

**COMPLAINTS MECHANISM**

Case SG/E/2020/18

# **DIVAČA-KOPER Second Rail Track (Slovenia)**

**CONCLUSIONS REPORT**

30 March 2022





# Divača-Koper Second Rail Track Conclusions Report

30 March 2022

## **Complaint confidential**

No

## **External distribution**

Complainant

Promoter

## **Internal distribution**

Management Committee

Secretary General

Inspector General

Relevant EIB services

## **Disclaimer**

The analysis, findings and conclusions presented in this report are based on the information available to the EIB Group Complaints Mechanism up to 7 February 2022 and may not reflect events or circumstances which occur after that date.

The conclusions of the report are solely addressed to the EIB.

## THE EIB GROUP COMPLAINTS MECHANISM

The European Investment Bank (EIB) Group Complaints Mechanism is a tool enabling resolution of disputes in case any member of the public feels that the European Investment Bank might have done something wrong, i.e. if it has committed an act of maladministration. The Complaints Mechanism is not a legal enforcement mechanism and will not substitute the judgement of competent judicial authorities.

Maladministration means poor or failed administration. It occurs when the EIB fails to act in accordance with a rule or principle that is binding upon it, including its own policies, standards and procedures. The concept of maladministration includes failure by the EIB to comply with human rights, applicable law, or with the principles of good administration. Maladministration may relate to the EIB's Group decisions, actions or omissions. This may include the environmental or social impacts of the EIB's projects and operations.

One of the main objectives of the EIB Group Complaints Mechanism is to ensure the right to be heard and the right to complain. For more information on the EIB Group Complaints Mechanism please visit: <https://www.eib.org/en/about/accountability/complaints/index.htm>.

### **Available remedy:**

Complainants that are not satisfied with the conclusions report may file a complaint of maladministration against the EIB Group with the European Ombudsman<sup>1</sup>.

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<sup>1</sup> Available at: <https://www.ombudsman.europa.eu/en/home>.

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## EXECUTIVE SUMMARY

In October 2020, the EIB Group Complaints Mechanism (EIB-CM) registered a complaint submitted by a non-governmental organisation known as DavkoPlačevalci Se Ne Damo<sup>2</sup>.

The complaint 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 project promoter is the Republic of Slovenia ("Slovenia") and the borrower/developer is a Slovenian special purpose company called 2TDK (wholly owned by Slovenia).

The EIB services completed the appraisal process in March 2019. The project was approved by the EIB Board of Directors the same year – subject to conditions to be fulfilled by the promoter, while the finance contract has not been signed yet (situation as of February 2022).

In March 2021, the EIB-CM issued an initial assessment report establishing the following allegations:

1. The project's negative impacts on the environment and non-compliance with EU environmental law: (i) the project's non-compliance with the Strategic Environmental Assessment (SEA) and Environmental Impact Assessment (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).

After reviewing the available information, the EIB-CM found areas of non-compliance with the EIB's own procedures and standards in relation to allegation 1 (Appendix 4 provides more details). Consequently, the EIB-CM issues the following recommendations and suggestions for improvement to the Bank, as provided in the table below.

### Summary of the outcome

Allegation	Recommendations	Suggestions for improvement
1. The project's negative impacts on the environment and non-compliance with EU environmental law	<p>1. Request the promoter to:</p> <p><b>(i) Update the environmental management plan (EMP) and</b></p> <p><b>(ii) Report to the EIB on its implementation and effectiveness.</b></p> <p><b>Points (i) and (ii) should be requested before and be available for the re-appraisal of the project prior to signature of the finance contract. Regular reporting by the promoter on the EMP should be included in the finance contract as part of the information duties.</b></p> <p><i>- Points (i) and (ii) to be implemented before the re-appraisal and request for regular reporting on the EMP to be implemented by the signature of the finance contract.</i></p>	<p>1. The Bank should request the promoter to <b>submit an assessment of the cumulative impacts</b> of the project, taking into account planned developments and activities in its area of influence including the third track - in line with EIB E&amp;S standards and that meets the Bank's satisfaction (see below).</p> <p><b>The cumulative impact assessment report should identify, assess and propose mitigation and/or compensation measures for any significant cumulative impacts of the 2TIR.</b></p> <p>This should be requested before and be available <b>for the re-appraisal of the project</b> prior to signature of the finance contract.</p>

<sup>2</sup> Taxpayers Don't Give Up (translation from Slovenian).

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	<p><b>(iii) Effectively communicate</b> with relevant stakeholders on the implementation of the EMP and any new project's developments during the project's implementation.</p> <p>In order to ensure effective communication, the promoter should prepare a <b>stakeholder engagement plan</b>, monitor and report on it to EIB on a regular basis.</p> <p><i>- To be implemented ASAP and no later than Q3 2023.</i></p> <p><b>2. Involve environmental specialist(s) for further advice (including regarding the inclusion of relevant environmental clauses in the finance contract), and for project monitoring.</b></p> <p><i>– To be implemented ASAP and no later than Q3 2023 (for the re-appraisal of the project), and be continued until at least physical completion of the project.</i></p>	<p><i>- To be implemented before the project re-appraisal.</i></p> <p>2. Amend the Bank's procedures in order to <b>effectively appraise environmentally risky projects</b>, especially what concerns the <b>involvement of environmental specialist(s)</b> in the appraisal and monitoring of <b>operations conducted within the Natura 2000 network/protected area of national importance.</b></p> <p><i>- The suggestion for improvement is expected to be implemented by Q1 2023.</i></p>
<p>2. The scope of the 2TDK Divača-Koper project as approved by the EIB differs from the actual scope of the 2TIR Divača-Koper investment programme</p>	<p>N/A</p>	<p>3. At the time of re-appraisal of the project, as well as again before the signature of the finance contract, engage with the promoter and <b>assess the status of the SEA for the third track, the likelihood for this plan to concretise and by when.</b> Document this assessment and <b>present the outcome to the Bank's governing bodies</b> as part of the second step approval process.</p> <p><i>- To be implemented in the context of the re-appraisal of the project and in the context of the second step approval before the signature of the finance contract.</i></p>

## GLOSSARY

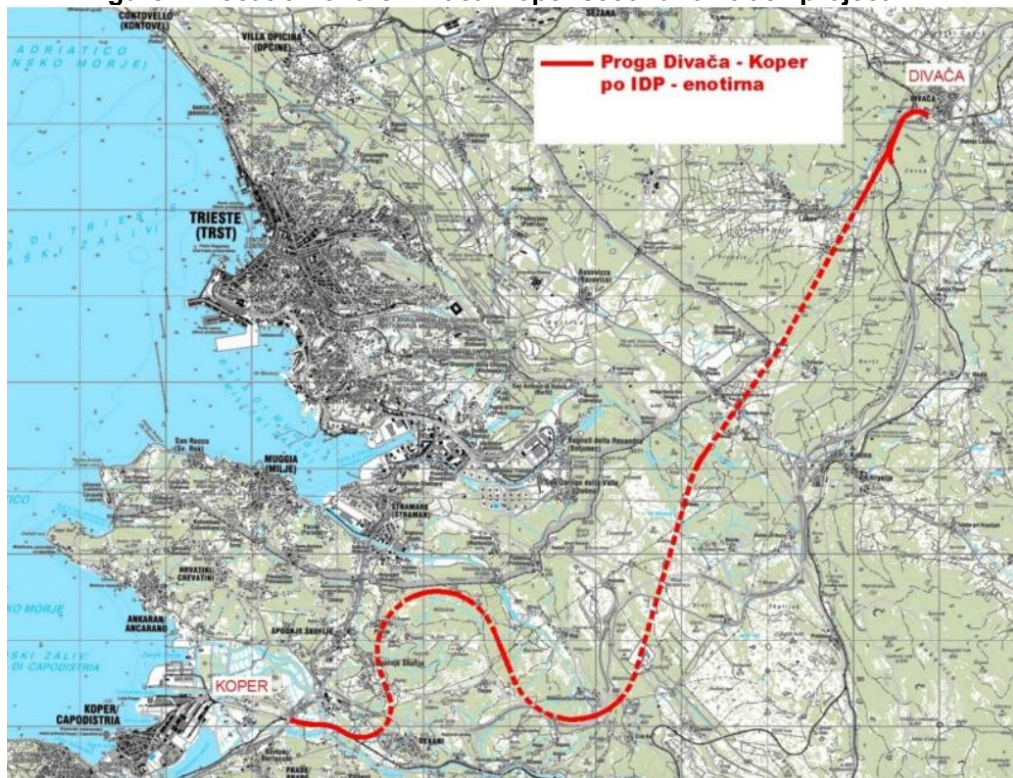
2TIR	Code name for the new Divača-Koper railway line
2TDK	Slovenian special purpose company implementing the Divača-Koper second rail track project, the borrower/developer
ARSO	<i>Agencija Republike Slovenije za okolje</i> (Slovenian) or Environment Agency is a body of the Ministry of Environment and Spatial Planning of the Republic of Slovenia
CEF	Connecting Europe Facility
CJEU	Court of Justice of the European Union
d.o.o.	<i>Družba z omejeno odgovornostjo</i> (Slovenian) Limited Liability Company
EC	European Commission
EIA / ESIA	Environmental impact assessment
EIB	European Investment Bank
EIB-CM	EIB Group Complaints Mechanism
EMP	Environmental (and Social) management plan
ESDS	Environmental and Social Data Sheet
ESPS	EIB Statement of Environmental and Social Principles and Standards
EU	European Union
MoE	Ministry of the Environment and Spatial Planning of the Republic of Slovenia. The Ministry existed under different names during the project lifetime, such as Ministry of the Environment or the Ministry of Agriculture and Environment
NGO	Non-governmental organisation
NSP	National spatial plan
OPS	Operations Directorate of the EIB
Promoter	Republic of Slovenia represented by the Ministry of Infrastructure
SEA	Strategic environmental assessment
Slovenia	Republic of Slovenia
TEN-T	Trans-European transport network
UNECE	United Nations Economic Commission for Europe

# 1 BACKGROUND

## 1.1 Overview of the project

- 1.1.1 In 2019, the EIB Board of Directors approved financing for the Divača-Koper second rail track project in the Republic of Slovenia ("Slovenia") for an amount of up to €250 million<sup>3</sup>. The project is being developed by a Slovenian special purpose company called 2TDK (the developer), which is wholly owned by Slovenia.
- 1.1.2 The project, as proposed for financing to the EIB, 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"). It includes 20.3 km of tunnels and a long viaduct of 1.1 km. See Figure 1 for the location of the project.

**Figure 1. Location of the Divača-Koper second rail track project<sup>4</sup>**



- 1.1.3 As per the project description, the three longest tunnels will have parallel service tunnels for maintenance and evacuation purposes. The service tunnels will be of the same diameter as the main tunnels. The excavation works will result in excavated material estimated at 4.2 million m<sup>3</sup>.<sup>5</sup>
- 1.1.4 The project runs through or close to seven Natura 2000 sites listed in Appendix 1. This also provides a list of surface water bodies and groundwater bodies relevant to the project. The project twice comes within 1 km of the Italian border.
- 1.1.5 As of February 2022, the finance contract for the project between the EIB and the developer/ Slovenia is yet to be signed, with its signature being subject to the implementation of certain conditions.

<sup>3</sup> The link to the project description on the EIB's website is available [here](#). Please note that for this project, a second-step approval of the final terms and conditions of the loan by the governing bodies is required before signing the Finance Contract.

<sup>4</sup> Source: [Issuu.com](https://issuu.com).

<sup>5</sup> Environmental and Social Data Sheet are available [here](#).

- 1.1.6 Preparatory works started in 2018 and the main construction works started in 2019. The project is in the implementation phase, with its progress being updated on the developer's website<sup>6</sup>.

## 1.2 The complaint

- 1.2.1 In October 2020, the EIB Group Complaints Mechanism (hereinafter the "EIB-CM") received a complaint from a non-governmental organisation (NGO) known as DavkoPlačevalci Se Ne Damo<sup>7</sup> (hereinafter the "complainant") regarding the Divača-Koper second rail track project.
- 1.2.2 The initial assessment report issued in March 2021<sup>8</sup> presents in detail the issues raised in the complaint. The EIB-CM conducted an investigation in relation to the allegations presented in Table 1, with its analysis and findings presented in Section 5.

**Table 1: The allegations**

Allegation	Description
Allegation 1	The project's negative impacts on the environment and non-compliance with EU environmental law
Sub-allegation 1.1	The project's non-compliance with the Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) Directives
Sub-allegation 1.2	The 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	The project's negative transboundary impacts and issues with transboundary consultations
Allegation 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)

- 1.2.3 The compliance review assessed the complaint's 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 Section 2). The review assessed 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.

## 2 APPLICABLE REGULATORY FRAMEWORK

### 2.1 The EIB Group Complaints Mechanism

- 2.1.1 The EIB Group Complaints Mechanism Policy<sup>9</sup> tasks the EIB-CM with handling complaints concerning alleged maladministration by the EIB Group<sup>10</sup>. Maladministration means poor or failed administration<sup>11</sup>. Maladministration may also relate to the environmental or social impacts of the EIB Group's activities, or to the project cycle-related and other applicable policies of the EIB.
- 2.1.2 The EIB-CM Policy specifies that the EIB-CM reviews the EIB's activities with a view to determining whether maladministration that is attributable to the EIB has taken place<sup>12</sup>.

<sup>6</sup> Information from the website: <http://www.drugitir.si/aktualno>.

<sup>7</sup> Taxpayers Don't Give Up (translation from Slovenian).

<sup>8</sup> The link to the report is available [here](#).

<sup>9</sup> Available at: [https://www.eib.org/attachments/strategies/complaints\\_mechanism\\_policy\\_en.pdf](https://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf).

<sup>10</sup> Article 5.1.3 of the EIB Group Complaints Mechanism Policy.

<sup>11</sup> Article 3.1 of the EIB Group Complaints Mechanism Policy.

<sup>12</sup> Article 5.3.3 of the EIB Group Complaints Mechanism Policy.

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- 2.1.3 The EIB-CM Policy and Procedures<sup>13</sup> regulate the work of the EIB-CM. The EIB-CM compliance review includes an investigation of compliance with existing policies, procedures and standards<sup>14</sup>.
- 2.1.4 It is important to note that according to Article 4.3.2 of the EIB-CM Policy, complaints against EIB Group counterparts such as borrowers/promoters, national, regional or local authorities are not handled by the EIB-CM.
- 2.1.5 As indicated below, the EIB environmental and social standards require compliance of the project with applicable EU and national law, which is the responsibility of the promoter and local authorities. Furthermore, 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.”
- 2.1.6 It is important to highlight Article 6.1.4 of the EIB-CM Policy stating that “[c]omplaints submitted to the EIB-CM do not have a suspensive effect on the actions/omissions and decisions challenged.”
- 2.1.7 Finally, Article 1.4.5 of the EIB-CM Procedures states that 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.

## 2.2 Project-applicable standards

- 2.2.1 As an EU body, the EIB is bound by EU law and committed to promoting EU policy objectives. The EIB-financed project must comply with the project-applicable standards, which include, but are not limited to, relevant environmental law and the EIB’s environmental and social standards<sup>15</sup> <sup>16</sup>. Specific standards used for this investigation have been set out below.

### **Relevant EU environmental law**

- 2.2.2 Directive on the assessment of the effects of certain plans and programmes on the environment (SEA Directive)<sup>17</sup>:
- The SEA shall apply to the plans and programmes for which the first formal preparatory act was issued after 21 July 2004<sup>18</sup>. The European Commission guidance<sup>19</sup> further clarifies the start of the application of the Directive’s provisions. As stipulated by the Directive, the obligation to carry out an SEA also applies to plans and programmes for which the first formal preparatory act was prepared before 21 July 2004, but which were not adopted until after 21 July 2006.
  - An SEA report shall identify, describe and evaluate likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives, taking into account the objectives and the geographical scope of the plan or programme<sup>20</sup>.

<sup>13</sup> Available at: [https://www.eib.org/attachments/strategies/complaints\\_mechanism\\_procedures\\_en.pdf](https://www.eib.org/attachments/strategies/complaints_mechanism_procedures_en.pdf).

<sup>14</sup> Article 4.3.14 and 5.3.3 of the EIB Group Complaints Mechanism [Policy](#).

<sup>15</sup> Paragraphs 10 and 12, Background section, EIB Statement of Environmental and Social Principles and Standards (ESPS, 2009).

<sup>16</sup> The EIB environmental and social standards are described in the ESPS (2009); the EIB Environmental and Social Standards (2018); and the EIB Environmental and Social Handbook (Volume II, 2013).

<sup>17</sup> Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive), available [here](#).

<sup>18</sup> In line with Article 13(3) of the SEA Directive (applicable on a strategic planning level), plans and programmes of which the first formal preparatory act is before that date and which are adopted or submitted to the legislative procedure more than 24 months thereafter, shall be made subject to the obligation referred to in Article 4(1), unless Member States decide on a case by case basis that this is not feasible and inform the public of their decision.

<sup>19</sup> SEA guidance, Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (European Commission, 2003), available [here](#) (see paragraphs 3.65 and 3.66).

<sup>20</sup> Article 5(1) of the SEA Directive.

- The public and any other consulted Member States should be informed by a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared, the opinions expressed and the results of consultations entered into have been taken into account and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with<sup>21</sup>.
- Criteria for determining the likely significance of effects during an SEA screening determination shall include “the degree to which the plan or programme influences other plans and programmes including those in a hierarchy” and the “**cumulative nature of the effects**”<sup>22</sup>.

### 2.2.3 Environmental Impact Assessment Directive (EIA Directive)<sup>23</sup>:

- The developer shall provide information including at least an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects<sup>24</sup>. The type of alternatives studied was not specified in the initial text of the EIA Directive (2011), though the amending Directive (2014) clarified the meaning of alternatives in its Annex IV, for example in terms of project design, technology, location, size and scale.
- The developer shall provide a description of the likely significant effects of the proposed project on the environment resulting from (a) the existence of the project, (b) the use of natural resources, and (c) the emission of pollutants, the creation of nuisance and the elimination of waste<sup>25</sup>. Information should cover the direct effects and any indirect, secondary, **cumulative**, short, medium and long-term, permanent and temporary, positive and negative effects of the project.
- Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia (a) a description of the project, together with any available information on its possible transboundary impact; (b) information on the nature of the decision which may be taken<sup>26</sup>. The Member States concerned shall enter into consultations regarding, inter alia, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable timeframe for the duration of the consultation period.<sup>27</sup>
- The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 of the Directive shall be taken into consideration in the development consent procedure<sup>28</sup>.
- Finally, the EIA Directive requires that members of the public concerned having a sufficient interest, or (where administrative procedural law of a Member State requires this as a precondition) maintaining the impairment of a right, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIA Directive<sup>29</sup>.

<sup>21</sup> Article 9(1)(b) of the SEA Directive.

<sup>22</sup> Annex II of the SEA Directive.

<sup>23</sup> 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 of the European Parliament and of the Council of 16 April 2014, available [here](#).

<sup>24</sup> Article 5(3) of the EIA Directive (2011).

<sup>25</sup> Annex IV “Information referred to in Article 5(1)” of the EIA Directive (2011).

<sup>26</sup> Article 7(1) of the EIA Directive (2011).

<sup>27</sup> Article 7(4) of the EIA Directive (2011).

<sup>28</sup> Article 8 of the EIA Directive (2011).

<sup>29</sup> Article 11 of the EIA Directive (2011).

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- The doubling of an existing railway track belongs to Annex I of the EIA Directive<sup>30</sup>, as clarified by the Court of Justice of the European Union (CJEU). The jurisprudence concluded that it is all the more obvious when the execution of the project at issue involves a new track route, even if that applies only to part of the project. Such a construction project is by its nature likely to have significant effects on the environment within the meaning of the EIA Directive<sup>31</sup>.

### 2.2.4 Reasoned opinions of the European Commission in relation to the EIA Directive:

- In 2020, the European Commission issued a reasoned opinion to Slovenia regarding access to justice in environmental matters under the EIA Directive. The Slovenian legislation requires individuals and NGOs to participate in administrative procedures before having access to a competent administrative court, thus narrowing their right of access to justice<sup>32</sup>. In addition, negative screening decisions in EIA procedures (i.e. a decision that an EIA is not needed) cannot be challenged by any natural or legal person, except for the developer and qualified NGOs. This is contrary to the jurisprudence of the CJEU that the public concerned must be entitled to bring an action against an administrative decision not to carry out an EIA<sup>33</sup>.
- In 2021, the European Commission issued a reasoned opinion to Slovenia regarding shortcomings concerning the timeframes in EIA transboundary procedures, the lack of a requirement for the competent authorities to take into account the results of preliminary verifications or assessments of the effects on the environment, and the incorrect transposition of the requirements to adapt the monitoring parameters to the nature, location and size of the project and to the significance of its effect on the environment. Slovenian legislation also does not provide sufficient penalties for violations of national provisions adopted pursuant to the EIA Directive<sup>34</sup>.

### 2.2.5 Water Framework Directive<sup>35</sup>:

- The objectives for the protection of surface water bodies and groundwater bodies are spelled out in Article 4(7), which also outlines the information needed for decision-making and key objectives of the assessment.

### 2.2.6 Directive on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)<sup>36</sup>:

- If the project may have a significant effect on sites designated or in the process of being designated as Natura 2000, an appropriate assessment under the Habitats Directive is required. An appropriate assessment is a decision of a competent authority assigned by the Member State to carry out such an assessment.
- Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site, the competent national authorities shall agree to the plan or

<sup>30</sup> Annex I, point 7(a) of the EIA Directive: "Construction of lines for long-distance railway traffic".

<sup>31</sup> Judgment of the Court in case C-227/01 *Commission v Spain*, EU:C:2004:528, paragraphs 48-50, as noted in the Commission's compilation of Environmental Assessment of Projects and Plans and Programmes, Rulings of the Court of Justice of the European Union, European Commission (2020), page 125.

<sup>32</sup> Pages 19 and 20, Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, Final report (2019) available [here](#). Access to justice in environmental matters, which is the third pillar of the Aarhus Convention, does not have a direct effect in EU law. However, as the European Union is a signatory to the Aarhus Convention, the CJEU analyses each case and offers its interpretation on the subject.

<sup>33</sup> Reasoned opinion of the European Commission of 30 October 2020 in infringement procedure ([INFR\(2011\)2216](#)).

<sup>34</sup> Reasoned opinions of the European Commission of 10 October 2019 and 23 September 2021 in infringement procedure ([INF-\(2019\)2225](#)).

<sup>35</sup> 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, available [here](#). See more under the EIB's Environmental and Social Standard 1.

<sup>36</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as [amended](#).

project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public<sup>37</sup>.

- Appropriate assessment of the implications of the plan or project for the site concerned takes into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives<sup>38</sup>. The key requirements for the appropriate assessment are spelled out in guidance documents prepared by the European Commission<sup>39</sup>.
- Authorisation of such a plan or project granted in accordance with Article 6(3) necessarily assumes that it is considered not likely to adversely affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2) of the Habitats Directive<sup>40</sup>.

#### **Relevant national environmental law<sup>41</sup>**

- 2.2.7 The provisions of the SEA Directive were transposed into the national Environmental Protection Act (2004, amended)<sup>42</sup>.
- 2.2.8 Environmental impact assessment (EIA) is carried out in accordance with the Environmental Protection Act (2004, amended).
- 2.2.9 The Habitats Directive was transposed into the Nature Conservation Act<sup>43</sup> and other nature protection regulations and by-laws, as follows:
- The main procedural requirements of the Habitats Directive are transposed into the Environmental Protection Act. Any exemptions applied to this Act are also applicable to appropriate assessment.
  - The Decree on Special Protection Areas (Decree on Natura 2000)<sup>44</sup> stated that the appropriate assessment will not be carried out for areas for which the decision has already been taken in the past in line with the Act on Settlements and Other Spatial Interventions<sup>45</sup>

<sup>37</sup> Article 6(3) of the Habitats Directive 92/43/EEC.

<sup>38</sup> Section 1.3, page 5, Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC, available [here](#).

<sup>39</sup> Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC (available [here](#)) and Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC (available [here](#)). Please note that there are more recent Guidance notes (2021) available [here](#).

<sup>40</sup> Page 25, Article 6 of the Habitats Directive: Rulings of the CJEU, Final Draft, September 2014, available [here](#).

<sup>41</sup> This is not an exhaustive list.

<sup>42</sup> Environmental Protection Act (ZVO-1) (Official Gazette of the Republic of Slovenia, No. 41/04, as amended), available [here](#) (in English).

<sup>43</sup> Nature Conservation Act (Official Gazette of the Republic of Slovenia, No. 96/2004 of 30 August 2004), available [here](#) (in Slovenian), Article 101 (assessment of the acceptability of plans):

“(1) For any plan or amendment of a plan adopted on the basis of law by a competent state body or a competent body of a self-governing local community in the field of spatial planning, water management, forest management, hunting, fishing, mining, agriculture, energy, industry, transport, waste and wastewater management, drinking water supply, telecommunications and tourism that could have a significant impact on the protected area, special protection area or potential special protection area by itself or in connection with other plans, an assessment of the acceptability of its impacts or consequences in relation to the protection objectives of these areas shall be carried out.

(2) The ministry shall assess the acceptability of the impact or consequences of the plan on the areas referred to in the preceding paragraph through a strategic environmental impact assessment. This procedure is conducted in accordance with the provisions of the law governing environmental protection, insofar as this law does not provide otherwise.”

<sup>44</sup> Article 17(1) of the Decree on Special Protection Areas adopted on 29 April 2004 (Official Gazette of the Republic of Slovenia, No. 49/04, amended), available [here](#) (in Slovenian).

<sup>45</sup> Articles 45.a and 45.b of the [Act on Settlements](#) and Other Spatial Interventions (Official Gazette of the Republic of Slovenia, No. 18/84, amended, Official Gazette of the Republic of Slovenia, No. 26/90, amended — ZPPreb and 23/02 — US decision) or Article 45 of the [Spatial Planning Act](#) (Official Gazette of the Republic of Slovenia, No. 110/02, 8/03, amended, and 58/03 — ZZk-1).

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and the Spatial Planning Act<sup>46</sup>. Annex 5 of the Decree provided the list of exempt projects. It included the 2TIR project<sup>47</sup>.

- Rules on the assessment of the acceptability of the implementation of plans and projects on Natura 2000 areas and protected areas<sup>48</sup>.
- Conservation objectives for all Natura 2000 sites are established in the Natura 2000 Management Programme<sup>49</sup>.

2.2.10 The Spatial Planning Act (ZUreP-1) valid at the time of the approval of the National Spatial Plan for 2TIR was replaced by a new act (ZUreP-2) in 2018<sup>50</sup>. The new planning and permitting legislation became applicable after 1 June 2018<sup>51</sup>. The new integrated system has introduced a comprehensive permit, which is fully challengeable before the courts.

2.2.11 The Mining Act<sup>52</sup> is applicable to economic activities aimed at the extraction of mineral resources.

### **Other relevant EU instruments**

2.2.12 The Trans-European transport network (TEN-T) was launched in 1996 by the Decision of the European Parliament and of the Council setting the guidelines for the development of the Trans-European transport network<sup>53</sup>. In 2010, the guidelines were updated to modify corridors and TEN-T maps<sup>54</sup>. In 2013, the Regulation<sup>55</sup> on Union guidelines for the development of the TEN-T was adopted<sup>56</sup>, replacing the former guidelines.

2.2.13 The TEN-T network is being supported by a financial instrument under the Connecting Europe Facility (CEF), which was launched by the CEF Regulation<sup>57</sup>, also in 2013.

### **Relevant EIB Environmental and Social Standards**

#### *The EIB Environmental and Social Standards<sup>58</sup>*

2.2.14 Standard 1: Assessment and management of environmental and social impacts and risks<sup>59</sup>:

<sup>46</sup> Article 45 of the [Spatial Planning Act](#) and Annex 5 of the [Regulation of the Republic of Slovenia on Special Protection Areas \(Natura 2000\)](#), "List of adopted decisions on the selection of the most appropriate solution" (Official Gazette of the Republic of Slovenia, No. 110/02, amended, and ZZk-1).

<sup>47</sup> Annex 5 to the Decree on Special Protection Areas (Decree on Natura 2000).

<sup>48</sup> Rules on the assessment of the acceptability of the implementation of plans and projects on Natura 2000 areas and protected areas (Official Gazette of the Republic of Slovenia, No. 130/04, amended), available [here](#) (in Slovenian).

<sup>49</sup> Slovenia prepared a Natura 2000 Management Programme for 2007-2013. The Natura 2000 Management Programme for 2015-2020 is available [here](#) (in English) and [here](#) (in Slovenian).

<sup>50</sup> The Spatial Planning Act (*Zakon o urejanju prostora* – ZureP-1) (Official Gazette of the Republic of Slovenia, No. 110/02, 8/03, amended, 58/03 — ZZK-1, 33/07 — ZPNačrt, 108/09 — ZGO-1C, and 80/10 — ZUPUDPP) was replaced in 2018 by No. 61/17 — ZUreP-2. The Construction Act is available [here](#) (in Slovenian) and the Spatial Planning Act (ZUreP-2) is available [here](#) (in Slovenian).

<sup>51</sup> Krajewska, M., Żróbek, S., and Šubic-Kovač, M. (2014), The role of spatial planning in the investment process in Poland and Slovenia, *Real Estate Management and Valuation*, Vol. 22, No. 2, pp. 52-66. The Construction Act (2002) merged two permits (a location/planning permit and construction permit) to create a single permit — the new construction permit (development consent). In 2007, the Spatial Planning Act further modified spatial planning and construction.

<sup>52</sup> Mining Act — ZRud-1 (Official Gazette of the Republic of Slovenia, No. 61/10 of 26 July 2010) (as amended).

<sup>53</sup> Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the TEN-T, available [here](#) (amended by Decision No 884/2004/EC (available [here](#)) and Regulation (EC) No 1791/2006).

<sup>54</sup> Decision No 661/2010/EU of 7 July 2010, available [here](#).

<sup>55</sup> See the [types of legislation \(europa.eu\)](#).

<sup>56</sup> Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the TEN-T and repealing Decision No 661/2010/EU (TEN-T Regulation), available [here](#) (as amended).

<sup>57</sup> Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility (CEF Regulation).

<sup>58</sup> Environmental and Social Standards (2018) are available [here](#) (in English).

<sup>59</sup> Standard 1, EIB Environmental and Social Standards (2018).

- The EIB recognises the need for a proactive approach to ensure that environmental and social considerations are taken into account during the early stages of strategic decision-making by promoters so as to have a real influence on the choice of alternative developments.
- The EIB is committed to developing a holistic approach to impact assessment and risk management by promoting the SEA as an “upstream” tool used to identify the best available options at an early planning stage and to improve the organisation and structure of the planning process.
- Stakeholder engagement entails a process comprising both information disclosure and meaningful consultation with stakeholders (project-affected people and/or communities and other interested parties) on an ongoing basis. More on stakeholder engagement is provided in paragraph 2.2.16.
- All operations located in the European Union that are likely to have significant effects on the environment, human health and well-being and may interfere with human rights will be subject to an assessment according to the EIA Directive. This assessment may be complemented by other assessments required by EU legislation, such as the appropriate assessment under the Habitats Directive and the Birds Directive, and the assessment under the Water Framework Directive, if applicable.
- In order to tackle the limitations of addressing environmental and social impacts at project level, the promoter will also take into account the general principles of the SEA Directive and the SEA Protocol under the Espoo Convention, if applicable. An appropriate assessment under the Habitats Directive for plans and programmes will complement the SEA, if required.
- The promoter should ensure a participative and transparent SEA process by engaging all relevant stakeholders in different SEA activities and stages and using various communication and consultation tools and methods depending on the occasion, type of stakeholders, context, timing and resources.
- As part of the impact and risk identification process, the promoter should collect and provide, at a minimum, the project description, including the physical characteristics of the whole project and, where relevant, its area of influence during the construction and operational phases, among other information.
- In defining whether the criteria and conditions set out in Article 4(7) of the Water Framework Directive are met, the promoter will follow the approach recommended by the European Commission guidelines, mainly those developed as part of the Common Implementation Strategy for the Water Framework Directive. The promoter will carry out the assessment at an appropriate project development stage, avoiding duplications.
- Where a comprehensive EIA is required, the promoter shall prepare an EIA study that will, at a minimum and among other things, include alternatives to the proposed project and the extent to which certain matters (including the evaluation of alternatives) are more appropriately assessed at different levels (including planning level, using the outcomes of the SEA, if applicable), or on the basis of other assessment requirements (e.g. biodiversity assessment).
- Taking into account the findings of the environmental and social assessment and the outcomes of the consultation with affected individuals, communities and other relevant stakeholders, the promoter will develop and implement an environmental (and social) management plan (EMP) that, in sum, will describe the mitigation of environmental and social impacts and risks, the performance improvement as well as the opportunities<sup>60</sup>.

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<sup>60</sup> The EMP shall include a study on the implementation of measures, the content of which is to be harmonised with the appropriate nature protection authority, and is to cover the following aspects: the method of construction and technical equipment, physical protection, time limitation, and envisaged management method for potential pollution. It is a tool for environmental authorities to monitor the implementation and effectiveness of environmental measures, to identify unforeseen significant adverse effects and to undertake appropriate remedial action.

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### 2.2.15 Standard 3: Biodiversity and ecosystems<sup>61</sup>:

- The EIB will only finance a project within a protected area, or within a nationally or internationally designated or recognised area for biodiversity conservation, if the promoter is able to demonstrate that the development is legally permitted and that the design of the project is consistent with any management plan for such areas. In the absence of such a plan, projects should be compatible with the achievement of the relevant conservation objectives used to designate the area in question.
- Projects located in the European Union that may have a significant effect on a site designated or in the process of being designated Natura 2000 shall be subject to the assessment procedures required under Articles 6(3) and 6(4) of the EU Habitats Directive. The use of the European Commission guideline for applying Articles 6(3) and 6(4) of the Habitats Directive is recommended (see paragraph 2.2.6).
- For projects within the Natura 2000 network, the EIB requires the promoter to ensure that the assessment is able to demonstrate, with supporting evidence, that (i) there will be no significant effects on a Natura 2000 site; or (ii) there will be no adverse effects on the integrity of a Natura 2000 site; or (iii) there is an absence of alternatives to the project or plan that is likely to have adverse effects on the integrity of a Natura 2000 site; and (iv) there are compensation measures which maintain or enhance the overall coherence of the Natura 2000 network and the project is justified by imperative reasons of overriding public interest.
- **Cumulative impacts** of the project should be appropriately assessed: (a) **between the different elements of the projects (no “salami-slicing” of impacts)**; (b) with regard to other projects in the same area likely to have similar impacts; and (c) with regard to other activities, **threats and pressures** in the wider landscape that might have similar or related impacts on biodiversity and ecosystems<sup>62</sup>.

### 2.2.16 Standard 10: Stakeholder engagement<sup>63</sup>:

- Environmental and social impact assessments should follow the spirit of the Aarhus Convention. It grants the public rights regarding access to information, public participation and access to justice, in governmental decision-making processes on matters concerning the local, national and transboundary environment. It focuses on interactions between the public and public authorities<sup>64</sup>.
- Initial stakeholder consultations will occur early enough for the rights and interests of impacted individuals and communities to influence decisions made throughout the project life cycle.
- The promoter will consult all identified stakeholders at strategic decision-making points during the project life cycle and certainly before any impact is delivered. Engagement with stakeholders during the life of a project is a dynamic and challenging process. Promoters are required to monitor the implementation of the stakeholder engagement plan.

<sup>61</sup> Standard 3, EIB Environmental and Social Standards (2018).

<sup>62</sup> For the purpose of Standard 3, “salami-slicing” is defined as artificially dividing a project into distinct sub-projects for the purpose of legal procedures, such as an ESIA.

<sup>63</sup> Standard 10, EIB Environmental and Social Standards (2018).

<sup>64</sup> The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (known as the Aarhus Convention).

## 2.3 Responsibilities of the EIB

### 2.3.1 EIB Statement of Environmental and Social Principles and Standards (2009)<sup>65</sup>:

- In line with the EIB Statement of Environmental and Social Principles and Standards, the responsibility for compliance with the project-applicable standards lies with the promoter and local authorities. However, the EIB will not finance projects that do not meet project-applicable standards. Whether the projects meet the project-applicable standards is established as part of the EIB's due diligence carried out during project appraisal and monitoring, when applicable<sup>66</sup>.
- At the project identification stage, an investment that has reached an advanced stage in the discussions with the promoter on possible EIB involvement is included in the EIB's project pipeline. Then the EIB appraises the project it is planning to finance<sup>67</sup>. Among other things, the appraisal aims to assess the project's environmental and social impacts and whether the project complies with the project-applicable standards. Sometimes, the appraisal results in conditions for disbursement. The promoter must complete these conditions to the satisfaction of the EIB prior to the disbursement of the EIB financing<sup>68</sup>.

#### *Project appraisal and monitoring*

### 2.3.2 Volume II of the EIB Environmental and Social Handbook (hereinafter the "Handbook", 2013)<sup>69</sup>:

- The appraisal takes place prior to a final decision by the Board of Directors of the EIB and it aims to assess, among other things: (i) whether the project complies with the project-applicable standards; and (ii) the project's impacts. Volume II of the Handbook also details the assessment procedure<sup>70</sup>. During appraisal, the EIB identifies the main environmental legal and regulatory framework relating to the project and any legal issues. The EIB needs to take into account residual impacts, i.e. those adverse environmental impacts caused by the operation that will remain after mitigation and impact management measures have been applied.
- At the appraisal, the Bank determines and recommends to the EIB Board of Directors contractual conditions to ensure the environmental and social acceptability of the project during implementation and operation. These checks include, among others: (i) conditions for disbursement, and (ii) particular undertakings.
- **When adverse environmental and social impacts and risks are anticipated, the EMP shall be referred to by the finance contract<sup>71</sup>.**
- The Handbook describes the project's area of influence as areas, individuals and communities impacted beyond the footprint of the project or activity by **cumulative impacts from further planned development of the project** or other sources of similar impacts in the geographical area, any existing project or condition, and other project-related developments that can realistically be expected at the time due diligence is undertaken. In addition to the area of geographical or spatial influence, temporal influence should also be determined.
- The EIB issues long-term loans and makes other investments for the development of projects in the European Union in order to support **EU policies**. In general terms — within the limits of any mandates that may apply — an investment is eligible for environmental

<sup>65</sup> The EIB Statement of Environmental and Social Principles and Standards (2009) is available at: [https://www.eib.org/attachments/strategies/eib\\_statement\\_esps\\_en.pdf](https://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf).

<sup>66</sup> Monitoring starts after the finance contract is signed.

<sup>67</sup> Paragraph 17 of the EIB Statement of Environmental and Social Principles and Standards.

<sup>68</sup> Paragraph 256, indent 2, Volume II of the EIB Environmental and Social Handbook (2013).

<sup>69</sup> Volume II, EIB Environmental and Social Handbook (2013), accessed on 26 November 2021.

<sup>70</sup> Paragraph 12 of the Background, and paragraph 17 of the EIB Statement of Environmental and Social Principles and Standards, [available here](#).

<sup>71</sup> Paragraph 261, page 147, EIB Environmental and Social Handbook (2013).

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reasons for EIB financing to the extent that it supports the objectives of the EU Treaties, the environmental and social acquis and the environmental priorities.

- The Handbook explains how the EIB conducts its work on environmental and social matters throughout the project cycle and specifies documentation/information required from the promoter for the purpose of the EIB's due diligence. The environmental and social assessment is not a single action but an ongoing and iterative process that takes place throughout the project cycle. Therefore, it is essential that environmental and social issues are taken into account during identification, appraisal, implementation, monitoring and evaluation.
- Effective identification and management of the environmental and social risks, impacts and opportunities are key prerequisites for **assisting promoters** with the progress of their projects in a timely and efficient manner. **Early screening of environmental and social issues** and **early attribution of an environmental specialist** seeks to ensure the prevention of problems later in the due diligence process.
- Should the project be complex in nature and have complex environmental and social issues, in particular related to biodiversity and climate change adaptation, then **support of an internal or external environmental specialist** should be sought to assist in the review of specific environmental and social aspects and impacts.
- Based on the project documents, a **screening checklist** should be completed, which will assist the team in highlighting any environmental and social risks and impacts at the project identification note stage.
- The Handbook provides guidance on screening, including consideration of cumulative impacts of the project with other existing or planned projects, and of indirect effects, such as certain major environmental and biodiversity effects. It also presents some criteria to measure the magnitude of impacts, such as the absolute amount of resource or ecosystem affected, the transboundary nature and the complexity of impacts.
- The environmental and social impact assessment shall be guided, among others, by principles such as the assessment of reasonable alternative courses of action and their environmental and social significance, even if the promoter does not have the power to implement these alternatives. Alternative courses of action include the option of doing nothing, and a **real analysis of alternatives** but not mere disposal of them in favour of a decision that has already been reached.
- For projects located in the EU, especially in the case of complex and/or sensitive projects, it is recommended that a Stakeholder Engagement Plan be developed as part of the environmental and social impact assessment process.
- Monitoring requirements may include **monthly and annual environmental and social reporting by the promoter** to the EIB including the EMP; particular additional requirements for monitoring of activities and outcomes; evidence of efforts to involve local communities and civil society in monitoring; and for very large complex projects, procedures for an independent panel of environmental and social experts or independent monitoring.
- The EIB finance contract contains environmental and social undertakings for a typical investment loan. If required, the team may propose **additional contractual conditions or undertakings** specific to the project, which take account of certain legislation that the team feels is necessary to draw to the borrowers' attention.

### *Other relevant EIB policies and requirements*

#### 2.3.3 EIB Transport Lending Policy<sup>72</sup>:

- In particular, the EIB seeks to support railway projects forming part of the TEN-T. Within this network, the European Commission has defined priorities (core network, freight

<sup>72</sup> EIB Transport Lending Policy (2011), available [here](#).

corridors), which shall be reflected in the Bank's value added assessment of proposed projects.

- The Bank will confirm that projects proposed for financing on the TEN-T comply with the growing set of technical specifications for interoperability (TSIs)<sup>73</sup>.

#### 2.3.4 Bank's internal procedures:

- A letter of support does not commit the EIB until (i) the Bank has been satisfied with the outcome of its appraisal, (ii) obtained the necessary approvals, and (iii) negotiations have been successfully concluded. The EIB has no legal obligation to provide finance until a finance contract is signed.
- The Board of Directors has the sole power to take decisions in respect of loans, guarantees and borrowings. The Board of Directors takes decisions on changes occurring after its approval of the operation involving a fundamental change in the nature, scope or technical content of the project. It should be noted that an accumulation of modifications of a technical or mechanical nature may lead to a significant or fundamental change in the nature of the project, which would imply the need for the governing bodies' approval. Moreover, consultation with the EC is required in case of a fundamental change in the nature, scope or technical content of the project. The changes are subsequently reflected on the EIB website.

#### 2.3.5 2017 Connecting Europe Facility Transport Blending Call<sup>74 75</sup>:

- Pre-financing, interim and balance payment(s) will be conditional on (a) the approval for financing by the European Fund for Strategic Investments (EFSI) Investment Committee and the EIB Board of Directors and, subsequently, full financial close for the entire financing requirement within 12 months from the date of signature of the grant agreement. Alternatively, for actions aiming at removing bottlenecks, actions with cross-border impact, or actions in Member States eligible under the Cohesion Fund, pre-financing, interim and balance payment(s) will be conditional on (b) the signature of a finance agreement by a national promotional bank, the EIB or at least one private sector investor for at least the value of the Connecting Europe Facility grant awarded, and a full financial close for the entire financing requirement within 12 months from the date of signature of the grant agreement<sup>76</sup>.
- The European Union's contribution to the Connecting Europe Facility Debt Instrument is managed indirectly by the EIB, as a risk-sharing partner, on behalf of the Union. The selection of the EIB as an entrusted entity was made taking into account Article 21(2) of the CEF Regulation and the requirements of Article 154 of the EU Financial Regulation<sup>77</sup>.
- Only the EIB is entitled to present projects for approval by the EFSI Investment Committee and the EIB Board of Directors. The EIB is the appropriate issuer of the letter of support for proposals requiring EFSI approval<sup>78</sup>.
- The purpose of the letter of support is also to demonstrate that the issuing institution has carried out an analysis of the project, providing a point of view independent from the one of the applicant.
- The approval by the EFSI Investment Committee and the EIB Board of Directors for the financing of projects that require such approval has to be obtained **within 12 months from the date of signature of the grant agreement**. There are no other restrictions applying to the date of

<sup>73</sup> TSI requirements are set out in Directive (EU) 2016/797 of 11 May 2016 on the interoperability of the rail system within the European Union, available [here](#).

<sup>74</sup> Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010 is available [here](#).

<sup>75</sup> Information on the 2017 CEF Transport Blending MAP call is available [here](#).

<sup>76</sup> Section 12.2.3 "Payment arrangements" of the Call for Proposals Concerning Projects of Common Interest under the Connecting Europe Facility in the Field of TEN-T, Multi-Annual Work Programme 2014-2020, CEF Transport 2017 Blending Call – General Envelope, available [here](#).

<sup>77</sup> CEF Transport Blending Facility under the Multi-Annual Work Programme 2014-2020, available [here](#).

<sup>78</sup> The CEF FAQ – General (8 June 2017) is available [here](#).

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obtaining EFSI and EIB approval. Both EFSI/EIB approval and financial close should take place within this time frame. Both conditions need to be complied with for the disbursement of the Connecting Europe Facility grant for each individual project.

### 3 WORK PERFORMED

- 3.1.1 After receiving the complaint in October 2020, the EIB-CM conducted an initial meeting with the EIB services involved in the Divača-Koper second rail track project, during which it requested clarifications and further details regarding the EIB's due diligence on the project.
- 3.1.2 The EIB-CM reviewed all relevant information and documents, such as project documents available on the EIB's project website, additional documents made available by the EIB services and publicly available external documents, such as decisions pertaining to the project and the national investment programme.
- 3.1.3 The EIB-CM also reviewed relevant information provided by the complainant in support of its allegations, in its original submission as well as in subsequent submissions and during calls.
- 3.1.4 On 16 March 2021, the EIB-CM issued the initial assessment report, in which it established the allegations that have become the focus of the investigation. The report was provided to the complainant and made available on the website of the EIB-CM<sup>79</sup>.
- 3.1.5 The compliance review assessed the complainant's allegations in the context of potential Bank maladministration, including whether the project complied with the applicable regulatory framework and the EIB Group's own policies, procedures and standards. The review analysed the project documentation and the due diligence process carried out by the Bank in the areas related to the complainant's concerns as identified in Table 1, taking into account the scope of the project as approved by the EIB for financing.
- 3.1.6 Based on the collected and analysed information, the EIB-CM prepared this conclusions report.

### 4 THE PROJECT CYCLE

#### 4.1 EIB project pre-appraisal

- 4.1.1 In July 2017, following endorsement of the governing bodies, the EIB issued a letter of support with conditions to Slovenia for 2TIR to be submitted with the application for the 2017 Blending Call of the Connecting Europe Facility 2014-2020. One of the conditions specified in the letter of support is the completion of positive and satisfactory due diligence in relation to the project, in particular the fact that the EIB would need to be satisfied that the project is technically, financially and economically viable and meets EU requirements in respect of tendering and the environment. In the letter of support with conditions, the project is described as the construction of about 27 km of new rail line between the rail junction at Divača and the port of Koper in south-west Slovenia.
- 4.1.2 In May 2018, the promoter requested the EIB services to start the appraisal of the Divača-Koper rail track project for the construction and operation of the second railway as a single track.

#### 4.2 EIB project appraisal

- 4.2.1 The project appraisal took place from June 2018 to March 2019. The project under appraisal consists of the construction of 27 km of single-track railway line on a new alignment between the port of Koper and the rail junction in Divača. It includes eight tunnels and two viaducts. The appraisal concluded to be in favour of financing the project with conditions with the aim to address a number of issues. Among other facts, the EIB's appraisal observed the following:
  - The EIB services have followed this project since 2006, and engaged with the promoter on various issues. The EIB appraisal stated a number of issues: technical, engineering, environmental and socioeconomic issues. The potential for value engineering was inhibited

<sup>79</sup> The initial assessment report is available [here](#).

by the historical selection of parameters. Also the appraisal noted a lack of experience of the developer in project management while services such as implementation of environmental aspects will be subcontracted.

- According to the promoter, the chosen solution of service tunnels along the three longest tunnels is the only feasible option. The EIB appraisal noted that the decision to build the service tunnels with the same cross-section as the main tunnels was made with a view to possible track duplication in the future.
- In 2017, at the promoter's request, the EIB issued the letter of support with conditions for the Connecting Europe Facility Blending Call. The promoter requested the EIB to approve the financing of the project in April 2019 in order to meet the Connecting Europe Facility blending grant deadline (end of May 2019). The appraisal highlighted that the blending grant relates only to construction works on the main tunnels (about 50% of the physical scope and cost of the overall project). In these circumstances, the services agreed to submit the financing proposal for the EIB's approval with conditions.
- The project is located in a sensitive natural environment. The appraisal stated that the project is acceptable for financing in environmental and social terms with the appropriate conditions referring to the Environmental and Social Data Sheet. However, the appraisal also noted that there is a risk that the planned mitigation measures are insufficient, resulting in larger than expected negative impacts on Natura 2000 protected areas and/or surface water bodies or groundwater bodies. After a site visit, the appraisal observed that the impact of the railway line would normally be limited to the sections at grade or on viaducts; however, the impact of the tunnels on the karst cannot be ruled out.
- In addition to project-related "conditions before signature", the appraisal proposed the following project-related conditions prior to first disbursement: (i) completion of the main tunnel drives, (ii) completion/progress of the EIA procedure(s) for the port of Koper expansion and (iii) specific confirmation from the competent authority that the project will have no significant impact on nature conservation sites.
- As part of the reporting requirements, the appraisal mentioned the obligation for the promoter to report annually on significant changes to the initial scope of the project (as described in the technical description of the project) with justification, and on any major issues with environmental or social impact.

#### *Environmental and Social Data Sheet<sup>80</sup>*

#### 4.2.2 Among other matters, the Environmental and Social Data Sheet:

- Described the project as a single-line rail track on a new alignment to increase rail capacity between the port of Koper and the rail junction in Divača. It presented the overall benefits of the project, including ultimately an improvement in the environmental situation.
- Featured the Transport Development Strategy of Slovenia until 2030 subject to the SEA. The document presents the EIA procedure undertaken for Annex I projects over the period 2012-2014, with transboundary consultations held with the competent Italian authorities and their comments taken into account in the environmental consents. Public consultations took place between October and November 2012 with comments and requests from the public taken into account when defining the conditions specified in the environmental consent granted by the competent authorities.
- Noted that environmental risks and impacts had been analysed during the EIA procedure and the project was subject to appropriate assessment (Article 6(3) of the Habitats Directive). The outcome was an extensive programme of corresponding mitigation measures.
- Observed that the EIA report and the environmental consent define further detailed studies to be undertaken prior to the commencement of the works, such as a study for the

<sup>80</sup> The Environmental and Social Data Sheet is available on the EIB's [website](#).

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prevention and reduction of particle emissions, as well as monitoring during construction and operation. Despite the geological surveys carried out and other mitigation measures, some residual risks that cannot be mitigated remain because of the karst phenomena and the corresponding potential contamination of groundwater or change in hydrological regime.

- Stated that the competent authority screened out a project change consisting of enlargement of the cross-section of the service tunnels. The promoter intends to build these service tunnels with the same cross-section as the main tunnels with a view to possible future use of the service tunnels 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 additional track is ever to be considered for implementation, it will need to be the subject of a separate regulatory procedure.
- Made specific mention of one of the conditions proposed in the appraisal, notably the one related to nature conservation.

### 4.3 EIB project approval

4.3.1 The project description and the conditions mirror the ones proposed by the appraisal and provided in the Environmental and Social Data Sheet (ESDS)<sup>81</sup>. The project approval:

- Acknowledged issues around the project, the planning history which goes back over 25 years, i.e. the issues noted by the appraisal (see paragraph 4.2.1, points 1, 2 and 3). It was noted that a change of the project design was not envisaged.
- Stated that in June 2017, the EIB issued a letter of support with conditions for the Connecting Europe Facility Blending Call. The promoter requested the EIB's approval in April 2019 in order to meet the Connecting Europe Facility blending grant deadline (end of May 2019). The EIB's approval noted that the promoter only partially met the conditions stipulated in the EIB's conditional support letter.
- Made a remark that once the milestones put in place for the promoter are met, the EIB services will revert to the Bank's governing bodies prior to signature to seek approval of the final terms and conditions.

### 4.4 Project within the EU Trans-European transport network

4.4.1 The project documentation refers to the National Programme for the Development of Slovenian Railway Infrastructure (adopted in 1996) as a starting point for the development of the 2TIR<sup>82</sup>. In the same year, the third Pan-European Transport Conference in Helsinki<sup>83</sup> identified 11 pan-European transport corridors, where Corridor V was identified as Trieste/Koper-Lviv. The key nodes in Slovenia were Koper, Postojna and Ljubljana. Railway transport strategic development in Slovenia is presented in more detail in Appendix 2.

4.4.2 In 2004, the European Parliament and the Council adopted a decision<sup>84</sup> defining priority projects at EU level. It included priority project 6 with the following railway lines: Venice-Ronchi Sud-Trieste-Divača, Koper-Divača-Ljubljana and Ljubljana-Budapest.

4.4.3 In 2010, the guidelines for the development of the TEN-T presented Axis 6 connecting Ljubljana with Koper via the Divača node and an additional branch from Divača to Trieste-Lyon<sup>85</sup>. Also in 2010, at a ministerial meeting in Ljubljana, Italy withdrew from the Trieste-Divača section<sup>86</sup>.

<sup>81</sup> The link to the project description is available [here](#).

<sup>82</sup> Feasibility study for the project (2000).

<sup>83</sup> Opinion of the Economic and Social Committee on the "Pan-European transport conference and social dialogue – from Crete to Helsinki", Official Journal C 204, 15/07/1996 P. 0096, available [here](#).

<sup>84</sup> Decision No 884/2004/EC of the European Parliament and of the Council of 29 April 2004.

<sup>85</sup> Decision No 661/2010/EU of 7 July 2010, available [here](#).

<sup>86</sup> Meeting took place on 24 February 2010. Letter from Italy to Slovenia no. 007-131 / 2007 / 54-0006250 of 21 April 2010.

Later on, based on the proposal from the European Commission<sup>87</sup>, the European Parliament and the Council confirmed the corridors of the core TEN-T and their financial support under the 2014–2020 multiannual financial framework.

- 4.4.4 The 2TIR is part of two core TEN-T corridors: the Mediterranean and the Baltic-Adriatic, aiming to clear a railway bottleneck. Since its accession, Slovenia has received EU financial support for the development of the TEN-T and the 2TIR. In 2004, it received EU funding for technical documentation for the construction of the second track of the Divača-Koper railway line<sup>88</sup>. During the 2014 – 2020 EU programming period, Slovenia received three Connecting Europe Facility grants for the project to assist surveys for executive design, construction of access roads and structures for bridging Glinščica valley<sup>89</sup>. In September 2020, the European Commission issued a decision to support the project with 2014-2020 programming period from the EU Cohesion Funds<sup>90</sup>.

## 5 ANALYSIS AND CONCLUSIONS

### 5.1 Allegation 1: Project's impacts and compliance with EU environmental law

- 5.1.1 Allegation 1 points to the project's negative impacts on the environment and its non-compliance with EU environmental law. It is composed of three sub-allegations (see paragraph 1.2.2), which are dealt with below.

#### Sub-allegation 1.1: Compliance with the EIA and SEA Directives

- 5.1.2 The complainant alleges non-compliance with the EIA and SEA Directives. As the SEA is applied to plans and programmes that precede the project-level assessment and development consent, the application of the SEA Directive is analysed first.

##### *Application of the SEA Directive to the relevant plans and programmes*

- 5.1.3 The EIB-CM reviewed the project's development (enlargement of the tunnels, changes and possible track doubling) and linkages with other projects such as the development of the port of Koper. It established that the key decision which set the preferred alternative had been issued before the SEA Directive became applicable in Slovenia (see below and Appendix 2).
- 5.1.4 The first formal preparatory act — the preparation programme for the 2TIR project — was adopted on 17 March 2000, and then a government decision was issued regarding the preferred alternative on 27 November 2003 (both of which occurred before 21 July 2004). The National Spatial Plan (NSP) for 2TIR was adopted on 14 April 2005 (before 21 July 2006).<sup>91</sup> Therefore, according to the provisions of the SEA Directive, application of the SEA was not required (see Appendix 2). The key decision-making steps for the project were taken within the land use planning procedure and prior to the application of the requirements of the SEA Directive (see paragraph 2.2.2, point 1)<sup>92</sup>. The project's schematic timeline is presented in Figure 2.

<sup>87</sup> The European Commission assembled the proposal based on the submissions from the Member State. Regulation (EU) No. 1315/2013 of the European Parliament and of the Council of 1 December 2013 on Union guidelines for the development of the TEN-T and repealing Decision No.661/2010/EU available [here](#).

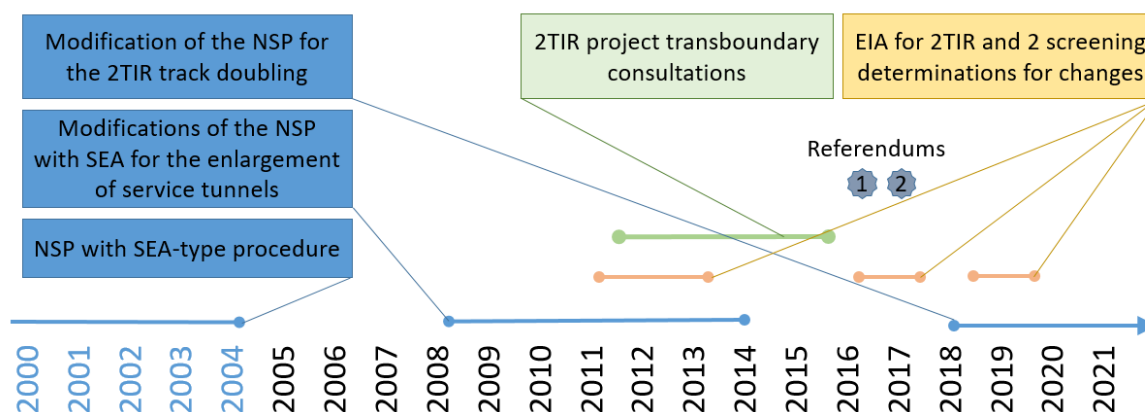
<sup>88</sup> Information available [here](#) (last accessed on 26 October 2021).

<sup>89</sup> Projects 2016-SI-TMC-0151-M and 2017-SI-TM-0016-W. Information available [here](#).

<sup>90</sup> Information on EU Cohesion policy investments in Slovenia available [here](#).

<sup>91</sup> As stated earlier, the SEA shall apply to the plans and programmes for which the first formal preparatory act was issued after 21 July 2004. The obligation to carry out an SEA also applies to plans and programmes for which the first formal preparatory act was prepared before 21 July 2004, but which were not adopted until after 21 July 2006.

<sup>92</sup> The decision-making procedure for the most appropriate location and solution was described in the Decision of 2000 of MoE.

**Figure 2: Timeline of 2TIR SEA and EIA procedures<sup>93</sup>**

\* \* \* \* \*

- 5.1.5 In 2004, the promoter applied for the modification of the NSP for 2TIR with an environmental report<sup>94</sup>. An SEA-type procedure was carried out according to the national requirements valid at the time. The NSP for 2TIR was subject to a “comprehensive environmental impact assessment procedure in accordance with the rules governing the protection of the environment and the ‘assessment of the acceptability of the effects of the implementation of the plans on protected areas, in accordance with the rules governing nature conservation’<sup>95</sup>. The environmental report analysed a single alternative for a greenfield project with a parallel set of smaller safety tunnels. The requirements of EU environmental law (the SEA and Habitats Directives) were not applicable to this step of decision-making (see paragraph 2.2.2, point 1 and paragraph 2.2.9, point 1).
- 5.1.6 The SEA procedure was carried out for the subsequent relevant strategic documents during the project’s lifetime. Until 2021<sup>96</sup>, at least three project-related/relevant plans and programmes were subject to an SEA screening determination or a full procedure (see also Appendix 2), namely:
- **First modification** of the NSP for 2TIR because of the enlargement of the 2TIR safety tunnels (screening decision requiring a full SEA procedure of 2009 and the SEA decision of 2014);
  - **Transport Development Strategy** of Slovenia adopted in 2016 (a full SEA procedure completed in 2015);
  - **Second modification** of the NSP for 2TIR for the third 2TIR track (screening decision in 2019 requiring a full SEA procedure, which -to the best of the EIB-CM’s knowledge- was ongoing as of January 2022).
- 5.1.7 Initial strategic project development, i.e. before the Decree on the NSP for 2TIR (2005), was not supported by an SEA. The EIB-CM is of the opinion that any SEA carried out for modifications of the NSP of 2TIR did not meet the purpose of comparing environmental impacts of alternatives and assessing cumulative environmental impacts with other plans. This stems from the fact that land use planning is not deciding on, but implementing the alternative selected earlier (the location decision was already taken in an earlier administrative procedure (2003) - see paragraph 5.1.4).
- 5.1.8 In Slovenia, the Spatial Development Strategy is used as the main policy document to coordinate policies across sectors<sup>97</sup>. National sectoral planning has to fit in with land use planning, which is often carried out for just one project (land use modification for a single project

<sup>93</sup> Figure 2 was prepared by the EIB-CM.

<sup>94</sup> The report prepared in 2004 and updated in 2005 is called *Poročilo o vplivih na okolje* (in Slovenian) and was prepared by Pro Loco d.o.o. SEA in Slovenian is *Celovite presoje vplivov na okolje* (CPVO) or a comprehensive environmental impact assessment.

<sup>95</sup> Page 4, SEA decision No. 35409-406/2008/98 re. NSP (CPVO) of 25 April 2014.

<sup>96</sup> The EIB appraisal ended in 2019. Moreover, please see disclaimer on the cover page of the report for the cut-off date regarding information available to the EIB Group Complaints Mechanism.

<sup>97</sup> OECD (2017). The Governance of Land Use: Country Fact Sheet Slovenia, available [here](#).

activity), for which an SEA is performed. In CM's view, such SEAs for a single project are rather cumbersome and probably not the most effective in the sense that the SEA does not fulfil its objective of assessing, among others, alternatives and cumulative effects<sup>98 99</sup>. The SEA, if conducted for the NSP for 2TIR (2005), would have been useful if there was a possibility to analyse alternatives; however, this was no longer possible as the preferred location was established in 2003<sup>100</sup> (see paragraph 5.1.5 and Appendix 2).

#### *Cumulative impacts*

- 5.1.9 **First modification of the NSP for 2TIR (enlargement of tunnels) (2014):** The SEA for the modification of the NSP because of the enlargement of the 2TIR safety tunnels included the appropriate assessment, but the SEA was limited to a selected route and did not re-examine variants (see paragraph 5.1.5). Its timing overlapped with the project's main EIA procedure and in the EIB-CM's view, this may have brought some confusion to the public (see Figure 2).
- 5.1.10 Other strategic procedures that provided an opportunity to appraise cumulative effects (as they were carried out for the transport sector) were the National Programme for the Development of Slovenian Railway Infrastructure (1996, prior to the SEA Directive) and the Transport Development Strategy (2016) (see Appendix 2).
- 5.1.11 **Transport Development Strategy (2016):** The projects analysed in the SEA for the Transport Development Strategy included Ljubljana-Koper, Ljubljana-Sežana, Ljubljana-Jesenice, Ljubljana railway hub and the development of the port of Koper. For the railway sector, the Transport Development Strategy specified the objective of improving the accessibility of international and intercity passenger transport and cross-sectoral impacts. While the Transport Development Strategy and the SEA hinted at the track doubling of 2TIR, it did not include it in the cumulative impact assessment. The SEA only assessed the cumulative impacts of the existing developments at the time and did not include the third 2TIR track, which became a planned development since 2017 (see Appendix 2).
- 5.1.12 **Second modification of the NSP for 2TIR (double track) (2019):** In 2017, a government decision on preparations for the future railway line upgrade launched the preparations for the track doubling of 2TIR. In 2019, the Ministry of the Environment and Spatial Planning (hereinafter MoE) issued a positive SEA screening determination (a need for a full SEA) for further modification of the National Spatial Plan for 2TIR aimed at the third 2TIR track. It can reasonably be expected that an assessment of the cumulative impacts is carried out as part of the SEA process. The procedure was ongoing at the time of the EIB-CM's investigation to the best of its knowledge.

#### *Public consultations*

- 5.1.13 The EIB-CM found no evidence of public consultations carried out before 2004, a phase when the project kicked off and was proposed for the TEN-T programme (see paragraph 4.4.1). Public participation is included in later procedures. Although the **NSP for 2TIR (2005)** was not subject to the SEA Directive, the adoption procedure included public consultations that were carried out on the environmental report for NSP for 2TIR (see Appendix 2). They took place in September 2004 in Koper and Hrpelje.
- 5.1.14 During the consultations, the public raised objections to the chosen location alternative and asked to re-examine it or compare it with other alternatives. The consultation document<sup>101</sup> stated that location plans shall be decided by the Slovenian government based on a proposal from the MoE in consultation with a set of stakeholders, as provided by the Spatial Planning Act (valid at the time)<sup>102</sup>. In the EIB-CM's view, this situation does not provide evidence of meaningful public engagement as understood under the EIB environmental and social standards (see paragraph

<sup>98</sup> Kontić, B. and Dermol, U. (2014). Confronting reality in strategic environmental assessment in Slovenia — Costs and benefits. *Environmental Impact Assessment Review* 50 (2014) 42–52.

<sup>99</sup> Bragagnolo, C. and Geneletti, D. (2012). Addressing cumulative effects in Strategic Environmental Assessment of spatial planning, [228535387.pdf \(core.ac.uk\)](https://www.core.ac.uk/doi/pdf/10.1016/j.eiar.2012.05.001).

<sup>100</sup> This took place before Slovenia's accession to the EU and the transposition deadline for the SEA Directive into national legal systems.

<sup>101</sup> Minutes prepared by the MoE No. 352-22-3/00 of 12 October 2004.

<sup>102</sup> Articles 45 and 170 (revoked) of the Spatial Planning Act (Official Gazette of the Republic of Slovenia, No. 110/02, amended).

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2.2.14, point 3 and paragraph 2.2.16). Since 2003 there was no real scope to consult the public on the location anymore.

- 5.1.15 After the NSP for 2TIR was adopted by a legislative procedure (2005), challenging the location of the project became an almost impossible task for the public concerned (as noted in the Commission's assessment, see paragraph 2.2.4, point 1)<sup>103</sup>. The above situation poses a challenge for the application of the Aarhus Convention and its "access to justice" pillar (access to a review procedure by court)<sup>104</sup> <sup>105</sup>. The only way to challenge the location (given that it was set by the Spatial Planning Act) is also via a legislative procedure, such as a referendum<sup>106</sup>.
- 5.1.16 **At the 2TIR EIA stage**, the promoter carried out public consultations, as required by the EIA Directive, without prejudice to the European Commission's reasoned opinions on access to justice in EIA consultations and on EIA transboundary consultations, with the reasoned opinion on the latter issued after completion of EIB's appraisal (see paragraph 2.2.4). The stakeholder engagement carried out in the context of the EIA followed the formal requirements, including the sharing of environmental information and the public consultations. The comments from the public included criticism about the location alternative chosen and questions/concerns about significant environmental impacts of the project itself.
- 5.1.17 As the public concerned was not satisfied with the outcome of the public consultations, it initiated two referendums in 2017 and 2018. Referendums are rarely held in Slovenia. Resorting to referendums in this case might be a signal that the carried out regulatory procedures did not satisfy the public and did not eliminate its concerns around the project (see paragraph 4.2.1, point 2 and paragraph 4.3.1, point 2). The results of the first referendum were annulled and the turnout of the second referendum was not sufficient to have a conclusive result<sup>107</sup>.
- 5.1.18 The project's EIA transboundary consultations are analysed below (see paragraphs 5.1.65 to 5.1.75).

### *Compliance with the EIA Directive*

- 5.1.19 The project falls under Annex I of the EIA Directive; therefore, it was subject to an EIA appraisal and permit in accordance with the national law transposing the EIA Directive (this is without prejudice to the ongoing infringement procedure noted in paragraph 2.2.4). Annex IV of the EIA Directive (2011 version valid at the time of the procedure) contains the requirements in terms of the environmental information to be provided to the relevant environmental authorities. The Directive does not require an assessment of location alternatives, but an outline of the main alternatives studied and reasons for the choice of the developer in terms of environmental impacts must be provided (see paragraph 2.2.3, point 1).
- 5.1.20 The EIB's environmental and social standards state that the EIA must examine reasonable alternative courses of action and their environmental and social significance, even if the promoter does not have the power to implement these alternatives (see paragraph 2.2.16).
- 5.1.21 In 2012, an EIA report prepared for the project in question described the preferred alternative as well as other aspects required by national law. The report provided an explanation for the analysed project's location, as approved by the Decree for NSP for 2TIR. The EIA report described technological alternatives (solutions) and other alternatives for the disposal of excavation material as a by-product of construction. The description of alternatives complies

<sup>103</sup> Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters. Final Report (2019), page 106: In Slovenia, the judicial review of plans and programmes is generally not possible. However, some changes were introduced in 2018 partially opening spatial plans to judicial review. The modification of the Construction Act and the Spatial Planning Act enables a new system with a comprehensive permit, which is challengeable before the courts. Standing is limited to the persons whose rights are impaired by the plan, the NGOs working in the public interest sphere of spatial planning, environmental protection, nature conservation or the protection of cultural heritage, if they have already objected to the plan during the planning procedure, and to the State Attorney, on behalf of the government. Available here: [https://ec.europa.eu/environment/aarhus/pdf/Final\\_study\\_EU\\_implemation\\_environmental\\_matters\\_2019.pdf](https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implemation_environmental_matters_2019.pdf).

<sup>104</sup> Access to justice is the right to challenge public decisions and request to review procedures (based on the Aarhus Convention, 1998). Slovenia ratified the Convention on 29 July 2004.

<sup>105</sup> At national level, environmental NGOs may challenge acts before a national court, which may then submit a preliminary question to the CJEU on the validity of EU law necessary for the decision at national level, following the procedure under Article 267 of the Treaty on the Functioning of the European Union. See more [here](#).

<sup>106</sup> A referendum is a tool for the public to express opinions about national legal acts.

<sup>107</sup> Information on the second referendum in an online press is available [here](#) (in English).

with the EIA Directive (applicable at that time, procedurally and strictly speaking), however, it is not fully in line with the requirements as per the EIB's environmental and social standards (2018) (see paragraphs 2.2.14, 2.2.15 and 2.3.2), as presented in the following paragraph.

- 5.1.22 Section 3 of the EIA report (2012) presents alternative locations for the project in question and the conclusions of decision-making from the year 2000 until the adoption of the NSP for 2TIR. Emphasis is made on the decision of the MoE (2000) rejecting alternative 4.1 and approving alternative I/2. This was transformed into variant I/3, which was then approved by the government decision of 2003 and eventually enacted by the Decree on NSP for 2TIR in 2005 (see Appendix 2). In the EIB-CM's view, it would have been good practice for the purpose of informing the public, in the EIA report, to prepare a summary of other location alternatives and arguments that were used to discard them before the government's decision. Given that the project is entirely located within the Natura 2000 network, the lack of likelihood of significant negative impacts on Natura 2000 sites or the justification for crossing protected areas of national interest could have, in the EIB-CM's view, been demonstrated more rigorously in the EIA report, going beyond the exemption provided for in the legislation (see paragraph 2.2.9, point 2). The EIB's standards calls for "a **real analysis of alternatives** but not mere disposal of them in favour of a decision that has already been reached" (see paragraph 2.3.2, point 11).
- 5.1.23 The promoter provided the environmental decision-making authority with several studies, including the main EIA report and a report required by the appropriate assessment. Both the main EIA and the appropriate assessment reports were supplemented and amended based on the comments from competent authorities (including transboundary consultations) and the public. In 2014, the Slovenian Environment Agency (ARSO) issued two EIA decisions for the project: the Environmental Consent and a Supplementary Decision to the Partial Environmental Consent (see Appendix 3).
- 5.1.24 The EIB-CM found the procedural steps in the EIA process to be compliant with the EIA Directive, but not fully in line with the EIB environmental and social standards in terms of comparison of alternatives (see paragraph 2.2.14, paragraph 2.2.15 and paragraph 2.3.2), and also without prejudice to the effectiveness of the consultation process, access to justice and rigor of the appraisal as required by the Habitats Directive (see paragraph 2.2.14 and paragraph 2.2.15, point 4). It must be noted that the EIB was requested to appraise the project only in 2018, 4 years after the issue of the EIA decision.

#### *EIB's compliance with own procedures and standards*

- 5.1.25 In 2017, the EIB services requested the relevant Bank's governing body to approve the issuance of the letter of support with conditions. The EIB-CM takes note that the project was appraised in 2019. .
- 5.1.26 The EIB appraisal rated the project's sustainability as acceptable, while noting that the project is located in a sensitive natural environment. However, the EIB-CM did not find evidence that the services carried out the environmental and social impact rating based on an established checklist (see paragraph 2.3.2, point 9). The objective of this checklist is to assist the appraisal team in highlighting any environmental and social risks and impacts. In the EIB-CM's view, as the environmental and social risk and impact checklist was not completed as part of the project appraisal, environmental risks may have received insufficient visibility in the decision-making process, including cross-border environmental risks.
- 5.1.27 The EIB services have followed the project since 2006 (see paragraph 4.2.1, point 1); however, the EIB project appraisal only formally started after the project identification note was issued. This could have been followed by the involvement of environmental and social specialist(s) in project oversight. Although the EIB environmental and social standards recognise the need for a proactive approach to ensure that environmental and social considerations are taken into account during the early stages of strategic decision-making by promoters (see paragraph 2.2.14), the EIB formal appraisal started very late in the project cycle and the appraisal team was not supported by environmental and social specialist(s). Having recourse to environmental specialist would have also been justified by the proximity to protected and sensitive areas (the project is carried out inside the Natura 2000 network), the "technical and environmental complexity," the project's visibility "in the public realm" and public complaints reaching the EIB as well (see paragraph 2.3.2).

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- 5.1.28 The EIB is bound by its commitment to the development of the TEN-T through participation in the Connecting Europe Facility as an EU body (see paragraph 2.3.5). The EIB appraised the project in line with the EIB Transport Lending Policy, considering various aspects of the project as provided by the promoter. The EIB services requested the approval for financing the project with conditions (prior to the signature of the finance contract and disbursement, and undertakings), this in view of addressing certain risks/concerns identified (see paragraph 4.2.1, point 6 and paragraph 4.3.1, points 1 and 2).
- 5.1.29 As required by the EIB's standards, the EIB received the EIA report with a non-technical summary and information required by the Habitats Directive. In its appraisal, the EIB services noted the location-based impacts and risks (see paragraphs 4.2.1 and 4.2.2) and mitigants, as required by the EIB standards (see paragraph 2.3.2, points 12 and 13). However, in the EIB-CM's view, insufficient environmental safeguards and conditions were established to ensure compliance with environmental and social standards throughout the project cycle (during project implementation and monitoring), namely in relation to the EMP, the project's cumulative impacts, and continuous stakeholder engagement (paragraph 2.3.2, bullet points 3, 8 and 10).
- 5.1.30 The EIB posted the EIA report on a dedicated project page on its website (file in pdf with limited permissions, and that cannot be translated using online tools)<sup>108</sup>. The EIB was provided with EIA documentation in the English language, which was used in the appraisal process. This information in English was not pro-actively disseminated to the public.
- 5.1.31 The Environmental and Social Data Sheet (ESDS) contains only one environmental condition. That said, the ESDS stated that if an additional track is ever to be considered for implementation, it will need to be the subject of a separate regulatory procedure.

### Conclusions

- 5.1.32 **Setting the location of 2TIR.** After the adoption of the NSP for 2TIR in a legislative procedure (Decree 2005), the national project development framework did not allow the chosen alternative to be changed, as all subsequent decision-making steps/procedures had to ensure compliance with the Decree adopting the NSP for 2TIR (see paragraphs 5.1.3, 5.1.7 and 5.1.8).
- 5.1.33 **Application of the SEA Directive and cumulative impacts.** The promoter demonstrated the formal application of the SEA procedure to the plans and programmes related/relevant to the project (and the SEA Directive once it became applicable in Slovenia). The EIB-CM reviewed the SEA information and the requirements of the SEA Directive, which appear to have been fulfilled (see paragraphs 5.1.5 to 5.1.8). However, the EIB-CM established that no assessment of the cumulative impacts of the project took place, except in the TDS (2016). The SEA of the TDS appraised cumulative impacts of 2TIR (single track) with other projects within the TDS. However, the third 2TIR track (double track) -which is a planned development since 2017 - was not included in the assessment of cumulative impacts within the TDS. The EIB-CM does not have information on the SEA for the third 2TIR track (as the procedure is ongoing) and/or whether it contains an adequate assessment of cumulative impacts. **The lack of cumulative impact assessment of the project with other planned development** (the third track was initiated by the governmental decision of 2017 and the SEA for the modification of the NSP of 2TIR was launched in 2019) **is not in line with EIB Environmental and Social standards** (see paragraph 2.2.2, point 4, paragraph 2.2.14, paragraph 2.2.15, paragraph 2.3.2, and paragraphs 5.1.9 to 5.1.12).
- 5.1.34 **Project's EIA procedure and stakeholder engagement.** The EIA procedure for the project was carried out in line with the EIA Directive, which is without prejudice to issues identified by the European Commission (see also conclusions on sub-allegation 1.3). It should be noted that the EIB's appraisal cycle started several years after the completion of the EIA procedure for 2TIR. However, the EIA report -in terms of description of alternatives- is not in line with the requirements as per the EIB's Environmental and Social standards (see paragraph 5.1.21). The latter guide both procedural and qualitative E&S due diligence. Also, meaningful public engagement was not found to be satisfactory and fully in line with **EIB Environmental and social Standard 10** (See paragraphs 5.1.14 and 5.1.17).
- 5.1.35 **Letter of support with conditions.** In 2017, following endorsement of the relevant Bank's governing body, the EIB issued a letter of support with conditions before the project identification note and before project appraisal. Despite the non-fulfilment of the conditions set in the letter of

<sup>108</sup> The EIB's website dedicated to the project is available [here](#) (in Slovenian).

support by the time the appraisal was completed (2019), the EIB services submitted to the Board of Directors a proposal for the financing of the project with conditions (see paragraph 5.1.25).

- 5.1.36 **The EIB's project appraisal tools.** The EIB-CM could not find any evidence that the appraisal team applied environmental and social appraisal tools (such as the environmental and social risk screening checklist). This led to an underestimation of the project's environmental and social risks, despite the complexity of the project being emphasised in the appraisal documents (see paragraph 5.1.26).
- 5.1.37 **The EIB's environmental and social specialist.** Despite the project's location inside the Natura 2000 network and the presence of numerous outstanding issues, the EIB services did not involve an environmental and social specialist(s). Even though the core EIA decision for 2TIR had already been issued by the time of the appraisal, the investment is in continuous development, as the third track is in the planning stage (see paragraph 5.1.27). As a result, **insufficient safeguards and conditions were established to ensure compliance with environmental and social standards during project appraisal and monitoring**, namely in relation to the environmental management plan (EMP) and the project's cumulative impacts (see paragraph 5.1.29).
- 5.1.38 **Project information on the EIB's website.** The project-related EIA information provided on the EIB's website was not readily reproducible and accessible to non-native speakers. The Bank did not pro-actively disseminate documents in English that contained environmental information, which were held by the Bank (see paragraph 5.1.30).

## Sub-allegation 1.2: Compliance with the Habitats and Water Framework Directives

- 5.1.39 The complainant alleged the project's negative impacts on protected areas and non-compliance with EU directives such as the Habitats and Water Framework Directives.
- 5.1.40 The project's EIA included a scoping phase and consultations with appropriate national authorities. The stakeholder consultation process in the EIA enabled the EIA information to be reviewed in line with the project-applicable national standards. The EIB-CM therefore focused on assessing the compliance of the project with EU law.

### *Compliance with the Habitats Directive*

- 5.1.41 The TEN-T corridors are created based on information provided by the Member States. The original name of the relevant corridor had the following nodes in Slovenia: Koper, Postojna and Ljubljana (see paragraph 4.4.1). This placement of the nodes provided many possible alternatives for the 2TIR, especially in relation to the Natura 2000 network. The 2TIR alignment alternatives were then reduced by moving the corridor node from Postojna to Divača (see paragraph 4.4.2). As a result, the entire project (and many of its alignments) ended up almost exclusively inside the Natura 2000 network. The NSP for 2TIR was exempt from appropriate assessment on the basis of legislative provisions prior to an EIA (see paragraph 2.2.9, point 2). It is the EIB-CM's opinion that such exemption enabled the project to be located inside the Natura 2000 network. It means that at the time, the assessment of alternative locations was less thorough as otherwise would be required by the SEA Directive, when applicable.
- 5.1.42 **NSP for 2TIR (2005):** The SEA-type procedure for the NSP for 2TIR included the preparation of an environmental report, and consultations with the public and an appropriate environmental authority on the project's likely impacts on the Natura 2000 network. The NSP for 2TIR was drawn up taking into account the Nature Protection Guidelines for 2TIR (2004)<sup>109</sup>. The MoE checked the relevance of the guidelines after each modification of the Natura 2000 network. The public had an opportunity to express its opinion on the project, however the request from the public to find an alignment with less impact on Natura 2000 has been responded with a given fact that the location had been decided already.

<sup>109</sup> The Institute for Nature Conservation of Slovenia prepared guidelines approved by Decision of the MoE No. 7-III/2-3/2-O-04/TT of 16 February 2004 on Nature Protection Guidelines for the NSP for 2TIR on the Divača-Koper section.

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- 5.1.43 **EIA procedure (2012-2014):** In terms of compliance with the requirements of the Habitats Directive (see paragraph 2.2.6), the NSP for 2TIR was subject to an EIA for 2TIR (2012-2014), which integrated appropriate assessment as required by the Habitats Directive (see Appendices 2 and 3), but without the possibility of reassessing alignment alternatives. The promoter prepared an annex to the EIA report for assessing the project's compliance with the Habitats Directive. The EIA decisions (2014) were issued concluding no likely significant negative impacts on the Natura 2000 network with mitigation measures (Article 6.3 assessment), despite many open questions raised regarding the interaction between the project, the Karst area and Natura 2000 protection features (such as streams and karst itself) during project construction.
- 5.1.44 While the EIA decision (of 13 February 2014) indicates likely significant negative impacts on caves, it does not link this with significant negative impacts on Natura 2000 sites or conservation objectives. Some information was still to be collected and studies to be prepared (such as on likely impacts of construction on caves or forest fires), but the relevance of such studies to appropriate assessment findings or the process of amending or supplementing the EIA/appropriate assessment decisions was not addressed. The concerns regarding the project potentially impacting unknown caves and potential negative impacts on water regimes have been addressed with the Caves Protocol, which is a document outside of the EIA procedure, but with direct relevance to the EIA decision. Said decision enforced the presence of environmental supervision and the implementation of an EMP.
- 5.1.45 In order to carry out appropriate assessment correctly, conservation objectives shall be established for each Natura 2000 site and adopted at the national level (see paragraph 2.2.6). At the time of the EIA procedure, priority species and habitats as well as conservation objectives were set within the Natura 2000 Management Programme (see paragraph 2.2.9, point 4).
- 5.1.46 The protection objective for the SCI Karst is to preserve the extent and characteristics of caves not open to the public<sup>110</sup>. The impact on the protection objective was evaluated through a karst study conducted by the Karst Research Institute<sup>111</sup>. The study established that the project does not cover the area of known caves, but that there is a likelihood that new caves will be discovered that will be at risk of pollution. Since all these negative effects can be effectively reduced by mitigation measures, the impact on habitat type 8310 has been assessed as insignificant. The karst study mentioned is the result of scientific research work conducted by a group of experts in the field of karstology.
- 5.1.47 In 2013, the Slovenian Institute for Nature Conservation confirmed that the EIA procedure for the 2TIR project was carried out in accordance with the national requirements (see paragraph 2.2.9) and that the project guidelines issued by the Institute for Nature Conservation do not require an amendment<sup>112</sup>. However, the project required further exemptions related to compliance with the national law in order to accommodate the project on the alignment<sup>113</sup>. The EIB-CM did not review the procedure, if any, required for such an amendment. Furthermore, there is no infringement procedure against Slovenia in terms of implementation of the requirements of the Habitats Directive relevant to this project.
- 5.1.48 **EIA report and supplements to EIA information:** The project is implemented in or is located near a number of Natura 2000 sites both in Slovenia and in Italy (see Appendix 1, Table 1.1). Information relevant to the appropriate assessment is provided in the EIA report (final version of 2014) and its supplements. Any above information and other relevant studies requested by or submitted for decision-making supports the appropriate assessment of the authorities, as such assessment is an opinion of an appropriate authority integrated in the EIA decision-making.

<sup>110</sup> Habitat type 8310, Annex 1 "Natural Habitat types of Community interest whose conservation requires the designation of special areas of conservation", the Habitats Directive.

<sup>111</sup> Karst Research Institute, ZRC SAZU, March 2010. Performing tasks for environmental protection and nature conservation – underground world – prior to the commencement of preparatory works for the construction of a new two-track Trieste–Divača railway line – the Divača–Črni Kal section, Postojna. Karst study presented in the EIA report.

<sup>112</sup> Opinion of the Institute for Nature Conservation No 7-III-1/24-O-09/TTACGMG of 22 March 2013 referenced in the letter addressed to the Ministry of Infrastructure and ARSO, dated 31 May 2013.

<sup>113</sup> In 2014, the Municipality of Sežana issued the Ordinance amending the Ordinance on the proclamation of natural sites and cultural monuments in the area of the Municipality of Sežana (Ordinance No. 13/92 of 14 April 2014 published in Official Gazette of Slovenia No 26/2014).

- 5.1.49 The EIA report, any relevant chapter or an annex dedicated to the assessment of the likelihood of impacts is also consulted with appropriate specialised nature protection authorities. During the consultation with the Institute for Nature Conservation (the appropriate authority in Slovenia), some shortcomings in the information and mitigation measures were established related to crayfish and its habitats in the Škofijski potok, and it was pointed out that the protection regime at the time of the decision-making did not allow for any intervention in the protected area and prohibited construction in general. The EIA decision referred to a satisfactory explanation received from the promoter, as provided in the clarifications to the EIA report (July 2012 and January 2014) <sup>114</sup>.
- 5.1.50 The project is near the Italian border and in close proximity to two Natura 2000 sites in Italy (see Appendix 1, Table 1.1). The decision-making authority stated that any potential impacts have been appropriately considered by the promoter and the impacts on both Natura 2000 sites in Italy are unlikely to be significant because proper mitigation measures have been established to prevent any potential significant negative impacts on surface and groundwater. See more on transboundary impacts under sub-allegation 1.3.
- 5.1.51 **First modification of the NSP for 2TIR (enlargement of tunnels) (2009):** In parallel with an EIA for the project in question, an SEA was taking place for the tunnels' enlargement. A full SEA was implemented, which included appropriate assessment and resulted in an SEA decision (2014) (see Appendix 2). After the adoption of the modified NSP for the enlargement of the tunnels, the promoter applied for an EIA, but in this case it concluded with a negative screening decision (no full EIA required) (see Appendix 3). The changes were not considered to result in the likelihood of significant negative impacts on the conservation objectives of the Natura 2000 sites and the network.
- 5.1.52 **Second modification of the NSP for 2TIR (third track) (2019):** The latest directly relevant entry point for the appropriate assessment is the SEA procedure initiated for the track doubling of 2TIR, which -to the best of the EIB-CM's knowledge- was ongoing as of January 2022.

#### *Compliance with the Water Framework Directive*

- 5.1.53 The project's compliance with the key requirements of the Water Framework Directive (i.e. no deterioration and maintenance or achievement of good water ecological and chemical status and good chemical and quantitative status (for groundwater bodies)) was assessed during the EIA (in an integrated procedure). The appraisal, as required by the Water Framework Directive, is less structured (compared with the requirements of the EIA and SEA Directives). The implementation of the requirements relies on good practices, which are also described in the EIB environmental and social standards. The standards were found to be met, also taking into account additional information prepared by the promoter. The EIA report and the supplementary information resulted in the EIA and the issuance of water permits (2013).
- 5.1.54 The project site is a water basin covered by the Adriatic River Basin Management Plan. There are two relevant river basins: (i) river basin of the Soča and (ii) river basin of Adriatic rivers and the sea. The plan<sup>115</sup> calls the situation in the river as problematic in terms of water quantity and sensitivity to climate change (see the list of relevant water bodies provided in Appendix 1, Table 1.2).
- 5.1.55 The EIA documentation provided an analysis of the surface and groundwater situation. The promoter carried out sampling and analysis to verify environmental baseline information. The assessment methods included lab analysis of chemical components in soil, groundwater, surface water, etc. The effects were weighted according to a specific methodology that is not the most commonly used, but acceptable. Where the effects were assessed as severe or very severe, it was clearly stated that this can only go ahead with very stringent mitigation measures. The assessment provided conclusions with mitigation measures, which, if implemented correctly, are adequate. For example, the EIA decision contains a condition to construct a dam to prevent any change in the hydrological status of spring water.
- 5.1.56 The supplements to the EIA report included the "Analysis of the Risk of Contamination of Groundwater and the Rižana Catchment because of the Construction of the Second Track of

<sup>114</sup> The EIA decision of 13 February 2014 No. 35402-2/2012-96.

<sup>115</sup> P. 262 of the Slovene River Basin Management Plan (2009-2015), available [here](#) (last accessed 15 July 2021).

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the Divača–Koper Railway Line<sup>116</sup>, other supplementary analyses on the project's impacts in question and the Caves Protocol<sup>117</sup>, which is aimed at managing unidentified or unmanaged risks to water bodies during project implementation. The EIA report included additional soil studies at the Krnica site. However, the report also noted that the collection of soil samples was not carried out due to the opposition of local residents, which indicates social issues around the project.

5.1.57 The EIA report included the EMP, which is also a requirement as per the EIB's environmental and social standards (see paragraph 2.2.14). The EMP for the construction and operation of 2TIR consists of three parts: (i) for investors, (ii) for construction, and (iii) for operations<sup>118</sup>. The monitoring shall start before the works and is continuous (regular measurements in several locations)<sup>119</sup>. The existence of the EMP satisfies the requirement of the EIA Directive to ensure monitoring of significant adverse environmental effects<sup>120</sup>.

### *EIB's compliance with own procedures and standards*

5.1.58 The EIB's appraisal stated that the project is acceptable for financing in environmental and social terms with the appropriate conditions. However, the appraisal also noted that there is a risk that the planned mitigation measures will be insufficient, resulting in larger than expected negative impacts on Natura 2000 protected areas and/or surface water bodies or groundwater bodies (see paragraph 4.2.1, point 5).

5.1.59 The Environmental and Social Data Sheet notes the potential impacts on and risks to surface water bodies and groundwater bodies. It states that these risks and impacts were analysed during the EIA procedure and resulted in an extensive programme of corresponding mitigation measures. However, it also states that despite the geological surveys carried out and other mitigation measures, some residual risks that cannot be mitigated remain because of the karst phenomena and the corresponding potential contamination of groundwater or change in hydrological regime (see paragraph 4.2.2, point 4).

5.1.60 Among the conditions prior to the first disbursement for the project, the EIB services proposed confirmation from the competent authority that the project will have no significant impact on nature conservation sites. As the EIA procedure had already been completed, the formal answer from the competent authority would not ensure the compliance of the project with the Habitats Directive, if issued before (i) the EIA for the third track, and (ii) the completion of monitoring. In the EIB-CM's view, it would have been more effective to propose contractual conditions and undertakings with regard to the monitoring programme and the need for specialist oversight in order to ensure the maximum mitigation of negative impacts on Natura 2000. Because of the risk of insufficient planned mitigation measures, the EIB services should indicate, as part of the conditions for inclusion in the finance contract, the need for the promoter to keep the EIB informed about the implementation of the EMP in the context of EIB monitoring, as provided by its standards (see paragraph 2.3.2, point 3). Even if the Bank did not involve environmental specialist(s) in the project appraisal, this expertise will be needed during the monitoring phase.

### *Conclusions*

5.1.61 The appropriate assessment is the decision-making carried out by an appropriate nature protection authority until project completion, as final impacts are not known until the implementation and monitoring of the EMP is completed<sup>121</sup>. Therefore, the quality and status of implementation of the EMP are crucial. As the promoter prepared an EMP, the requirements of

<sup>116</sup> Report prepared by GeoZS, IRGO (2011).

<sup>117</sup> The Protocol on Conduct if Caves are Discovered (2017).

<sup>118</sup> *Celostni načrt okoljskega monitoringa v času gradnje in v času obratovanja za Drugi tir železniške proge na odseku Divača–Koper*, December 2013, prepared by Aquarius d.o.o.

<sup>119</sup> The EIA decision (2014) requires monitoring to begin prior to the start of construction and to set the baseline for establishing the impacts during construction and operation as well as improve knowledge about the hydrogeological situation. The plan should ensure (1) the continuation of measurements of groundwater levels with the current piezometers, (2) the continuation of measurements of the flow at the Rižana Kubed II measurement station (measurements to be carried out by ARSO), (3) the continuation of measurements of water supply samples, registering the measurements of turbidity and microbiological quality (measurements are implemented by the Rižana water pipeline in Koper), and (4) the continuation of measurements of the Glinščica and Griža flows.

<sup>120</sup> Article 8a(4) of the EIA Directive (2014).

<sup>121</sup> The appropriate assessment should take place any time during the project's lifetime, especially if it is inside the Natura 2000 network.

the Habitats Directive and Water Framework Directive appear to have been fulfilled. Therefore, the EIB-CM found the allegation to be ungrounded, without prejudice to the major impacts of the decisions made leading to the Decree on the NSP for 2TIR (2005) given the national legal context. The challenges posed by the location are being dealt with by existing administrative and good practice tools, such as the EMP (see paragraphs 5.1.44 and 5.1.57).

- 5.1.62 The EIB-CM reiterates its conclusions with regard to the late involvement of the EIB services and **the lack of involvement of environmental specialists in due diligence during project appraisal**, despite the appropriate assessment procedure, the need for additional research (for instance on karstology, forest fire safety study), and the complexity of the project and some residual risks being emphasised in the appraisal documents (see paragraphs 5.1.58 and 5.1.59).
- 5.1.63 The findings and conclusions on the EIB's compliance with its own procedures and standards regarding sub-allegation 1.1 are also relevant to this sub-allegation. The **services should propose additional relevant environmental condition(s) and undertaking(s) to be included in the finance contract**, such as regular reporting on the implementation of the EMP (see paragraphs 5.1.58 and 5.1.62).

### Sub-allegation 1.3: Transboundary impacts and transboundary consultations

#### Allegation

- 5.1.64 The allegation concerns the project's negative transboundary impacts and issues with transboundary consultations.

#### *Transboundary consultations as part of SEA*

- 5.1.65 The requirement to carry out transboundary consultations for SEA was fulfilled for all relevant decision-making steps where a full SEA linked with the 2TIR was required and implemented.
- 5.1.66 Transboundary consultations are typically initiated based on bilateral agreements, or, in the absence of those, based on good practice and international protocol — typically conducted with central authorities such as Ministries of Foreign Affairs or directly with Ministries of the Environment (as the case was, the national focal point for the Espoo Convention).
- 5.1.67 **NSP for 2TIR (2005)**: When the NSP for 2TIR (2005) was adopted, there was no requirement to carry out transboundary consultations on plans and programmes. Slovenia ratified the UNECE Protocol on SEA to the Espoo Convention<sup>122</sup> in 2010<sup>123</sup>.
- 5.1.68 **Modification of the NSP for 2TIR (enlargement of tunnels) (2009)**: The screening determination resulted in the requirement for a full SEA for the modification of the NSP for 2TIR. At the time of the SEA in question, transboundary consultations for 2TIR EIA were not yet finished (see Figure 2 and paragraph 5.1.6). The modification of the NSP concerned the enlargement of the tunnels, while the key transboundary environmental impacts stem from the tunnelling and not the transportation and disposal of additional excavation material. That said, the EIB-CM did not receive any evidence of transboundary consultations for this SEA. At the same time, the EIA for the enlargement of service tunnels was screened out from a full EIA and would therefore not have been subject to transboundary consultations, which is appropriate (see below on transboundary consultations for EIA of 2TIR).
- 5.1.69 **TDS (2016)**: The preparation and adoption of the TDS (2016) was carried out with an SEA, which included transboundary consultations with Austria, Hungary, Croatia and Italy on the SEA report<sup>124</sup> (see Appendix 2).

<sup>122</sup> Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (SEA Protocol), Kiev, 21 May 2003, information available [here](#).

<sup>123</sup> Slovenia signed the SEA Protocol on 22 May 2003 and ratified it on 23 April 2010.

<sup>124</sup> Page 241, National Transport Development Strategy (2016). Documents are available [here](#).

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5.1.70 **Further modification of the NSP for 2TIR (double track) (2019):** Transboundary consultations within the SEA for the third 2TIR track should take place. The process is ongoing and was therefore not reviewed by this enquiry.

### *Transboundary consultations for EIA (2012-2014 (2016))*

5.1.71 Slovenia initiated transboundary consultations with Italy, which is affected by the project's proximity to the border. Information was transmitted in 2012 by sending the EIA report with annexes. Invitations to technical consultations followed in October 2012 (consultations in November 2012, not attended) and in April 2013 (consultations in May 2013, no evidence of attendance). Communications were sent in Slovenian and Italian. The reply regarding the issuance of the construction permit was sent in English (2016).

5.1.72 It is worth pointing out that while EIA and the relevant transboundary consultations were taking place, the promoter initiated and carried out the SEA procedure for the first modification of the NSP for 2TIR for the enlargement of the service tunnels (see Figure 2 and paragraph 5.1.6). While the EIB received the replies to Italy's written comments on the EIA documentation, there was no evidence of further correspondence or exchanges. In 2016<sup>125</sup>, Slovenia informed Italy that the EIA procedure for 2TIR was completed by providing both EIA permits in Italian. Slovenia also informed Italy that the final decision — the construction permit — was issued by the competent authority on 31 May 2016<sup>126</sup>. Note should be taken of the reasoned opinion issued by the European Commission in 2021 regarding shortcomings concerning the timeframes in EIA transboundary procedures - with relevance to the ongoing SEA for the third track (see paragraph 2.2.4, point 2).

### *Transboundary impacts*

5.1.73 Slovenia contacted the Italian Ministry of the Environment and the Protection of Land and Sea, the Friuli-Venezia Giulia Region and the Italian Technical Commission for Environmental Impact Verification. The latter provided its comments in 2012<sup>127</sup>. As a result of the consultations with Italy, the EIA report was supplemented and the amendment was delivered to Italy in 2013 together with the replies to the request for clarifications<sup>128</sup>.

5.1.74 The reply from Slovenia to Italy provides 14 broad comments. In the early stages of preparation of the EIA report preparation (earlier versions of the report dating back to 2012 may have been provided to Italy), the comments were substantial and included concerns that the project could have adverse effects on the quality of underground caves and on surface water bodies — the pollution of the Rosandra River and the modification of the water regime could lead to changes in the ecological balance in protected areas if not properly solved — concerns that noise barriers from viaducts have not been planned and visualised, and that the impact on protected areas (Rosandra valley, the Osp River and the lakes close to the village of Noce)<sup>129</sup> has not been assessed. An important outcome of the consultations was the preparation of the EMP, which was requested by Italy.

### *Conclusions*

5.1.75 Transboundary consultations did take place during some of the key SEA procedures and on the project's EIA. Although, as pointed out above, it is the EIB-CM's opinion that the timing of the 2TIR EIA, the transboundary consultations and the SEA for the modification of the tunnels might not have been optimal (see paragraph 5.1.72). Transboundary consultations for the 2TIR EIA had not yet finished by the time the SEA to modify the NSP for 2TIR (enlargement of tunnels) took place. This conclusion is made without prejudice to the infringement procedure noted in paragraph 2.2.4, point 2 and the lapse of time between the EIA decisions and the final EIA notification to Italy. Therefore, moving forward, the Bank should pay special attention to transboundary consultations that are relevant to the project.

<sup>125</sup> Letter sent on 2 August 2016 in English.

<sup>126</sup> The permit was valid for three years but contains the option of two one-year extensions.

<sup>127</sup> The EIA decision of 13 February 2014 No. 35402-2/2012-96 references Opinion No. 1087 of 16 November 2012 of the Technical Commission for Environmental Impact Verification.

<sup>128</sup> The EIA decision of 13 February 2014 No. 35402-2/2012-96 states that a risk analysis was performed (an appendix to the EIA report). Slovenia provided replies to Italy's comments in May 2013.

<sup>129</sup> La Val Rosandra, il Rio Osp ed i laghetti presso il villaggio di Noce.

## 5.2 Allegation 2: Change of the project's scope

### *Allegation*

- 5.2.1 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).

### *Scope of the project approved for EIB financing*

- 5.2.2 At the project identification and appraisal stage, the project was presented as the construction of a new railway line between the railway junction at Divača and the port of Koper, as a single track, as provided in the technical project description across the EIB's project documents (see paragraph 4.1.2). The EIB-CM understands that the technical description of the project and the scope of the investment were identical at the time of appraisal.
- 5.2.3 The promoter's request for appraisal states that the project (the Divača-Koper rail track) is the construction and operation of the second railway track on the new alignment. Nevertheless, the Environmental and Social Data Sheet notes that the project's modification by enlargement of the set of service tunnels is done with a view to possible future use of the service tunnels for an additional railway track (see paragraph 4.2.2, point 5), which expanded the project's area of influence according to the EIB's environmental and social standards taking into account the situation at the time. The Environmental and Social Data Sheet states that "if such additional track is ever to be considered for implementation, it will need to be the subject of a separate regulatory procedure".
- 5.2.4 The promoter launched the track doubling preparation in 2017 (see Appendix 2) – before EIB appraisal. The SEA screening determination for the modification of the NSP for 2TIR as a double-track line was issued in 2019. At this point, the EIB's project appraisal was just completed. Even if the (ongoing) SEA procedure does not necessarily imply the definite implementation of the planned change to the scope of the investment (double tracking), it is an essential step in the approval process of the modified NSP for 2TIR.
- 5.2.5 As of March 2022, the EIB has not received an official request for changing the scope of the project (single track as presented in the technical description of the project and as appraised by the Bank). In December 2020, the developer confirmed that the technical description of the project is still valid (with minor corrections), and thus that the project scope in the request for EIB's financing remains a single track line, as the developer has "no mandate to initiate or implement any activities" regarding the construction of the third track. As of March 2022, the finance contract for the project is yet to be signed<sup>130</sup>; the Bank has no contractual obligations yet for this project. Therefore, this leaves an opportunity to consider and **finalise environmental contractual obligations** (conditions and undertakings) taking into account project related developments in order to ensure the project's full compliance with the Bank's environmental standards.
- 5.2.6 The EIB-CM is of the opinion that the third track is linked to the project as appraised and proposed for EIB financing from the perspective of the project's area of influence and cumulative impacts. As such, the double tracking would constitute a fundamental change in the nature, scope and technical content of the project (see paragraph 2.3.4, point 3). The third track itself falls under Annex I of the EIA Directive and thus requires a full EIA because of likely significant negative impacts on the environment (see paragraph 2.2.3, point 6); therefore is subject to full SEA and EIA procedures. The EIB's environmental and social standards require to ensure adequate assessment and taking into account cumulative impacts during project initiation, appraisal, implementation and monitoring (see paragraph 2.3.2, point 6).
- 5.2.7 The services confirmed to the EIB-CM that if the Government of Slovenia decides to go ahead with the double tracking of 2TIR, (i) the technical description of the project would have to change, and (ii) this would constitute a 'fundamental change' to the project as understood in the Bank's internal procedures. Accordingly, the project would require a new approval by the Board of Directors (see paragraph 2.3.4, point 3). Finally, the EIB services confirmed that such fundamental change to the project (before or after signature of the finance contract) would

<sup>130</sup> Situation as of February 2022.

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require re-appraisal of the project in its entirety (double tracking), including consultation with and E&S due diligence by the competent services.

- 5.2.8 The EIB services confirmed to the EIB-CM that there can be no in between situation where the technical description of the project to be financed by the EIB remains for a single track on one hand and where the Government of Slovenia would go ahead with the implementation of the project with double tracking on the other hand. In EIB-CM's view, the action taken by the Slovenian Government in terms of modification of the NSP for 2TIR, being at the stage of an SEA already, gives a clear signal of the likely "go ahead" with the investment expansion. It is therefore in the interest of the Bank services to follow up closely the project developments before going back to the governing bodies for the second step approval and before the signature of the finance contract.

### Conclusions

- 5.2.9 The EIB-CM found this allegation non-grounded, as the promoter requested the appraisal and financing of the project only related to a single track of 2TIR (which is presented as such in the technical description of the project). The EIB-CM takes note of the services' commitment to re-appraise the project in its entirety (2TIR as a double track) if the Government of Slovenia decides to go ahead with the double tracking plan (paragraph 5.2.7). There is a need for re-appraisal in this case because the change is linked to significant impacts on the environment in line with the SEA and EIA Directives, and to ensure full compliance with the current EIB's policies and standards (including environmental standards, see paragraphs 5.2.5 and 5.2.6).

## 6 RECOMMENDATIONS AND SUGGESTIONS FOR IMPROVEMENT

In formulating its recommendations and suggestions for improvement, the EIB-CM took into account the confirmation by the services that they will re-appraise the project (expected to happen in the third quarter of 2023) before the signature of the finance contract, and that this will be a full scale re-appraisal.

### 6.1 Recommendations

The EIB-CM recommends the Bank to do the following:

- 6.1.1 Request the promoter to:

- (i) Update the environmental management plan (EMP), and
- (ii) Report to the EIB on the EMP's implementation and effectiveness<sup>131</sup>.

**Points (i) and (ii) should be requested before and be available for the re-appraisal of the project** prior to signature of the finance contract. **Regular reporting by the promoter on the EMP should be included in the finance contract as part of the information duties.**

*- Points (i) and (ii) to be implemented before the re-appraisal and requested for regular reporting on the EMP to be implemented by the signature of the finance contract.*

- (iii) Effectively communicate with relevant stakeholders on the implementation of the EMP and any new project's developments during the project's implementation.

In order to ensure effective communication, the promoter should prepare a stakeholder engagement plan, monitor and report on it to the EIB on a regular basis.

*- To be implemented ASAP and no later than Q3 2023.*

<sup>131</sup> E.g. following the issue (and/or update) of the development consent(s) and taking into account the Caves Protocol.

- 6.1.2 Involve environmental specialist(s) for further advice (including regarding the inclusion of relevant environmental clauses in the finance contract) and for project monitoring.
- *To be implemented ASAP and no later than Q3 2023 (for the re-appraisal of the project), and be continued until at least physical completion of the project.*

## 6.2 Suggestions for improvement

The EIB-CM suggests that the Bank:

- 6.2.1 **Request the promoter to submit an assessment of the cumulative impacts** of the project, taking into account planned **developments** and activities in its area of influence including the third track - in line with EIB E&S standards and that meets the Bank's satisfaction (see below).

**The cumulative impact assessment report should identify, assess and propose mitigation and/or compensation measures for any significant cumulative impacts of the 2TIR.**

This should be requested before and be available for the re-appraisal of the project **prior to signature of the finance contract.**

- *To be implemented before the project re-appraisal.*

- 6.2.2 Amend the Bank's procedures in order to **effectively appraise environmentally risky projects**, especially what concerns **the involvement of environmental specialist(s)** in the appraisal and monitoring of **operations conducted within Natura 2000 network/protected area of national importance.**

- *The suggestion for improvement is expected to be implemented by Q1 2023.*

- 6.2.3 At the time of re-reappraisal of the project, as well as again before the signature of the finance contract, engage with the promoter and assess the status of the SEA for the third track, the likelihood for this plan to concretise and by when. Document this assessment and present the outcome to the Bank's governing bodies as part of the second step approval process.

- *To be implemented in the context of the re-appraisal of the project and in the context of the second step approval, before the signature of the finance contract.*

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## APPENDIX 1: NATURA 2000 SITES AND WATER BODIES RELEVANT TO THE PROJECT

**Table 1.1: Natura 2000 sites relevant to the project<sup>132</sup>**

Code	Name	Interaction	Management plan/year	Comments
SI3000276	SAC Kras	Crossed by the project over 13.1 km	Čičarija (2020), Istra (2019), Kras I (2016), Kras II (2018), Vremščica (2017) and Vrhe (2017)	The site was a site of Community importance (SCI) at the time of the EIA (2014); it was designated as an SCI in 2007 and as a special area of conservation (SAC) in 2012
SI5000023	SPA Kras	Crossed by the project over 15.4 km	Čičarija (2020), Gorica (2017), Istra (2019), Kras I (2016), Kras II (2018), Vremščica (2017) and Vrhe (2017)	Site designated as a special protection area (SPA) in 2004
SI3000060	SAC Rižana	Distance to the project: 350 m	Nature Park Strunjan (2019) <sup>133</sup>	The site was proposed as an SCI at the time of the EIA (2014)
SI3000252	SAC Škocjanski zatok	Distance to the project: 1.2 km	As above	Site confirmed as an SCI in 2007 and designated as an SAC in 2012
SI5000008	SPA Škocjanski zatok	Distance to the project: 1.2 km	As above	Site classified as an SPA in 2004
IT3340006	SCI Carso Triestino e Goriziano	A continuation of SI3000276 in Italy	Conservation measures approved in 2020 replacing measures adopted in 2013 and modified in 2016 <sup>134</sup>	Site designated as an SAC in 2013
IT3341002	SPA Aree Carsiche della Venezia Giulia	A continuation of SI5000023 in Italy	As above	Site designated as an SAC in 2005

**Table 1.2: Surface water bodies and groundwater bodies relevant to the project**

Code	Water body	Comments
	River basin of Adriatic rivers and the sea	The Osp with named tributaries (e.g. the Škofijski potok, the Vinjanski potok/il Menariolo (it.)) and unnamed tributaries. It also includes sources of the river Podravje, an unnamed river with a source at Podgorci, the Trnovsca stream, and the stream west of Kava peak.
VTPodV 5019	Groundwater body: the coast and Karst including Brkini hills	Environmental issues noted in the 2006-2015 River Basin Management Plan are linked to the quantity of water, which are being exacerbated by climate change. The area was still lacking data and a statistical substantiation of quantitative forecasts. The Glinščica and its tributaries are located in this area. It runs into the Trieste part of the Karst and later to the sea (the Gulf of Trieste).

<sup>132</sup> Information on designation according to the datasheets.

<sup>133</sup> Information available [here](#) (in Slovenian).

<sup>134</sup> Information available [here](#) (in Italian).

		The area consists of natural channels, silted bottom, predominantly sand and sediment, and the underground.
S1518VT3	Surface water body: Rižana from its upstream waters to its outfall	It has three zones, as follows: (i) the coast from the inflow of the Rižana to the inflow of the Timava, (ii) the Rižana river area, and (iii) the coast from the inflow of the Badaševica to the inflow of the Rižana. The Krniški potok belongs to this surface water body. Key pressures are organic matter, nitrogen and phosphorus pollution.

## APPENDIX 2: NON-EXHAUSTIVE PROJECT-RELATED STRATEGIC DEVELOPMENT INCLUDING SEA-TYPE AND SEA PROCEDURES<sup>135</sup>

Date	Action/Decision	Comments
1996	National programme for the development of Slovenian railway infrastructure <sup>136</sup> .	<i>Nacionalni program razvoja Slovenske železniške infrastrukture</i> (NPRSZI), start of the project's development, all options open. It was the basis for the modification of the NSP for 2TIR.
<b>Preparation of the NSP for the 2TIR project (SEA Directive not applicable)<sup>137</sup></b>		
17 March 2000	Preparation programme for the 2TIR project.	MoE adopted the programme to draw up a site plan for the second track of the railway line on the Divača–Koper section. This decision is considered the key decision in project development and its date was decisive in non-application of the SEA for the land use plan change.
7 April 2000	The Natura 2000 Directorate of the MoE issued guidelines for the 2TIR.	Variants assessed: 4.1 and I/2. Variant 4.1 was deemed unacceptable, while for the I/2 variant an additional area examination was proposed, especially regarding caves. The preferred variant I/3 was not mentioned.
26 September 2000	Decision No. K0324-1/00 of the MoE.	Comments and guidance given by the municipality of Koper and the municipalities of Dekani and Black Kal on the proposed I/2 variant were largely taken into account, assessing that <u>variant I/3 was more acceptable.</u>
December 2000	Statement/position of the MoE regarding the most suitable variant for project execution from the standpoint of local communities <sup>138</sup> .	The communities of Koper, Hrpelje-Kozina, Sežana and Divača recommended variant I/3 as the most suitable.
27 November 2003	Decision of the Government of Slovenia No. 343-07/2001-4 on the 49 <sup>th</sup> Session.	Variant I/3 was adopted based on the study of variants (2000) <sup>139</sup> , issued in several versions. The decision issued in the same meeting kicked off the modification of the NSP for the 2TIR and the preparation of necessary technical documentation. The study of variants included various methods, such as a multi-criteria analysis, consultations with stakeholders (municipalities and local authorities <sup>140</sup> ), but not the public. Variants were not assessed in terms of

<sup>135</sup> The information provided in the table was made available to the EIB-CM during the complaint's review and does not provide an exhaustive view of strategic decision-making, or SEA-type and SEA procedures carried out for 2TIR.

<sup>136</sup> *Nacionalni program razvoja Slovenske železniške infrastrukture* (NPRSZI) (Official Gazette of the Republic of Slovenia, No. 13–609/96).

<sup>137</sup> The authority responsible for land use planning in the Republic of Slovenia is the Directorate for Spatial Planning, Construction and Housing of the MoE. In the past, the Ministry of Infrastructure was also tasked with matters of land use planning.

<sup>138</sup> The first two drafts of the study of variants for 2TIR were prepared in 1999-2000, while the final version was issued in October 2000 by INVESTBIRO Koper.

<sup>139</sup> The study of variants for 2TIR (final version dated October 2000) was prepared by INVESTBIRO Koper.

<sup>140</sup> These stakeholders are not listed in the summary, but references are made to the originators of written comments and from hearings (No. 352-22-3/00 of 12 October 2004) by the MoE.

Date	Action/Decision	Comments
		limiting factors. Based on the government decision (2003), the modification of the NLP for 2TIR had to focus on the preferred alternative.
16 February 2004	Decision No 7-III/2-3/2-O-04/TT on Nature Protection Guidelines for the NSP for 2TIR on the Divača-Koper Section.	The MoE issued a decision; the guidelines contain mitigation measures, conditions and justification for the project.
18 June 2004	Decree on the Spatial Development Strategy of Slovenia No. 3397.	Adopted by the Slovenian government noting the need for the development of the project.
27 August 2004 to 27 September 2004	Public information and consultation on the NSP for 2TIR <sup>141</sup> and EIA report (2004, amended in 2005).	Public hearings in Koper and Hrpelje on 7 September 2004, comments summarised and presented by the MoE on 12 October 2004.
18 October 2004	Positions on comments and proposals obtained at the public presentation of the NSP for 2TIR adopted by the MoE with preliminary consent from the Ministry of Transport.	Prepared on the basis of additional verifications of comments and proposals.
29 April 2005	Decree on the NSP for the 2TIR single-track railway line.	Adopted by the Slovenian government (Official Gazette of Slovenia, No. 43/05) <sup>142</sup> . This decree concluded the placing of "the railway route in physical space" <sup>143</sup> . After the enactment of the above decree, which was not appealable at the time of its issue <sup>144</sup> , the discussion on location alternatives was closed.
<b>Modification of the NSP because of the enlargement of the tunnels for 2TIR (screening determination on the need for an SEA and a full SEA)</b>		
27 January 2009	Screening decision on the need for a SEA (CPVO) for the modification of the NSP	The screening decision was requested by the Ministry of Infrastructure and Spatial Planning, Directorate of Spatial Planning.
2009 to 2012	SEA report (first draft of October 2009 with the last amendment in 2013) <sup>145</sup> .	The CPVO report used in the proceedings was prepared by Aquarius d.o.o in October 2009 and updated in March 2010, June 2010, September 2010, February 2011, June 2011, September 2011, February 2012, March 2012 and January 2013.

<sup>141</sup> The NSP was prepared based on the study by INVESTBIRO Koper. The two variants described are I/2 and I/3. The environmental report was to comply with the requirements of the EIA Directive valid at the time (as stated in the Decision of the MoE on the preparation programme for the 2TIR project (2000)).

<sup>142</sup> Government Decree on the National Spatial Plan for 2TIR No. 1688 (Official Gazette of the Republic of Slovenia, No. 43/2005).

<sup>143</sup> Chronology of planning for the new railway line on the Divača–Koper section (May 2016, DRI).

<sup>144</sup> Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters. Final Report (2019), page 106: In Slovenia, the judicial review of plans and programmes is generally not possible. However, some changes were introduced in 2018 partially opening spatial plans to judicial review. The modification of the Construction Act and the Spatial Planning Act enables a new system with a comprehensive permit, which is challengeable before the courts. Standing is limited to the persons whose rights are impaired by the plan, the NGOs working in the public interest sphere of spatial planning, environmental protection, nature conservation or the protection of cultural heritage, if they have already objected to the plan during the planning procedure, and to the State Attorney, on behalf of the government. Available here [https://ec.europa.eu/environment/aarhus/pdf/Final\\_study\\_EU\\_implementation\\_environmental\\_matters\\_2019.pdf](https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implementation_environmental_matters_2019.pdf).

<sup>145</sup> Both reports were prepared by Aquarius d.o.o. A supplement report for protected zones was also prepared (2013).

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Date	Action/Decision	Comments
26 March 2012 to 26 April 2012	Public information and consultations regarding the NSP with a public hearing in the Municipality of Divača and the Municipality of Hrpelje-Kozina on 4 April.	Display in the Ministry of Infrastructure and two public hearings on 4 April for the Municipalities of Divača and Hrpelje-Kozina. The Ministry of Infrastructure adopted positions on the comments and suggestions made in the public hearing of the draft NSP (No. 350-08-13/2005 of 29 June 2012).
25 April 2014	SEA decision No. 35409-406/2008/98 regarding the NSP (CPVO) issued by the Ministry of Agriculture and the Environment.	The decision (appealable) included appropriate assessment. There is no mention of the transboundary consultations or cumulative impact assessment <sup>146</sup> .
30 July 2014	Decree No. 2609 <sup>147</sup> , amendments and supplements to the Decree on the NSP for 2TIR.	Adopted by the Slovenian government.
8 May 2017	Act on the Construction, Management and Administration of the Second Track of the Divača–Koper Railway Line (Official Gazette of Slovenia, No. 51/18) <sup>148</sup> .	The act was passed by the National Assembly.
<b>SEA of the Slovenian Transport Development Strategy until 2030</b>		
	Preparation of the SEA report.	SEA report <sup>149</sup> analysed the cumulative impacts and the interactions between the development of various transport modes including rail. The analysis covered the Ljubljana-Koper connection, its impacts and the impacts of other major developments across the sector, and proposed mitigation and monitoring measures.
2014	The Slovenian authorities initiated the cross-border (transboundary) consultations on the SEA report with Austria, Hungary, Croatia and Italy.	The results of transboundary consultations were summarised in the final SEA report <sup>150</sup> .
November 2014	After completing consultations with the appropriate national authorities, the MoE issued an opinion on the adequacy of the SEA report <sup>151</sup> and the English version was forwarded to the countries participating in the consultations.	Comments were received from Croatia and Italy in June 2015, while Austria and Hungary did not provide any comments.
15 December 2014 to 31 January 2015 <sup>152</sup>	Publication of the draft strategy and the SEA.	The public hearing took place on 9 January 2015 at the Ministry of Infrastructure.

<sup>146</sup> The SEA decision states that 225 550 m<sup>3</sup> of additional material will be transported to the Koper railway to be processed by Salonit Anhovo d.d., which is a Slovenian cement producer. The basic characteristics of the expansion of the service tubes of tunnels T1, T2 and T8 are the enlargement of the excavation profiles (transversal surfaces) of the service tubes (between 22.6% to 25.1%), an increase in the surface of the tube circumference at the time of construction by 12%, and an increase in the amount of excavated material by 691 300 m<sup>3</sup> (limestone and flysch).

<sup>147</sup> Decree No. 2609 on the modification of the Decree on the National Spatial Plan for 2TIR.

<sup>148</sup> Date of adoption 8 May 2017, available here ([in Slovenian](#)).

<sup>149</sup> SEA report (2015) prepared by Aquarius d.o.o. Ljubljana.

<sup>150</sup> Information taken from the Report on transboundary consultations prepared by Aquarius d.o.o., available [here](#) in Slovenian.

<sup>151</sup> MoE Opinion No. 3540924/2012/45, dated 14 November 2014.

<sup>152</sup> Information from the Resolution of the Mol of 17 July 2015.

Date	Action/Decision	Comments
29 July 2015	Decision of the Slovenian Government No. 37000-3/2015/8.	The National Transport Development Strategy was adopted after an SEA <sup>153</sup> .
<b>Further modifications of the National Spatial Plan for the second track of the railway line on the Divača-Koper section based on the investment project (full SEA)</b>		
June 2017	Decision on the necessary preparations to enable the future railway line to be upgraded to a double-track line.	Decision of the 138 <sup>th</sup> session of the Slovenian government.
May 2019	Application for an SEA decision for the modification of the National Spatial Plan for 2TIR to cover double tracking.	The promoter initiated an SEA screening determination procedure for the modification of the National Spatial Plan for 2TIR to cover double tracking <sup>154</sup> .
May 2019 (updated June 2019)	Draft National Spatial Plan for the second track of the railway line on the Divača-Koper section based on the investment project <sup>155</sup> .	Prepared by Urbis d.o.o., Maribor, No. 2019/POB-022.
8 November 2019	Decision No. 35409-173/2019/16 <sup>156</sup> of 8 November 2019 on screening to establish the need for an SEA for the track doubling and the modification of the National Spatial Plan for 2TIR.	A positive screening decision was issued by the Directorate for the Environment of the MoE. It confirmed the need to carry out the comprehensive environmental impact assessment and separate project preparation, including an EIA and public consultations.
<b>Public initiatives against the project</b>		
24 September 2017	2017 Slovenian railway referendum on a law governing the Divača-Koper rail upgrade <sup>157</sup> .	The results were annulled by the Supreme Court in March 2018. The referendum was marked by a low turnout of 21%. The Supreme Court ordered a new vote.
13 May 2018	2018 Slovenian railway referendum on a law governing the Divača-Koper rail upgrade <sup>158</sup> .	The proponents of the referendum expressed a wish for it to be held together with the early general election, thus ensuring a higher voter turnout. However, the Supreme Court backed the decision of the National Election Committee to hold the election and the referendum on separate dates. The turnout was even lower (15%).
5 September 2021	Joint request and complaint to the Constitutional Court of Slovenia.	Request to assess the constitutionality, legality and respect for human rights in 2TIR investment management and preparation with constitutional issues identified in the Act on the Construction, Management and Administration of the Second Track of the Divača-Koper Railway Line (ZIUGDT, Official Gazette of Slovenia, No. 51/18 of 20 July 2018) and related acts. Request to terminate 2TDK.

<sup>153</sup> Decision of the MoE No. 35409-24/2012/14.

<sup>154</sup> Information from the website of drugitir.si [Ministrstvo s pobudo za nadgradnjo proge Divača–Koper v dvotirno progo | Drugi tir.](#)

<sup>155</sup> Ibid.

<sup>156</sup> Decision No. 35409-173/2019/16 of 8 November 2019 of the MoE.

<sup>157</sup> Information [here](#).

<sup>158</sup> Information [here](#).

## APPENDIX 3: NON-EXHAUSTIVE LIST OF ENVIRONMENTAL IMPACT ASSESSMENT PROCEDURES<sup>159</sup>

Date	Decisions/Actions	Comments
<b><i>EIA procedure for the second track and safety tunnels with smaller diameter</i></b>		
15 February 2012	Request for the EIA permit by the Directorate of Railways and Cableways of the Ministry of Infrastructure.	The scope of the original project was with a smaller diameter of safety tunnels.
2012-2014	Preparation of information for the EIA procedure. The EIA report included an annex on protected areas as well as a report on the impacts on protected areas on the Italian side <sup>160</sup> .	The EIA report was prepared by PRO LOCO d.o.o. <sup>161</sup> and the annex by Aquarius d.o.o. <sup>162</sup> . The first draft of December 2009 was supplemented in 2012 and 2013.
2012	On 4 April 2012, public hearings were held in the Municipality of Divača and the Municipality of Hrpelje-Kozina. Public consultations on the EIA were held between 5 October 2012 and 5 November 2012.	Public comments were summarised in the EIA decision of 13 February 2014 (see below).
13 February 2014	Partial Environmental Consent (No. 35402-2/2012-96) with approval of the project.	Issued by ARSO because one section was approved in a separate decision (next entry).
29 October 2014	Supplementary Decision to the Partial Environmental Consent (No. 35402-2/20 12-100) for intervention in the Beka Landscape Park.	Issued by ARSO.
<b><i>Development consent (construction permits)</i></b> <sup>163 164</sup>		
3 March 2015	Construction permit No. 35401-2/2015-5 for the construction of 1 km of the second track of the Divača-Koper railway line — the main track at Koper Tovorno.	Issued by the Directorate for Spatial Planning, Construction and Housing of the MoE.
31 March 2015	Construction permit No. 35105-73/2014/27 01031380 for the construction of the Divača-Koper railway line (1.2 km) — extraction track.	Issued by the Directorate for Spatial Planning, Construction and Housing of the MoE.
31 March 2016	Construction permit No. 35105-118/2011/162-05 for the construction of the Divača-Koper railway 3ine at the section between Divača Station and the Dekani Substation.	Issued by the Directorate for Spatial Planning, Construction and Housing of the MoE
6 August 2018	Decision by which the construction permit of 31 March 2015 issued to the Slovenian Infrastructure Agency of	The amendment concerned the change of developer from the

<sup>159</sup> The information provided in the table was made available to the EIB-CM during the complaint's review procedure and does not provide an exhaustive view of EIA procedures carried out for 2TIR.

<sup>160</sup> Pro Loco d.o.o. prepared the EIA report (2012, amended in 2013) and Aquarius d.o.o prepared the Annex to the EIA report on protected areas as well as the report on the impacts on protected areas on the Italian side (2013)

<sup>161</sup> PRO LOCO d.o.o has ceased to exist. It prepared the environmental report for the modification of the NDP for 2TIR (2004, supplemented in 2005), and the EIA report (2012, amended in 2013).

<sup>162</sup> The Aquarius d.o.o website is available here: <http://www.aquarius-lj.si/>. It prepared the annex to the EIA report on protected areas in 2012 as well as a report on the impacts on protected areas on the Italian side in 2013.

<sup>163</sup> The Construction Act (2002) states that the construction permit is an administrative decision under which the relevant administrative body allows such execution of works and prescribes the specific conditions that must be observed during the execution of works, after having found that the intended construction is in accordance with the spatial planning document.

<sup>164</sup> The authority responsible for issuing construction permits is the Directorate for Spatial Planning, Construction and Housing of the MoE.

	the Mol was amended. Permit No. 35105-118/2011/168.	Slovenian Infrastructure Agency of the Mol to 2TDK.
<b>Transboundary consultations</b>		
22 May 2012	Italy requested the EIA documentation from Slovenia.	Letter No. DVA-2012-0012190 of 22 May 2012.
17 October 2012	EIA documentation was sent to Italy (central government, in Italian) and Italy was invited to technical consultations.	The documentation included an annex to the EIA report on protected areas as well as a report on the impacts on protected areas on the Italian side. Italy did not respond to the invitation for technical consultations.
7 November 2012	Italy made the material publicly available on the official website of the Friuli-Venezia Giulia region and thus allowed for public participation.	
November 2012 to October 2013	Written comments were provided by the Friuli-Venezia Giulia autonomous region.	
30 November 2012	Italy submitted the opinion.	Opinion No. 1087 of 16 November 2012 (U. prot DVA-2012-0028389 of 23 November 2012).
23 April 2013	The MoE of Slovenia forwarded the replies and additional clarifications to Italy, inviting it to technical consultations since it had not responded to the previous invitation (2012), and requesting a response by 15 May 2013.	Italy did not respond to the invitation.
11 October 2013	Comments received from Friuli-Venezia Giulia.	Decision No. 1762 of 27 September 2013.
2 August 2016	The final environmental consent together with the final construction permit was forwarded to Italy (central government).	
<b>EIA procedures for modifications of the tunnels</b>		
7 September 2017	The request for the screening procedure to change the project by expanding service tubes SC-T1, SC-T2 and SC-T8.	The conclusions of ARSO stated no change related to cross-border impacts, therefore no need for transboundary consultations.
27 July 2018	Public hearing.	Minutes prepared and recorded in document No. 35405-375/2017-21.
31 August 2018	Negative screening decision (No. 25405-375/2017-23) for the expansion of service tubes SC-T1, SC-T2 and SC-T8 <sup>165</sup> .	The decision issued by ARSO included a statement that the change will have no significant impacts on the environment. The decision notes that the object of the planned project is exclusively the enlargement of the service tubes of the three longest tunnels, namely T1, T2 and T8 (SC-T1, SC-T2 and SC-T8), which will not be in operative use after the construction of the second track (but will remain in the service function). It also states that no other projects are planned in the area of the tunnel tubes T1, T2 and T8, which would have cumulative effects on the environmental burden.

<sup>165</sup> Decision of the MoE No. 35405-375/2017-23 of 31 August 2018.

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29 May 2020	Negative EIA screening decision <sup>166</sup> on the change in the project concerning the processing and transportation of the excavation material from rail to road of the MoE No. 35405-50/2020-18. There is no need for a full EIA for the change to the project, as it was approved by decisions No. 35402-2/2012-96, No. 35402-2/20 12-100 and No. 25405-375/2017-23.	The decision concerns the change in the transportation mode of the excavated material (from rail to road), the clarification of the quantities of the material to be excavated and the destination points for the material.
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<sup>166</sup> Decision of the MoE No. 35405-50/2020-18 of 29 May 2020.

## APPENDIX 4: SUMMARY OF CONCLUSIONS AND OUTCOME

Allegation	Summary of conclusions on project compliance with applicable standards	Summary of conclusions on the EIB's compliance with own procedures and standards	Recommendations	Suggestions for improvement
#1.1	<p>While in compliance with applicable EU law at the time, the timing of the project-related SEA procedures rendered them ineffective to explore other location alternatives and effectively consult the public on these <sup>167</sup> and significant negative cumulative impacts, when all options were still open.</p> <p>The EIB-CM established the lack of cumulative impact assessment of the project with other planned development, more particularly the third track (initiated by the governmental decision of 2017, and the SEA for the modification of the NSP of 2TIR launched in 2019), which is not in line with EIB Environmental and Social standards.</p> <p>The EIA procedure for the project was carried out in line with the EIA Directive, without prejudice to the infringement</p>	<p>The EIB services were aware of the track doubling plans, as reflected in the ESDS. However, they did not request information on and did not ask the promoter to assess the potential cumulative impacts of this planned development together with the project as described in the current technical description.</p> <p>The conditions set in the letter of support were only partially fulfilled at the time of the project's appraisal and approval process. The appraisal and approval process proposed conditions for signature and for disbursement.</p> <p>The EIB-CM did not find evidence that the EIB services used the environmental and social risk screening checklist (relevant in case of</p>	<p>1. Request the promoter to:</p> <p>(i) Update the environmental management plan (EMP) and</p> <p>(ii) Report to the EIB on its implementation and effectiveness <sup>169</sup>.</p> <p>Points (i) and (ii) should be requested before and be available for the re-appraisal of the project prior to signature of the finance contract. Regular reporting by the promoter on the EMP should be included in the finance contract as part of the information duties.</p> <p><i>- Points (i) and (ii) to be implemented before re-appraisal and requested for regular reporting on the EMP to be implemented by the signature of the finance contract.</i></p>	<p>1. The Bank should request the promoter to submit an assessment of the cumulative impacts of the project, taking into account planned developments and activities in its area of influence including the third track - in line with EIB E&amp;S standards and that meets the Bank's satisfaction (see below).</p> <p>The cumulative impact assessment report should identify, assess and propose mitigation and/or compensation measures for any significant cumulative impacts of the 2TIR.</p> <p>This should be requested before and be available for the re-appraisal of the project prior to signature of the finance contract.</p> <p><i>- To be implemented before the project re-appraisal.</i></p> <p>2. Amend the Bank's procedures <sup>170</sup> in order to effectively appraise environmentally risky projects, especially what concerns the involvement of environmental specialist(s) in the appraisal and monitoring of operations conducted within Natura 2000 network/protected</p>

<sup>167</sup> Given that the decision was already taken by the Republic of Slovenia Government in 2003.

<sup>169</sup> E.g. following the issue (and/or update) of the development consent(s) and taking into account the Caves Protocol.

<sup>170</sup> E.g. the use and effectiveness of the E&S risk weighting checklist included in Volume II of the Handbook.

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	<p>procedure initiated by the European Commission.</p> <p>However, the description of alternatives in the EIA report is not in line with the requirements as per EIB's environmental and social standards.</p> <p>The stakeholder engagement during the EIA followed the formal requirements, but is not in line with the EIB environmental and social standards. The shortcomings in terms of meaningful stakeholder engagement would require special attention from the EIB side.</p>	<p>complex and risky projects).</p> <p>Moreover, the EIB did not involve the necessary human resources specialised in environmental matters during the project appraisal despite the project complexity (as was emphasised in the appraisal documents).</p> <p>The two shortcomings above resulted in insufficient emphasis made on environmental issues to the governing bodies of the Bank at the stages of issuance of the letter of support with conditions and project approval.</p>	<p>(iii)</p> <p>Effectively communicate with relevant stakeholders on the implementation of the EMP and any new project's developments during the project's implementation. In order to ensure effective communication, the promoter should prepare a stakeholder engagement plan, monitor and report on it to EIB on a regular basis.</p> <p>- <i>To be implemented ASAP and no later than Q3 2023.</i></p>	<p>area of national importance.</p> <p>- <i>The suggestion for improvement is expected to be implemented by Q2 2023.</i></p>
#1.2	<p>The requirements of the Water Framework Directive have been fulfilled by carrying out additional studies, requiring continuous monitoring starting before construction, and establishing mitigation measures, such as for surface and groundwater bodies.</p> <p>The requirements of the Habitats Directive have been fulfilled by establishing mitigation measures and monitoring of the project impacts.</p>	<p>The EIB services did not identify and propose all appropriate contractual environmental conditions and undertakings for the project in question, including the monitoring requirements<sup>168</sup> and meaningful stakeholder engagement, in order to ensure full compliance of the project with environmental standards throughout the project's cycle.</p>	<p>2. Involve environmental specialist(s) for further advice (including regarding the inclusion of relevant environmental clauses in the finance contract) and the project monitoring.</p> <p>- <i>To be implemented ASAP and no later than Q3 2023 (for the re-appraisal of the project), and be continued until at least physical completion of the project.</i></p>	

<sup>168</sup> E.g. appointment of an independent panel of environmental and social specialists to monitor environmental impacts, as enabled by the EIB's environmental and social procedures.

#1.3	Transboundary consultations did take place during the key SEA procedures and the EIA, though the timing of the EIA-related transboundary consultations and the SEA for the modification of the tunnels was not optimal. This is stated without prejudice to the relevant infringement procedure launched by the European Commission.	n/a		
# 2	<p>The technical description of the project (as a single track), which is the basis for the EIB's appraisal and approval process, remains the same at the time of issuance of this conclusions report.</p> <p>However, the impacts of the project as approved for EIB financing cannot be considered the same given the steps taken by the promoter to construct a third track on the same line.</p>	<p>The 2TIR is undergoing modifications (ongoing SEA procedure for third track).</p> <p>The EIB environmental and social standards require the assessment of the project in terms of its cumulative impacts taking into account its further planned development in the same geographic area, therefore the services will need to request the promoter to provide information in this respect.</p>	n/a	<p>3. At the time of re-appraisal of the project, as well as again before the signature of the finance contract, engage with the promoter and assess the status of the SEA for the third track, the likelihood for this plan to concretise and by when. Document this assessment and present the outcome to the Bank's governing bodies as part of the second step approval process.</p> <p>- <i>To be implemented in the context of the re-appraisal of the project and in the context of the second step approval, before the signature of the finance contract.</i></p>

**Annex 1.**  
**Management Response to the CM Conclusion Report concerning the**  
**Divača – Koper Second Rail Track project**

EIB Management takes the matters raised in the CM Report seriously and acknowledges CM's value as an independent forum to address concerns from external parties on EIB financed projects.

Nonetheless, EIB Management would like to reconfirm that the EIB approval in this case relates to a request for a single track rail line project. The possible future doubling of the track is outside the scope of the approved EIB project. As stated in the published Environmental and Social Data Sheet for the project, "[if] such additional track is ever to be considered for implementation, it will need to be the subject of a separate regulatory procedure". The EIB Management confirms that any substantial change of the scope of the project, such as the addition of a second track, whether before or after any loan signature, will be subject to a new approval in line with our standard procedures.

With respect to the CM Report's recommendations and suggestions, recommendation 6.1.1 and suggestions 6.2.1 and 6.2.3 are not implementable. These are based on the factually incorrect assumption of the existence of a separate project for a second new track, which was neither approved nor existing at the time of EIB's appraisal and approval in May 2019.

The EIB Management confirms that, whenever the Promoter may decide to sign an EIB loan, any update to the project scope that is subject of the loan, including its environmental impacts as per the Bank's E&S Standards, will be analysed. If substantially altered since appraisal in 2019, its final conditions will be subject to a second approval by the Bank's Governing Bodies - as already foreseen at the time of the first approval.

Suggestion 6.2.2 "Amend the Bank's procedures in order to effectively appraise environmentally risky projects" has been fully addressed by the revision of the EIB's Environmental and Social Standards Framework, approved in February 2022.