

## Thermal Power Plant - Šoštanj

Slovenia

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

Complaint SG/P/2012/01  
Thermal Power Plant - Šoštanj

# CONCLUSIONS REPORT

12 December 2013

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**Prepared by**

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**Complaints Mechanism**

**External Distribution**

Complainants: [REDACTED] behalf of FOCUS and [REDACTED] on behalf of Environmental Law Service  
Borrower: HSE  
Beneficiary: TEŠ

**Internal Distribution**

Management Committee  
Secretary General  
Inspector General  
EIB services concerned

### **The EIB Complaints Mechanism**

The EIB Complaints Mechanism intends to provide the public with a tool enabling alternative and pre-emptive resolution of disputes in cases whereby the public feels that the EIB Group did something wrong, i.e. if they consider that the EIB committed an act of maladministration. When exercising the right to bring a complaint against the EIB, any member of the public has access to a two-tiered procedure, one internal – the Complaints Mechanism Division (EIB-CM) – and one external – the European Ombudsman (EO).

Complainants that are not satisfied with the EIB-CM's reply have the opportunity to submit a confirmatory complaint within 15 days of the receipt of that reply. In addition, complainants who are not satisfied with the outcome of the procedure before the EIB-CM and who do not wish to make a confirmatory complaint have the right to lodge a complaint of maladministration against the EIB with the European Ombudsman.

The EO was "created" by the Maastricht Treaty of 1992 as an EU institution to which any EU citizen or entity may appeal to investigate any EU institution or body on the grounds of maladministration. Maladministration means poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Some examples, as set 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 activities and to project cycle related policies and other applicable policies of the EIB.

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

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

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## CONCLUSIONS REPORT

### PART I – Executive Summary

#### ***Thermo-Electric Power Plant - Sostanji***

**Complainants:** [REDACTED]; on behalf of FOCUS and [REDACTED] on behalf of ELS

**Date received:** 9 January 2012

**Project Status:** Signed and fully disbursed

**Board Reports:** 27 September 2007 and 15 December 2009

**Contracts Amount:** EUR 550 million (The Bank signed two Finance Contracts: FC1 EUR 110 million guaranteed by commercial banks; FC2 EUR 440 Million, guaranteed by the Republic of Slovenia)

#### **SUMMARY OF ALLEGATIONS**

1. Failure to comply with Directive 2004/17/EC
2. Alleged flaws in the EIB due diligence on the procurement pertaining to the project

#### **CLAIM**

The Complainants request the following:

- EIB should review its due diligence of the contested procurement procedures
- In case of non-compliance of the project with EIB standards, the EIB should withdraw its financial assistance to the project

#### **FINDINGS**

1. Inadmissible allegation
2. Ungrounded allegation



## 1. THE COMPLAINT

- 1.1 On 9 January 2012, [REDACTED] on behalf of Environmental Law Service, a Czech NGO and [REDACTED] on behalf of Focus, a Slovenian NGO, (hereinafter the Complainants), lodged a complaint challenging the environmental impact of the project, its compliance with the EU *acquis* in the field of procurement as well as the overall governance of the project, including the assessment of its economic feasibility. The complaint was formulated as part of the exchange of correspondence between the Complainants and the EIB following the submission of a first complaint on 28 February 2011, which did not concern the conformity of the project with EIB standards in the field of public procurement. For ease of reference, the present Conclusion Report deals only<sup>1</sup> with the allegations concerning the compliance of the procurement procedures pertaining to the contested project with the applicable regulatory framework which – according to the Complainants – is constituted by Directive 2004/17/EC of 31 May 2004 regulating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (the “Utilities Directive”).
- 1.2 In their letter, the complainants recalled that, in relation to public procurement for EIB-financed projects, the EIB’s policy is to ensure that EIB funds are used rationally, in the interest of the project it finances as well as in the interests of the EU. The Complainants observed that the EIB Guide to Procurement (EIB GtP) establishes for projects located within the EU that the applicable EU law on public procurement is complied with and that, for promoters which are subject to EU directives on procurement, regardless of their public or private nature, the Bank will take further steps during project implementation, to the extent necessary, to control compliance with the applicable regulatory framework in order to ensure the rationale employment of its funds, to protect the soundness of the project and reduce the risks involved.
- 1.3 The Complainants thus referred to a previous letter of [REDACTED] to Vice-President [REDACTED] dated 17 November 2011 by which the EIB had been informed of an infringement complaint concerning the alleged non-compliance of the procurement procedure for the execution of civil works for the main technological plant of the new Unit 6 (invitation for tenders sent on 18 January 2011)<sup>2</sup>. The Complainants thus claimed that “the EIB experts” should “take steps” during this stage to control compliance and to ensure all public procurement are carried out in line with the applicable regulatory framework. They claimed that, in case of non-compliance, the EIB should withdraw its financial support to the project. On 24 January 2012, the EIB Complaints Mechanism (EIB-CM) acknowledged receipt of the complaint and informed the Complainants of the launch of a review into their case as well as of the date by which they might expect a reply from the Bank.
- 1.4 On 1<sup>st</sup> of March 2012, the EIB-CM met the Complainants in Brussels. During the meeting, the Complainants further elaborated on the allegations made against the project; given the diversity of allegations pertaining different EIB policies and standards and in order to ensure a thorough assessment of the Complainants’ concerns, the EIB-CM agreed with the Complainants to carry out three separate inquiries. Meanwhile on 13 March 2012, the Complainants<sup>3</sup> wrote another letter, addressed to the EIB Management Committee and confirming that the European Commission (EC) had registered a complaint concerning the alleged infringement of the EU law in the field of procurement. On the basis of the considerations made in the letter, the complainants argued that the EIB due diligence of the project had been called into question and requested the EIB Board of Directors to suspend disbursement on this operation during the non-judicial proceedings initiated by their complaints.
- 1.5 On 19 March 2012, the EIB-CM informed the Complainants of the rationale behind the necessity to extend the timeframe for the handling the complaint in accordance with article 10.2 of Title IV EIB CMPTR. On 20 August 2012 the EIB-CM informed the Complainant that it was not in a position to provide them with the Reports by the expected date, apologised for the delay and ensured its commitment to provide a formal reply within the shortest delay.

<sup>1</sup> Two separate Conclusions reports present the EIB-CM findings and conclusions on the allegations concerning the compliance of the project with EIB environmental standards as well as the overall governance of the Project, including the compliance of the project with requirements concerning the profitability of investment projects and the EIB’s due diligence of the economic feasibility of the project.

<sup>2</sup> See §4 of this Report.

<sup>3</sup> It is to be noted that the letter was co-signed by representatives of Greenpeace Slovenia.



- 1.6 On 14 January 2013, Greenpeace wrote a letter to the EIB President whereby *inter alia* the Complainants requested the Bank to clarify whether it was aware of the official complaint lodged by a company in December 2012 with the National Review Commission in connection to potential failures of Public Procurement. The Complainants observed that the NRC would investigate whether TES properly followed public procurement rules and the result of such investigation might be the annulment of all contracts which were made in breach of these rules. In its reply of 7 March 2013, the EIB Secretary General thanked the Complainants for bringing to the attention of the EIB the case before the Slovenian National Review Commission and informed them that the complaint was still on-going and that it concerned the procurement of a component of the project which was not financed by the EIB. As regards the infringement complaint concerning allegations related to procurement, he also added that, to his understanding, the European commission concluded that the complainant's allegations were not of nature to give rise to the opening of an infringement procedure against the Republic of Slovenia.
- 1.7 On 30 January 2013, [REDACTED] Members of the European Parliament, addressed a letter whereby they called upon the EIB President to withhold the disbursement of EIB funds for the project. Among the issues raised in the letter, the MEPs alleged that TES had not acted in accordance with public procurement rules in any of the tenders published so far and that at the moment of the message the Slovenian Commission for Public Procurement was evaluating the status of TES, whether it should be considered a public entity to which public procurement rules apply or not. The MEPs observed that although TES had argued in the past not to be bound by public procurement rules because it operates in a competitive market, the opinion of the Competition Protection Office of September 2012 – requested by the Ministry of Finance – found that there was no sufficient competition in the Slovenian energy market.
- 1.8 On 4 February 2013, the EIB-CM as well as representatives of the EIB Communications Department and of the EIB operational services responsible for the project met the Complainants in Luxembourg. During the meeting, the EIB-CM was informed that the EC had closed the infringement complaint in 2012. On 7 February 2013, the Complainants provided the EIB-CM with a copy of the response of the EC to the infringement complaint concerning the conformity of the project with the EU *acquis* in the field of procurement.

## 2. METHODOLOGY OF THE INQUIRY

- 2.1 As part of its inquiry into the complaint, the EIB-CM has reviewed the relevant project documents, including the correspondence of the EIB with the Complainants as well as that with the Borrower, the applicable regulatory framework, the Project Appraisal Reports, the Bank's Board Reports, the Finance Contract and other documents attesting the EIB's due diligence of the project. Meetings took place with the services responsible for the project appraisal and monitoring to understand the background and the status of implementation of the project as well as to exchange views on the issues raised by the complaint.
- 2.2 The EIB-CM engaged with the Complainants on more than one occasion since the Complaint was received. In addition to the stakeholders meeting of 1st March 2012, the EIB-CM met with them during the annual meeting organised by the Bank between the EIB's Board members and the Civil Society organisations on 4 February 2013 in Luxembourg.

### 3. BACKGROUND INFORMATION

#### 3.1 The Project

- 3.1.1 The project concerns the construction of a 600 MW super critical, lignite-fired steam turbine power plant and associated cooling tower, stack, flue gas desulphurisation, wastewater treatment and control systems and connection to an existing substation. According to the Board report, the power plant will operate in cogeneration mode, supplying heat to the local district heating system. It would largely replace the existing lignite-fired generating capacity operating at low conversion efficiencies (26-33%). As a result, lignite consumption and CO<sub>2</sub> emissions would remain at current levels, but electricity production is expected to increase by more than 30%.
- 3.1.2 The promoter of the project is Holding Slovenske Elektrarne d.o.o. (HSE), a state-owned holding company that generates and supplies over half of Slovenia's inland electricity consumption. HSE was established as a limited private company by law adopted by the Government of the Republic of Slovenia on 26 July 2001. The project is implemented by the national electricity company - Termoelektrarna Šoštanj (TEŠ). TEŠ is owned by HSE.
- 3.1.3 The project is expected to contribute to security of electricity supply (physically and with respect to oil price volatility) and will support a diverse energy mix in the Slovenian power sector. It will also exploit indigenous fuel resources and support employment in a convergence region, all of which are important EU policy objectives. The financial structure of the project includes also a EUR 200 m EBRD financing and up to EUR 475 m own funds. The security of the Bank's loan consists of commercial banks guarantees for EUR 110 million and a State Guarantee for the balance (EUR 440 million).

#### 3.2 The project cycle

- 3.2.1 On 11 July 2007, the EIB services issued the Appraisal Report for the Project. This indicated that tender notices comprising turnkey contracts for the implementation of the power island had been published according to Directive 2004/17/EC<sup>4</sup> and that the Promoter would have assessed the received tenders in August/September 2007. On 27 September 2007, the EIB Board of Directors approved the proposal to provide a loan of EUR 350 million to TEŠ to carry out the project. The Board Report reiterated the information contained in the Appraisal Report. On the same day, the EIB signed a Finance Contract (FC1) with TES.
- 3.2.2 Article 6.05 of the FC1 stipulates that *"the Borrower undertakes to purchase equipment, secure services and order work for the Project*
- a) *in accordance with EU law in general and with the relevant EU Directives; and*
  - b) *in so far as EU Directives do not apply, by procurement procedures which, to the reasonable satisfaction of the Bank, respect the criteria of economy and efficiency."*
- 3.2.3 On 30 October 2009, the EIB services updated the Appraisal Report (the updated Report) following request by the Promoter for additional financing. The updated Report further expanded on the advancement of the procurement procedures pertaining to the supply of equipment and the provision of services required for the completion of the power generation unit and in particular:
- Power Island
  - Flue gas desulphurisation (FGD) plant
  - 400 Kv Gas Insulated Switchyard
- From the information provided in the updated Report, the Promoter signed the Contract on supply of the Power Island on 27 June 2008, while the other two procurement procedures were still on-going and the successful bidder had not yet been selected. Elaboration of tender documents for the rest of the ten lots to be procured as part of the project was underway.

<sup>4</sup> The invitation to tender was published in the OJEU No. 2006/S dated 7 October 2006 and that public invitation to Tender was published on 8 December 2006. The deadline for submission of tenders was set in August 2007.



- 3.2.4 On 15 December 2009, the EIB Board of Directors approved an Update of the Board Report based on the findings of the updated Appraisal Report. The Board authorised an increase of EUR 200 m, up to a total of EUR 550 m. The updated Board Report referred to the impact of the outcome of limited competition in the tender process on the cost increase of the Project but stated that *"... despite the cost increase its financial and economic performance [of the project] has not changed significantly compared to the first appraisal"*.
- 3.2.5 On 22 April 2010, the EIB signed a second Finance Contract (FC2) with TES, borrower and financial beneficiary of the contested lending operation. Recital 8 of the FC2 stipulates that *"the Statute of the Bank provides that the Bank shall ensure that its funds are used as rationally as possible in the interests of the European Community"* and that *"accordingly, the terms and conditions of the Bank's loan operations must be consistent with relevant Community policies"*. Article 6.04 of FC2 reiterates the same provision of art. 6.05 of FC1 as referred to in §3.2.2 of this Report. Article 6.07 of the FC2 prescribes that *"the Borrower shall comply in all respects with all laws to which it or the Project is subject where failure to do so results or is reasonably likely to result in a Material Adverse Change"*.
- 3.2.6 The first tranche of the loan was disbursed in February 2011. The second tranche was disbursed in March 2013, after TEŠ had signed a letter confirming the compliance of the Project with applicable EU law and EIB policies, including the EIB Guide to Procurement.

### 3.3 *The EIB due diligence of the contested procurement procedure*

- 3.3.1 During its inquiry, the EIB-CM contacted the EIB competent services to request evidence of the due diligence of the bank on the procurement procedure contested by the complainant. Beside what was summarized in the project documents referred to in §3.2 of this Report, the EIB competent services informed the EIB-CM of the fact that for the contested procurement procedure, the Borrower had opted for a "period indicative notice" whose format and content is described in Annex XV of the Utilities Directive.
- 3.3.2 The EIB competent services added that the Promoter had included all requested information in the notice that was published on 20 April 2004 and that the Directive did not require to mention the estimated cost of the contract in the notice. Finally, the EIB services explained that the notice was published in accordance with EU law requirements.
- 3.3.3 Furthermore, the EIB-CM was provided with a copy of the 2011 Progress Report which gives, *inter alia*, an update on the status of the procurement procedures for the Supply of the Main technological equipment (Power Island), the Flue Gases Desulphurization plant (FGD), the cooling tower and other preparatory works, the Civil works and other packages.
- 3.3.4 From the information therewith provided, it resulted that for the Power Island, the FGD and the cooling tower, including the preparatory works, an invitation to tender was published in the OJEU. The Progress Report states that the Invitation to Tender for the Civil works was published on the EBRD website (see §4.5 of this Report). In addition to that, the Report expands on the other packages, by establishing that all the tenders for major packages will be published in the OJEU and the EBRD website. From the information provided in the Progress Report and confirmed by the Promoter, it appears that procurement procedures were carried out in line with the requirements of EU law until 2011, when TES signed a Loan Agreement with the EBRD. Since 2011 major packages had been procured in accordance with the EBRD procurement policy.



#### 4. INFRINGEMENT COMPLAINT

- 4.1 On 16 November 2011 the Complainants together with [REDACTED] on behalf of CEE Bankwatch sent a letter to the concerned Vice-President and copied to the EIB Communications Department<sup>5</sup> by which It notified two complaints to the European Commission in relation to the contested project and requested a thorough review of EIB's involvement in the project *"as it seems that when approving the projects, some relevant facts were omitted by the bank"*. The two complaints were attached to the letter and concerned the compliance of the project with, respectively, the EU Environmental and Procurement *acquis*.
- 4.2 The complaint on alleged infringement of the EU *acquis* in the field of Procurement was submitted on 2 November 2011; it asserted that TES had failed to comply with the public procurement rules when awarding civil work public contract in 2011. In particular, the Complainants alleged that:
- In the contract notice of 18 January 2011 published in its buyer's profile and referring to a prior information notice published on the EBRD website, the contracting entity qualified itself as not subject to public procurement rules;
  - The contract notice failed to comply with the requirements set in Article 42 and Annex XIII of the Utilities Directive; and
  - The contracting entity failed to comply with the provisions of Article 44 of the Utilities Directive by not publishing the contract award notice.
- 4.3 Finally, the Complainants claimed that the Slovenian Public Procurement Act did not guarantee a possibility to claim a review of a public procurement procedure for individuals and entities who cannot demonstrate an interest in the public contract awarding procedure and a damage they may have suffered by an illegally conducted public procurement procedure.
- 4.4 On 26 September 2012, the EC replied to the Complainants. The EC drew the Complainants' attention to the fact that the contracting authority had published a contract notice on 21 January 2011, re-published the notice of 18 January 2011 on 25 January 2011 and had finally published the contract award notice on 7 June 2011. These documents were published on TED (Tenders electronic daily), an electronic tool of the Supplement to the OJEU, i.e. the official mean of publication of European public procurement notices. The EC noted that the contract notice of 21 January contained more information than the notice of 18 January and the missing information did not justify the launch of an infringement proceeding against the Republic of Slovenia.
- 4.5 Based on the above as well as on the fact that the contracting authority had also published the contract award notice on 7 June 2011 in accordance with the requirements set by article 44 of the Utilities Directive, the EC concluded that the contracting authority acted using an open procedure according to the Utilities Directive, *"notwithstanding the reserve mentioned in its notice of 18 January 2011, whereby the contracting authority declares itself not subject to Directive 2004/17/EC"*.
- 4.6 Finally, the EC rejected the claims concerning the access to justice by recalling that the EU *acquis* in the field of procurement obliges Member States to *"...ensure that review procedures are available...at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement"*. As a result, the EC concluded that the Complainants' allegations were not of nature to give rise to the opening of an infringement procedure and terminated its investigations into the matter in the absence of further comments of the Complainants.

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<sup>5</sup> In its message of 14 December 2011, the EIB Communications Department replied that the EIB had taken note of the complaints submitted to the European Commission, would follow their outcomes in close cooperation with the latter and had informed the EIB-CM about their notification. The EIB reply also addressed the complainants' request for a meeting, by requesting further information on the topics of the discussion and drawing the complainants' attention to the opportunity of addressing directly the EIB-CM for any stakeholders' engagement on the issues assessed by the latter within the framework of its inquiry.



## 5. APPLICABLE REGULATORY FRAMEWORK

### 5.1 *The Scope of the EIB-CM*

- 5.1.1 The EIB Complaints Mechanism applies to complaints of maladministration<sup>6</sup> lodged against the EIB Group (article 4.1 of Title II "Principles" of the EIB CMPTR); complaints may concern any alleged maladministration of the EIB Group in its actions and/or omissions (article 4.1 of Title IV "Rules of Procedure" of the EIB CMPTR).
- 5.1.2 Another relevant provision in the light of the allegations made by the complainant is established by article 2.3 of Title IV "Rules of Procedure" - CMPTR pursuant to which the CM is not competent to investigate complaints concerning International organisations, Community institutions and bodies, national, regional or local authorities. In the present case, it is worth recalling that article 2.5 of Title IV of the CMPTR establishes that the EIB-CM cannot deal with complaints which have already been lodged with other administrative or judicial review mechanisms or which have already been settled by them.
- 5.1.3 Finally, pursuant to art. 4.2 of Title III, the EIB CM gathers and reviews existing information on the subject under complaint, conducts appropriate inquiries with a view to assessing whether the EIB Group's policies and procedures have been followed, coordinates with other European institutions, reports on findings, makes recommendations regarding corrective actions and/or possible improvements of existing procedures, fosters the adherence to the EIB Group's policies and endeavours to resolve the issue giving rise to complaints<sup>7</sup>.

### 5.2 *The allocation of responsibilities in procurement procedures concerning EIB-financed projects*

- 5.2.1 On 25 March 2004, the EIB published on its website the EIB Guide to Procurement (GtP) whose purpose is to inform the Promoters of EIB-financed projects of the arrangements to be made for procuring works, goods and services required for the project. According to the GtP, in projects located within the European Union (EU) and in those Accession States that have already incorporated the relevant EC legislation, the EIB requires that the applicable current Community Directives on procurement are complied with, particularly as concerns open or restricted procedures with publication in the Official Journal of the European Union (OJEU). (§1.2 of the GtP).
- 5.2.2 §1.4 of the GtP stipulates that: *"Promoters are fully responsible for implementing projects financed by the Bank, in particular for all aspects of the procurement process, from drafting tender documents and awarding contracts through to implementing contracts. The involvement of the Bank is confined solely to verifying whether or not the conditions attached to its financing are met. The Bank may advise or assist Promoters in the procurement process, but is not a party to the resulting contracts. The Bank simply has the right and obligation to ensure that, in the case of projects inside the Union, Community provisions in this field [...] are respected, and that the procurement procedures are fair and transparent and the tender selected is economically the most advantageous. The rights and obligations of the Promoter vis-à-vis the tenderers for works, goods or services to be furnished for a project are governed by the local legislation and tender documents published by the Promoter, and not by this Guide". (emphasis added)*

<sup>6</sup> The definition of maladministration provided by the EIB CMPTR includes the EIB's failure to comply with the applicable legislation and/or established policies, standards and procedures.

<sup>7</sup> An example of the co-ordination with other European institution is provided by art. 9.3 of Title IV establishing that in case the complaint alleges a violation of EU legislation in projects located within the EU, the CM may inform the Secretary General of the EC about the complaint and forward the final Conclusions Report.



- 5.2.3 Section 2 of the GtP explains that within the Union procurement is covered by EU law as implemented by national legislation adapting the Directives to the national framework. In this section, for Promoters falling under the EU Directives on procurement, the EIB commits:
- to ensure at the project appraisal stage that the applicable procurement Directives concerning the tendering under competition on the basis of fair and non-discriminatory terms are complied with under the project; and
  - to take further steps during project implementation, to the extent necessary, to control compliance with applicable procurement Directives in order to ensure the rational employment of the Bank's funds, protect the soundness of the project and reduce the risks involved.
- 5.2.4 Annex 1 of the GtP "Specific Procurement Terms" reports the definition of open procedure as determined by EC Directives, i.e. formal procedures whereby all interested companies may submit tenders. These procedures must be advertised at least in the Official Journal of the European Union (OJEU). Annex 6 of the GtP provides a copy of the Standard Form of the Procurement Notice in the OJEU.

### 5.3 EU Law

- 5.3.1 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (the Utilities Directive) applies to the contested procurement procedure.
- 5.3.2 Article 22 c) of the Utilities Directive establishes that contracts awarded pursuant to the particular procedure of an international organisation shall be exempted from the application of the Utilities Directive.

## 6. THE SUBMISSION OF THE PROMOTER

- 6.1 During its inquiry, the EIB-CM was provided with a message of the EIB competent services dating back to February 2011 and concerning a short note prepared by HSE on the issue of public procurement; the message reported that two external legal opinions received by HSE confirmed that TES, HSE and other Slovenian energy companies are bound to comply with the Public Procurement in Water, Management, Energy, Transport and Postal Services Act and not with the general Public Procurement Act. In addition to complying with local legislation, TES had published calls for tenders in the OJEU in line with applicable EU Directive.
- 6.2 On 7 February 2013, TES sent a letter to the EIB President, whereby it explained that the Project had been thoroughly assessed by the various financial institutions, which continue to monitor the Project, and that it was compliant with all conditions precedent for the disbursement of the credit stipulated in the finance contract. On 25 February 2013, the Borrower sent a letter to the EIB whereby it stressed that it was aware of the EIB policies as the Guide to Procurement and that the EIB can only finance projects that strictly comply with the EIB policies and EU law. In the letter, the Borrower took the view that the allegations made by the complainants did not affect its ability to lawfully request the disbursement of the credit under the Finance Contract and that the project has been carried out and will be further implemented in compliance with all applicable law, including EU law, as well as with EIB policies.

## 7. FINDINGS AND CONCLUSIONS

### 7.1 *Allegation concerning the failure to comply with EU law*

#### Findings

- 7.1.1 From the information gathered during the inquiry, it results that, prior to addressing the EIB-CM on the issue, the complainants had lodged a complaint with the European Commission concerning the alleged infringement of EC law in the field of procurement by the Republic of Slovenia and that the greatest share of the procurement complaint lodged with the EIB-CM was based on the information/allegations/claims made in the complaint handled by the European Commission.
- 7.1.2 As explained in §5.1.2 of this report, the EIB CMPTR stipulates that the EIB Complaints Mechanism cannot deal with complaints which have already been lodged with other administrative or judicial review mechanisms or which have already been settled by the latter. From this provision, it can be inferred that the submission of identical allegations with the competent authority to initiate an infringement proceeding before the European Court of Justice affects the admissibility of the allegations made in the complaint before the EIB-CM.
- 7.1.3 However, given the impact of the outcome of the parallel administrative procedure on the EIB-financed project and given the concerns raised by the complainants, the EIB-CM pro-actively monitored the development of the case before the EC. The follow-up enabled the EIB-CM to learn about the dismissal of the substance of the Complainant's case.

#### EIB-CM Conclusions

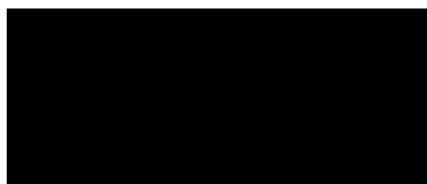
- 7.1.4 The information gathered during the EIB-CM's assessment shows that the Complainants lodged an identical case with the EC concerning the project's failure to comply with EU law in the field of procurement. The EC has dismissed the substance of the Complainant's case. The EIB competent services shall be provided with copy of the EC's response to the complainant.

### 7.2 *Allegation concerning flaws in the EIB due diligence in the field of procurement*

#### Findings

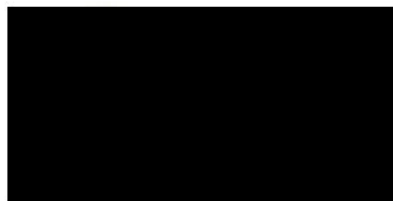
- 7.2.1 The present review has shown that with regard to the contested procurement procedures as well as with other procurement procedures carried out in accordance with the EBRD procurement policy, the Utilities Directive recognises an exemption due to the fact that the tender process is governed by particular procedures of an international organisation. It is also to be noted that the recourse to the EBRD procurement policy entails a close monitoring by EBRD competent services. Such services, in co-operation with the EIB competent services, are well placed to ensure the compliance of the Project with the co-financiers' requirement through the provision of non-objections to the publication of the tender documentation and the selection of the successful bidders.

- 7.2.2 The flaws in the EIB due diligence of the contested procurement procedures, which were alleged by the Complainants, stem from the allegations contained in their infringement complaint submitted to the EC. Given the decision of EC to dismiss the infringement complaint and based on the information provided in §7.2.1 of this Report, the EIB-CM considers the allegation as ungrounded and proceeds to file the complaint.



F. Alcarpe  
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Complaints Mechanism  
12 December 2013

PP



R. Rando  
Complaints Officer

12 December 2013

## Glossary

CMPTR: Complaints Mechanism Principles, Terms of Reference and Rules of Procedure  
EC: European Commission  
EIB-CM: EIB Complaints Mechanism  
GtP: Guide to Procurement