preparation. In CM's view, this may result in a possible conflict of interest and/or unintended bias in the monitoring and reporting.

6. CONCLUSIONS AND RECOMMENDATIONS

6.1 Table 2 presents the EIB-CM's conclusions and recommendations in relation to the different allegations of the Complainants related to compensation. As mentioned in the findings section, the EIB-CM identified specific issues related to the approach used to determine the market value of the affected property of the Complainants, and found that compensation for specific losses/impacts for Complainants No. 2, 3 and 5 is missing or inadequate in the determination of the "buy-out price" (total compensation package). The EIB-CM concludes that the determination of the compensation based on AS-TERRA valuation reports is not fully in line with the EIB E&S standards.

6.2 The EIB-CM takes note that a RAP evaluation/completion audit is planned for assessing the involuntary resettlement process. In EIB-CM's view, the list of concrete actions to address the concerns of the five Complainants (taking into account the EIB-CM's findings and conclusions), as referred to in the table below, can be prepared as soon as possible, and the results of their implementation could feed into the RAP evaluation/completion audit exercise. In other words, there is no need to wait for this exercise to take place in order to address the concerns of the Complainants.

6.3 With respect to the RAP evaluation/completion audit, the EIB-CM underlines the importance of an independent view to be provided on the whole process of resettlement and livelihood restoration, its compliance with EIB E&S standards, and any additional requirements/corrective actions for them to be met. So far, an in-depth analysis of the resettlement outcomes and the provision of more qualitative information about RAP implementation in the progress reporting is missing: an analysis about whether the owners who purchased alternative housing were able to buy a property of equivalent or better quality with the cash compensation paid for their affected property (and within what price ranges), information about their satisfaction with the new property, the percentage of owners who did actually reside at the affected property and percentage of owners for whom it was their only property and place of residence, the reasons why the 29 other owners have not (yet) purchased alternative housing, the re-establishment of businesses affected by the Project, and more generally regarding the status of restoration or improvement of the living conditions of the PAPs following physical displacement. The EIB-CM advises that the assessment of successful completion of the RAP implementation look into these aspects, and that the RAP evaluation/completion audit report therefore include this type of analysis and information.

Table 2 - EIB-CM's conclusions and recommendations regarding allegations related to compensation

Allegations related to compensation	Conclusions of EIB-CM's review	Recommendations for the EIB services
Alleged issues related to adequacy of monetary compensation (Complainants No. 1, 2, 3 and 5)		
<p>Alleged under-estimation of market value of affected property (Complainants No. 1, 2, 3 and 5)</p>	<p>There is indication that the market value of the affected property for Complainants No. 2, 3 and 5 has been underestimated by AS-TERRA. This finding is important given that the estimated market value of the property (component no. 1) constitutes the basis for all further calculations made to determine the total compensation package. Refer to section 5.2.4 and Annex 2 that reports the findings of the EIB-CM assessment for more details.</p> <p>Note: Complainant No. 1 already signed the purchase agreement with the City Council, received the proposed compensation amount, and purchased a new apartment. Therefore, the EIB-CM focused on the responsibility of the City Council to ensure -and if needed assist him in this respect- that his standards of living have improved, or at least been restored, at their pre-Project level following physical displacement.</p>	<p>The EIB-CM recommends that the Bank's operational services continue to closely follow up with the City Council (in collaboration with the Promoter). The Bank must ensure that the monetary compensation (total compensation package) provided to the Complainants is fair and at full replacement cost – taking into account the findings of the EIB-CM's assessment in this respect, and more generally EIB E&S standards, especially Standard 6.</p> <p>As part of their follow-up, it is advised that the services provide technical guidance to the City Council and work together to prepare a list of concrete actions for addressing the concerns of the Complainants in line with the EIB-CM's findings and more generally EIB E&S standards.</p>
<p>Alleged lack of valuation and compensation for land plot (Complainants No. 2 and 3)</p>	<p>According to EIB E&S standards, Complainants No. 2 and 3 are eligible for compensation for land. The EIB-CM agrees that as per AS-TERRA methodology, consideration was given to land in some ways and therefore the estimated market value of the affected property includes indirectly a certain value for the attached land. The EIB-CM makes some observations in this respect. Refer to section 5.2.5 for more details.</p>	<p>The EIB-CM will be following up within the next 12 months from the issuance of this report with the services on the actions taken to ensure fair compensation at full replacement cost in line with EIB E&S standards.</p>
<p>Alleged lack of valuation and compensation for perennial plants (Complainants No. 2 and 3)</p>	<p>The EIB-CM found a lack of special consideration, cost estimation and appropriate compensation for perennial crops and trees that are located on the land of Complainants No. 2 and 3 as part of the valuation process and calculation of the compensation amount. It concludes that this is not in line with the EIB E&S standards. Refer to section 5.2.6 for more details.</p>	

Allegations related to compensation	Conclusions of EIB-CM's review	Recommendations for the EIB services
<p>Alleged lack of compensation for moral damage and/or stress caused by involuntary resettlement (all Complainants)</p>	<p>It appears to the EIB-CM that the main purpose of the involuntary resettlement compensation factor (component no. 2 in the total compensation package) is to compensate the Project affected owners for the inconveniences caused by the involuntary nature of the sales transaction and purchase of new property. If this is the case, it can reasonably be assumed that the application of this factor intends to cover compensation for the stress caused by involuntary resettlement.</p> <p>In the EIB-CM's view, the application of an involuntary resettlement compensation factor can be considered good practice in the context of involuntary resettlement. Refer to section 5.2.7 for more details.</p>	
<p>Alleged lack of compensation for other losses such as loss of housing subsidy and other assets (Complainants No. 3 and 5)</p>	<p>Certain types of losses, including assets and opportunities, other than land and residential housing, were not given due consideration, and thus subject to valuation and compensation. It is the case for the potential loss of housing subsidy for Complainant No. 3, and the impact on two garages for Complainant No. 5 (upon verification of actual use by the household). Refer to section 5.2.8 for more details.</p>	
<p>Alleged inability to purchase alternative property with the paid/proposed compensation (Complainants No. 1, 2, 3 and 5)</p>	<p>Looking at the estimated market value of the affected property only (component no. 1), this amount is most likely not sufficient to purchase alternative property.</p> <p>If we consider the estimated market value and the application of the involuntary resettlement compensation and inflation factors (components no. 1, 2 and 3), the results are mixed as to whether or not the Complainants can purchase alternative property that is of at least equal or better quality than their affected property. In any case, this would then mean that no amount or a limited amount only would be left to compensate the affected owners for the involuntary nature of the selling transaction, which seems to have been the very purpose of this involuntary resettlement compensation factor. Refer to section 5.2.9 for more details.</p>	

Allegations related to compensation	Conclusions of EIB-CM's review	Recommendations for the EIB services
<p>Follow-up by the EIB-CM regarding the need to redress the situation of Complainant No. 4 (alleged exclusion from compensation and assistance)</p>	<p>To date (March 2020), the EIB-CM takes note that the situation of Complainant No. 4 has not been fully resolved yet. Refer to section 5.3 for more details.</p>	<p>The EIB-CM reiterates its recommendation made in its IAR. The EIB-CM considers that at this stage, there is a need to have the situation of the Complainant resolved as soon as possible. It recommends the EIB operational services to continue to work closely with the City Council (in collaboration with Promoter) and agree on the way forward in line with what is mentioned in §5.3.8 to §5.3.11 above.</p> <p>The EIB-CM will be following up within the next three months from the issuance of this report with the services and the Complainant regarding the proposed solution/options by the City Council. As part of its follow-up, the EIB-CM will pay particular attention to the degree of security and legal protection offered with the proposed accommodation, as well as the need to at least restore the living conditions of the Complainant to a level existing prior to the Project in line with EIB Standard 6.</p>

As a result of the EIB-CM's in-depth assessment of the Complainants' allegations, the multiple exchanges it had with them and its site visit, the EIB-CM developed a comprehensive understanding of their specific concerns. With a view to facilitating the implementation of its recommendations above, the EIB-CM had some concrete suggestions to address the issues raised by the Complainants in line with the EIB E&S Standards. These suggestions have been discussed with the Bank's services as part of the consultation process.

6.4 As far as the role of the Bank is concerned, the EIB-CM is making the following suggestions for improvement.

In terms of due diligence:

- 1) Ensure the RAP is as clear and comprehensive as possible and if this is not the case and/or all required information is not yet available at the time of project approval, request for an update of the RAP before the start of the resettlement process. Moreover, it is considered essential to directly address issues related to gaps between the national legislation and EIB E&S standards with the Promoter/local authorities from the very start and identify very concrete measures to bridge such gaps.
- 2) Adequately assess and properly document the E&S institutional capacity, especially the capacity of the responsible entity for implementing the RAP. Mobilise technical assistance resources if needed for providing continuous support to the concerned entity/key agencies in order to ensure full compliance with the Bank's E&S standards.

In terms of monitoring: Strengthen active monitoring of the Bank from the beginning of the resettlement process and ensure the establishment of an independent and effective GRM at project level at the start of resettlement.

S. Derkum
Head of Division
Complaints Mechanism
27 April 2020

O. El Sabee Larrañaga
Senior Complaints Officer
27 April 2020