

DIVAČA-KOPER second rail track (2017-0183)

Complaint SG/E/2020/18

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

INITIAL ASSESSMENT REPORT

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Complaints Mechanism

Prepared by

Complaints Mechanism

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THE EIB GROUP COMPLAINTS MECHANISM

The EIB Group Complaints Mechanism is designed to provide the public with a tool enabling alternative and pre-emptive resolution of disputes in cases in which members of the public feel that the EIB Group has done something wrong, i.e. if they consider 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.

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 set out by the European Ombudsman, are administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal to provide information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group’s activities and to Project cycle-related policies and other applicable policies of the EIB.

The EIB Group Complaints Mechanism is designed 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 Group Complaints Mechanism, please visit our website: <https://www.eib.org/en/about/accountability/complaints/index.htm>

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GLOSSARY OF TERMS AND LIST OF ACRONYMS

2TIR	Code name for the Divača-Koper railway line as presented in the investment programme
2TDK	Slovenian special purpose company implementing the Divača-Koper second rail track project (the developer)
EC	European Commission
EIA	Environmental Impact Assessment
EIB	European Investment Bank
EIB-CM	EIB Group Complaints Mechanism Division
ESDS	Environmental and Social Data Sheet
EU	European Union
NGO	Non-governmental organisation
SEA	Strategic Environmental Assessment

EXECUTIVE SUMMARY

In October 2020, the EIB Group Complaints Mechanism (EIB-CM) registered a complaint submitted by a non-governmental organisation (NGO) called *Davko Placevalci Se Ne Damo* (Taxpayers Don't Give Up). The case concerns the "Divača-Koper second rail track" project, which consists of the construction of 27 km of single-track railway line on a new alignment to increase rail capacity between the port of Koper and the rail junction in Divača in Slovenia. The complaint includes allegations about the following:

- An apparent double track on the new railway line planned by the promoter (true scope according to the complainant), which differs from the scope of the project appraised by and approved for financing by the EIB (single-track rail project with service tunnels).
- Grossly underestimated cost of the option chosen: there is a significant difference between the actual projected second rail track (2TIR) investment programme cost and the value of the investment programme adopted by the previous government. The estimate, which was the basis for obtaining an EIB loan, deviates significantly from the €1.84 billion now envisaged and is significantly higher than the €1.14 billion stated in the investment programme.
- The project does not comply with national and EU law, especially the Strategic Environmental Assessment (SEA) Directive, the Environmental Impact Assessment (EIA) Directive, the Habitats Directive and the Water Framework Directive.
- The project unnecessarily crosses through a Natura 2000 protected area and is expected to negatively impact the protected area, including the transnational Glinščica and Beka (Val Rosandra) nature reserve within the Natura 2000 framework.

The complainant urges the EIB to reconsider its decision to finance the project.

The project promoter is the Republic of Slovenia and the developer is a Slovenian special purpose company called 2TDK (fully owned by the promoter). The EIB services appraised the project and finalised the appraisal process in March 2019. The project was approved by the EIB's Board of Directors that same year, while the finance contract is yet to be signed.

Following the admissibility of the complaint, the EIB-CM carried out an initial assessment. In the light of this and due to the nature of the allegations made, the EIB-CM deems it appropriate to carry out a compliance review regarding the following allegations:

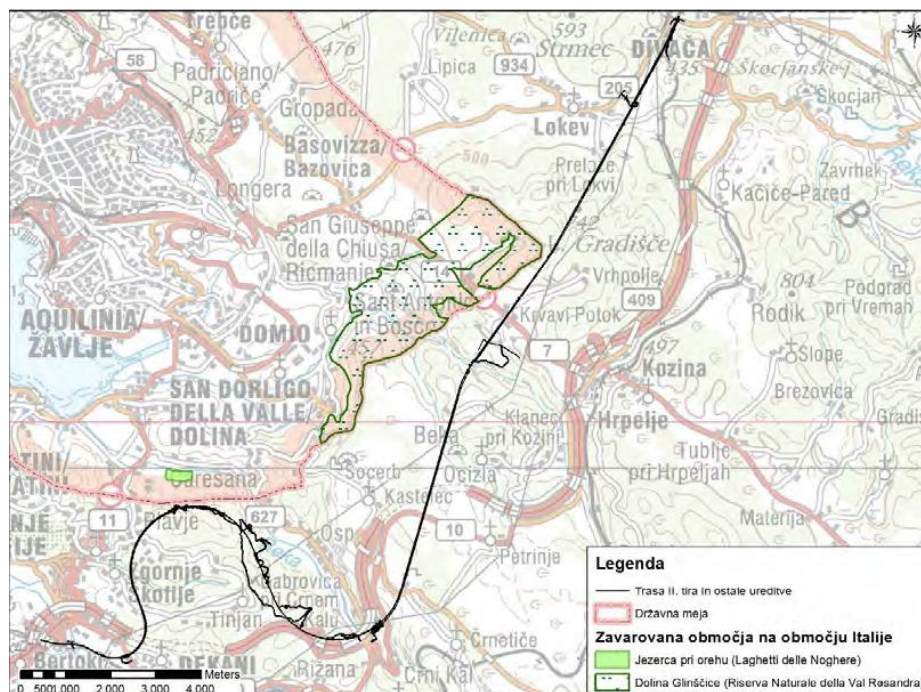
1. The project's negative impacts on the environment and non-compliance with EU environmental law: (i) non-compliance with the SEA and EIA Directives; (ii) the project's negative impacts on protected areas and non-compliance with the Habitats Directive and Water Framework Directive; and (iii) the project's negative transboundary impacts and issues with transboundary consultations.
2. The scope of the 2TDK Divača-Koper project as approved by the EIB (a single-track railway line with service tunnels) differs from the actual scope of the 2TIR Divača-Koper investment programme (a double-track railway line).

1. **BACKGROUND INFORMATION**

Project description

- 1.1 The complaint concerns the “Divača-Koper second rail track” project (2017-0183) in Slovenia, which was approved for financing by the EIB.
- 1.2 The project involves the construction of a new 27 km single-track electrified railway line (a second track, as it is commonly referred to in the documentation) located on a new alignment between the port of Koper and the rail junction in Divača (hereinafter the project, see Figure 1 below).
- 1.3 Due to difficult terrain and a 430-metre elevation difference over a short distance, the alignment includes eight tunnels with an aggregate length of 20.5 km and two viaducts with an aggregate length of 1 100 metres. For the longest three tunnels (6.7 km, 6 km and 3.8 km), the Republic of Slovenia (hereinafter the “promoter”) intends to build parallel service tunnels of the same diameter as the main tunnels for maintenance and evacuation purposes.
- 1.4 The project, as described above and in the technical description of the project included in the appraisal documents, was approved for EIB financing by the Board of Directors in April 2019. The borrower is expected to be the Slovenian company 2TDK, which is fully owned by the Republic of Slovenia. The finance contract is yet to be signed, with its signature being subject to the implementation of certain conditions.
- 1.5 The project aims to improve freight rail access to Koper port and thereby support the maintenance and improvement of rail modal share. Koper is one of five ports in the North Adriatic Ports Association (NAPA) competing to serve the central and southeast European freight market. The project is identified as part of the corridor development plans for the core Baltic Adriatic and Mediterranean TEN-T rail corridors¹. Investment will be necessary in the coming years to address the bottlenecks on this short section of the corridors.

Figure 1. Location of the Divača-Koper second rail track project



Source: EIA report (2012)

¹ Baltic Adriatic | Mobility and Transport (europa.eu)

Project development background

- 1.6 The EIB worked on the project preparation and performed the appraisal between 2017 and 2019.
- 1.7 According to the appraisal documents: The planning for the development of the project stretches back over 25 years. The current solution is the result of decisions taken in the past based on norms and expectations that were different from those prevailing today.
- 1.8 In June 2017, at the request of the Republic of Slovenia, the EIB issued a conditional letter of support for the Connecting Europe Facility (CEF) Blending Call. In May 2019, a €109 million CEF grant associated only with part of the project (see paragraph 1.2) was approved and signed. In 2019, the part of the project, as offered for the CEF funding, was valued at €545 million and required, among other things, at least €109 million of matching debt as part of its financing structure.
- 1.9 The project, which was presented to the EIB by the promoter and as approved for financing by the EIB, is a part of a bigger investment program² (also see paragraphs 4.23-4.26 below).
- 1.10 In September 2020, the EC announced that it has approved an investment of €80 million from the Cohesion Fund to build a tunnel and two viaducts as part of a wider scheme to provide a second railway track between the port of Koper and the village of Divača in Western Slovenia³.

2. THE COMPLAINT

- 2.1. In October 2020, the EIB-CM registered a complaint submitted by a Slovenian NGO⁴ *Davko Placevalci Se Ne Damo* (translates into English as *Taxpayers Don't Give Up*) concerning the project described above.
- 2.2. The complainant believes that the project scope (single-track rail project with service tunnels – as appraised by the EIB) differs from the actual scope of the 2TIR Divača-Koper investment programme: a double-track project on the new alignment.
- 2.3. The complainant alleges that there is also *“a significant difference between the actual [...] 2TIR investment, compared to the [investment programme] adopted by the previous government.”* The complainants assert that the estimate, which was the basis for obtaining an EIB loan, deviates significantly from the actual cost. It maintains that the investment programme is now priced at €1.84 billion, which is significantly higher than the €1.14 billion stated earlier, noting that *“even this increased estimate does not include all costs of the double-track line, which will be borne by Slovenian taxpayers,”* and that *“experience of such projects dictates an expectation of an actual cost which is likely [to be] 40-45% above this figure (i.e. somewhere in excess of 2.6 billion euros).”*
- 2.4. The complainant alleges that *“a number of EU Directives have been grossly violated during the preparation of the project,”* referring to the SEA, EIA and other directives. It alleges that national regulations were breached, including the Regulation on a uniform methodology for the preparation and processing of investment documentation in the field of public finance (2006)⁵. The complainant claims that one of the building permits was issued *“without a mandatory comprehensive environmental impact assessment (CPVO)”* and that *“the decision on [the] preparation [of the third track] was adopted by the Minister of the Environment [...] on*

² See the announcement in the national web portal (January 2019) <https://www.regionalobala.si/novica/vlada-potrdira-investicijski-program-za-drugi-tir-projekt-je-ekonomsko-upravicen> and the Investment Programme developed by Deloitte svetovanje d.o.o. available [here](#) (2019)

³ The EC announcement is available [here](#)

⁴ The complainant did not request confidentiality.

⁵ The Regulation can be accessed [here \(in Slovenian\)](#).

8 November 2019).”

- 2.5. The complaint raises the issue of the project *“unnecessarily wending [its] course through a Natura 2000 protected area”* (see Figure 1). The project is believed to *“impact strongly [on] the protected area, including the transnational Glinščica and Beka (Val Rosandra) nature reserve within the Natura 2000 framework.”*
- 2.6. The complainant points out that the project will jeopardise *“the aquifer and a watercourse that provides Trieste’s potable water supply (the chosen route unnecessarily sweeps in an expansive and expensive northward arc to a point within three hundred metres of the Italian border).”*
- 2.7. The complainant submitted a proposal for an alternative option to the project alignment, which in their opinion is significantly cheaper and has a much smaller environmental footprint.
- 2.8. The complainant urges the EIB to reconsider the financial support for the project, which was appraised as a single track, and affirms that the true scope of the project was concealed by the promoter.

3. REGULATORY FRAMEWORK

The role of the EIB-CM

- 3.1 The EIB Group Complaints Mechanism Policy⁶ tasks the EIB-CM with addressing complaints concerning alleged maladministration by the EIB Group⁷. The description of maladministration is provided in the EIB-CM Policy document⁸ and in the introduction on the EIB Group Complaints Mechanism (above).
- 3.2 The EIB Group Complaints Mechanism Policy and Procedures⁹ regulate the work of the EIB-CM. The EIB-CM compliance review includes an investigation of compliance with existing policies, procedures and standards¹⁰.
- 3.3 It is important to note that according to Article 4.3.2 of the EIB Group Complaints Mechanism Policy, *“Complaints against [...] national, regional or local authorities (e.g. government departments, state agencies and local councils) are not handled by the EIB-CM.”*
- 3.4 As indicated below, the EIB environmental and social standards require compliance of the project with applicable national and EU law, which is the responsibility of the promoter and local authorities. Further, Article 4.3.14 of the EIB-CM Policy states: *“However, the EIB Group has a duty to verify compliance with its applicable policies, procedures or standards.”*
- 3.5 Finally, Article 1.4.5 of the EIB-CM Procedures states: *“An EIB-CM review will not pass judgement on activities under the sole responsibility of third parties, notably those of the Promoter or Borrower, or of authorities at local, regional or national level, of European institutions or international organisations. Unless an infringement of EU law is established by the European Commission or a competent judicial authority, an EIB-CM review will not call into question the correctness of the transposition of EU law into national law by EU Member States. The EIB-CM will refer the matter to the European Commission in case of serious concerns and inform the Management Committee accordingly.”*

⁶ Available at: https://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf.

⁷ Paragraph 5.1.3 and 5.3.2 of the EIB Group Complaints Mechanism Policy.

⁸ Paragraph 3 of the EIB Group Complaints Mechanism Policy.

⁹ Available at: https://www.eib.org/attachments/strategies/complaints_mechanism_procedures_en.pdf.

¹⁰ Paragraph 4.3.14 and 5.3.3 of the EIB Group Complaints Mechanism Policy.

Project applicable standards

3.6 Based on the initial assessment, the project applicable standards include:

- Relevant national and EU environmental law such as the EIA Directive¹¹, the SEA Directive¹², the Habitats Directive¹³, the Water Framework Directive¹⁴, etc.;
- The EIB Statement of Environmental and Social Principles and Standards (ESPS, 2009¹⁵), the Environmental and Social Practices Handbook (Volume I (2018¹⁶) and Volume II (2013)), including:
 - Standard 1: Assessment and management of environmental and social impacts and risks;
 - Standard 3: Biodiversity and ecosystems;
 - Standard 10: Stakeholder engagement.

4. WORK PERFORMED BY THE EIB-CM

- 4.1 Following the admissibility of the complaint, the EIB-CM carried out an initial assessment on the concerns raised by the complainant. The objective of the initial assessment is to clarify the complainant's concerns, understand the complainant's position and the validity of the concerns raised, and determine if further work by the EIB-CM is necessary and/or possible (compliance review or mediation between the parties) to address the allegations or resolve the issues raised by the complainant.
- 4.2 As part of its initial assessment, the EIB-CM reviewed project documentation including the Environmental and Social Data Sheet (ESDS¹⁷) summarising the EIB's environmental and social appraisal and project information made available to the public on the EIB website¹⁸.
- 4.3 The EIB-CM was informed of previous communication between the Bank (2019) and the complainant in relation to this project. In that context, the Bank noted that it is aware of the long planning history and public debate regarding this project, and highlighted the fact that at the time the EIB had just started its due diligence process on the project for potential financing.
- 4.4 The EIB-CM had an initial meeting with the EIB services on the case, which took place in November 2020. The services shared information and further documentation following the meeting.
- 4.5 At the beginning of December 2020, the EIB-CM liaised with the complainant with a view to presenting the mandate and procedures of the EIB-CM and clarifying information and issues raised in the complaint. The EIB-CM reviewed the complaint and the further correspondence and additional documents provided by the complainant.
- 4.6 During the initial assessment, mediation and dialogue facilitation were considered, but were not

¹¹ EIA Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (as amended by Directive 2014/52/EU).

¹² SEA Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (applicable on a strategic planning level).

¹³ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended.

¹⁴ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, as amended.

¹⁵ The EIB Statement of Environmental and Social Principles and Standards (2009) is available [here](#) (in English).

¹⁶ The EIB Environmental and Social Practices Handbook (2018) is available [here](#) (in English).

¹⁷ The ESDS is available [here](#).

¹⁸ EIB project summary sheet (online), which can be accessed [here](#).

deemed suitable for the type of allegations.

Project documentation reviewed¹⁹

- 4.7 Information provided in paragraphs 4.10 to 4.22 below is sourced from the ESDS²⁰, a document that was prepared as part of the EIB's project appraisal and made public after the Board's approval of the project. The full document is available on the EIB website.

Project scope and a change to the project scope

- 4.8 The scope of the EIB project (approved for financing) is defined in the description of the project, as presented in the EIB documents pertaining to the project appraisal. Note that the finance contract with the promoter has not been signed yet.
- 4.9 According to the EIA Directive, a change to the project scope, as assessed for the purpose of development consent, is subject to a screening determination (a change of scope falling within the meaning of Annex II) or may be subject to an environmental impact assessment (a change of scope falling within Annex I).

Project alignment, environmental risks and mitigation measures

- 4.10 The project is a civil engineering scheme to be implemented as a greenfield development. It will be realised mostly in tunnels or on viaducts, which may give rise to a number of associated potential impacts and risks. As per the ESDS, the alignment has been defined taking into account the best available knowledge of the karst phenomena in the area and all known caves have been mapped. In particular, the alignment has been modified so that the Ocizeljjska Jama cave system will be avoided.
- 4.11 Environmental risks include geotechnical and geological risks (such as disturbances of surfaces, landslides, rockslides and erosion); contamination of soil by hazardous or harmful substances; pollution or alteration of groundwater and surface watercourses; destruction of or damage to caves; destruction of or damage to wildlife habitats (including those of protected species); visual impact; noise and vibration during construction; and burden on the environment due to significant surplus of excavated material (4.2 million m³, including the enlarged service tunnels as described below). The main cross-border risks are related to potential impacts on groundwater and surface watercourses, and noise during construction and operation.
- 4.12 The project runs through or close to the following Natura 2000 sites: SAC Kras (project runs 13.1 km through SI3000276), SPA Kras (project runs 15.4 km through SI5000023), SCI Carso Triestino e Groziano (IT3340006, close to the continuation of SI3000276 in Italy), SPA Aree Carsiche della Venezia Giulia (IT3341002, close to the continuation of SI5000023 in Italy), SAC Rizana (350 metres from the project), SI3000252 SAC Škocjanski zatok (1.2 km from the project) and SI5000008 SPA Škocjanski zatok (1.2 km from the project).
- 4.13 The project's risks and impacts were analysed during the EIA procedure. The EIA report and the environmental consent documentation define corresponding mitigation measures. Moreover, they define further detailed studies to be undertaken prior to the commencement of the works, such as a study for the prevention and reduction of particle emissions, as well as monitoring during construction and operation.
- 4.14 Mitigation measures include stabilisation of the terrain to prevent rockslides or landslides; sedimentation tanks; specific design of the drainage system and water-tightness of the tunnels to prevent water pollution; a detailed protocol for actions to take if caves are encountered, including notifying the competent authority; limitation of the construction time and of the size of construction bases; and screens for reducing environmental noise during operation.

¹⁹ Please, note that only extracts of project documentation are presented in this section.

²⁰ The ESDS is available [here](#).

- 4.15 The main residual impacts of the project are the conversion of about 106 ha of land (mostly forest, but also 29 ha of agricultural land); visual intrusion; use of finite resources; and nuisance during the construction phase, for both wildlife and trackside dwellers.
- 4.16 Despite the geological surveys carried out and other mitigation measures, there remains some residual risk related to the karst phenomena and the corresponding potential contamination of groundwater or change of hydrological regime. The appraisal documentation also states that this risk cannot be fully mitigated.

National authorisation for the project on a strategic level

- 4.17 According to the ESDS, the project forms part of Slovenia's transport development strategy up to 2030, which has been subject to an SEA as set out in Directive 2001/42/EC.
- 4.18 The ESDS also notes that the project has been subject to considerable public debate and two national referenda.

Project development consent

- 4.19 The project falls under Annex I of the EIA Directive (Directive 2011/92/EU, as amended) with the EIA procedure undertaken between 2012 and 2014.
- 4.20 The project's alignment passes the immediate vicinity of the Slovenian/Italian state border (see Figure 1 above). As per the ESDS, transboundary consultations were held with the competent Italian authorities in 2012 to 2013 and their comments were taken into account in granting environmental consent.
- 4.21 In February 2014, the competent authority (the Environmental Agency of the Republic of Slovenia) granted partial environmental consent, which did not include a section in the Beka Landscape Park; this section runs on a viaduct between two tunnels. In October 2014, the competent authority issued a supplementary decision giving consent for the Beka Landscape Park section.
- 4.22 The appraisal documentation states that, as part of the EIA, an appropriate assessment of the likely impacts of the project on these sites was carried out in accordance with Article 6(3) of Directive 92/43/EEC (the Habitats Directive). The EIA report and environmental consent documentation establish some specific mitigation measures for avoiding or minimising impacts on these sites, such as forbidding works or transport of material in particular areas, limiting the period during which trees and bushes may be cut, and limiting the period during which watercourses may be regulated.

Investment programme modification

- 4.23 In June 2017, the government of Slovenia issued a decision (on the level of Secretary General) to start the preparation of the necessary legal and technical bases in order to allow the planned railway line on the Divača-Koper section to be upgraded to a double-track line.
- 4.24 The ESDS²¹ mentions that in August 2018, the competent authority screened out a change in the project design consisting of enlargement of the cross-section of the service tunnels. The promoter's intention is to build these service tunnels with the same cross-section as the main tunnels with a view to possibly using the service tunnels in the future for installing an additional railway track. The analysis carried out for the screening out decision is, however, limited to the mere impact of enlarging the cross-section and does not consider the potential construction of an additional track. If such an additional track is to ever be considered, it will need to be the subject of a separate regulatory procedure.

²¹ The ESDS is available [here](#).

- 4.25 In July 2019, the promoter (Directorate for Spatial Planning, Construction and Housing of the Ministry of the Environment and Spatial Planning) requested a screening for the need to carry out an SEA (CPVO - celovite presoje vplivov na okolje or comprehensive environmental impact assessment procedure in Slovene) in the process of amending the national land use plan for the second track of the railway line on the Divača-Koper section. In November 2019, the Directorate for the Environment of the Ministry of the Environment and Spatial Planning issued a Decision Ref. 35409-173/2019/16 (8.11.2019) stating a full SEA procedure must be carried out.
- 4.26 In December 2020, the developer issued a letter (date 03 December 2020), stating that the 2DKT company "has no mandate to initiate or implement any activities regarding the construction of the second railway track of the project."

5. WAY FORWARD

- 5.1 As a result of its initial assessment, the EIB-CM identified the following allegations, which will be subject to a compliance review:

Allegation 1: Project's negative impacts on the environment and non-compliance with EU environmental law:

Sub-allegation 1.1: Project's non-compliance with the EIA and SEA Directives;

Sub-allegation 1.2: Project's negative impacts on protected areas and non-compliance with EU directives such as the Habitats Directive and Water Framework Directive;

Sub-allegation 1.3: Project's negative transboundary impacts and issues with transboundary consultations.

Allegation 2: Scope of the 2TDK Divača-Koper project as approved by the EIB (a single-track railway line with service tunnels) differs from the actual scope of the 2TIR Divača-Koper investment (a double-track railway line).

- 5.2 The compliance review will assess the complainants' allegations in the context of potential Bank maladministration, including whether the Bank complied with the applicable regulatory framework and the EIB Group's own policies, procedures and standards (see paragraphs 3.1 to 3.6). The review will assess the project documentation and the due diligence process carried out by the Bank in the areas related to the complainant's concerns as identified above (see paragraph 5.1), taking into account the scope of the project as was approved by EIB for financing.
- 5.3 The outcome of the compliance review will be communicated to the complainant through the EIB-CM's Conclusions Report.

Complaints Mechanism
16.03.2021

Complaints Handling
& Reporting
16.03.2021