

## **D4R7 PPP PROJECT SLOVAK REPUBLIC**

**Complaint  
SG/E/2018/35**

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

# **Initial Assessment Report**

28 February 2019

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### **The EIB Complaints Mechanism**

The EIB Complaints Mechanism is intended to provide the public with a tool enabling alternative and pre-emptive resolution of disputes in cases where the public feels that the EIB Group has done something wrong, i.e. if a member of the public considers that the EIB has committed an act of maladministration. When exercising the right to lodge a complaint against the EIB, any member of the public has access to a two-tier procedure, one internal - the Complaints Mechanism Division (EIB-CM) - and one external - the European Ombudsman (EO).

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

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

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

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

### **The Initial Assessment Report**

The objectives of this initial assessment are fact finding-oriented and aim to:

- clarify the concerns raised by the Complainant(s), to better understand the Complainants' allegations and the views of other project stakeholders (project promoter, national authorities, etc.) and establish a position on the situation in the field;
- understand the validity of the concerns raised for those projects that cause substantial concerns regarding social or environmental outcomes and/or seriously question the governance of EIB financing;
- assess whether and how the project stakeholders (e.g. Complainants, the Bank's services and the project promoter) could seek resolution in respect of the allegations;
- determine if further work by the EIB-CM is necessary and/or possible to resolve the issues raised by the Complainant(s) (such as, but not limited to, investigation, compliance review, facilitation or mediation between the parties).

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## EXECUTIVE SUMMARY

On 31 August 2018, the NGO Triblavina (“Complainant”) submitted a complaint to the European Investment Bank’s Complaints Mechanism (“EIB-CM”) concerning the D4 Highway and R7 Expressway PPP project (“project”). The Complainant requested that the EIB-CM review the Bank’s monitoring of the project in light of the allegation that the design changes made to the D4 Highway contravened the EIB’s environmental and social standards and contractual requirements. The specific allegations concern (i) the non-compliance of the project’s technical design with the relevant international conventions; (ii) the negative impact of the project on a Natura 2000 site; (iii) the non-compliance of the project with EU/national law on environmental impact assessment, and (iv) the non-compliance of the project with national law.

The project consists of the design, construction, financing, operation and maintenance of two sections of the D4 Highway with a total length of 27 km, and three sections of the R7 Expressway with a total length of 32 km, procured as a public-private partnership (“PPP”). The EIB is only financing the D4 component of the project, which forms part of the Trans-European Transport Network (“TEN-T”) and benefits from a guarantee from the European Fund for Strategic Investments (“EFSI”). The project is promoted by the Government of the Slovak Republic, represented by the Ministry of Transport and Construction (“MTCD” or “promoter”). The concessionaire under the PPP contract is Zero Bypass Limited – a special-purpose vehicle (“concessionaire” or “borrower”). The Bank signed a finance contract with the borrower in June 2016.

The allegations focus on the implementation of the EIB’s requirements, which falls within the remit of the borrower and the promoter. The EIB-CM is examining whether the EIB monitored the contested technical and environmental issues in accordance with the applicable regulatory framework. The EIB-CM launched the initial assessment of the case in accordance with the EIB-CM Principles, Terms of Reference and Rules of Procedure (“CMPTR”).<sup>1</sup> In this context, the EIB-CM consulted the Bank’s services, and contacted the European Commission about the issues raised in the complaint relating to the application of the Habitats Directive (92/43/EEC).

In the initial assessment, the EIB-CM identified the relevant elements of the EIB’s environmental and technical monitoring framework for the project. The EIB-CM noted that the Independent Engineer is providing services including monitoring the project as defined in the Independent Engineer Agreement between the Independent Engineer, MTCD and the concessionaire. The agreement includes, inter alia, confirming the contractually requested quality and progress, monthly reporting, as well as certifying the invoicing of payments by the borrower and the D4R7 construction joint venture. In addition, a Lenders’ Technical Adviser (“LTA”) is assisting the lenders with the monitoring of the technical, environmental and social compliance of the project on behalf of lenders.

In the upcoming investigation stage, the EIB-CM will review the aforementioned monitoring reports as well as other relevant project documents. While the initial assessment does not aim to reach a conclusive opinion on the allegations, the EIB-CM’s initial assessment established the following facts regarding the project’s compliance with applicable EU environmental law:

- Concerning the application of the EIA Directive (2011/92/EC) in the context of the project, the EIB-CM noted the November 2018 decision of the Regional Court of Bratislava to annul one of the EIA screening decisions issued for the project in 2016. The court returned the case to the Ministry of the Environment (“MoE”) to conduct a new permitting procedure, indicating that a full EIA is required for the design changes under national law.

<sup>1</sup> European Investment Bank – Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (31 October 2012).

- As regards the negative impacts on the Natura 2000 site located within the project's area of influence, the competent Slovak authorities notified the European Commission in 2016 of a set of compensatory measures, pursuant to Article 6(4) of the Habitats Directive. This notification was also received by the EIB in 2016, as required by the loan conditions under the finance contract. In 2017, the promoter changed the location of the originally planned compensatory measures, and the modifications were approved by the MoE in April 2017. It appears, however, that the implementation of the compensatory measures has been subject to a significant delay. Only one of the nine measures has been fully implemented in line with the notification to the European Commission pursuant to the Habitats Directive. The construction work in the Natura 2000 area has already been ongoing, and the delay in the implementation of the compensatory measures means that the project is currently having a significant negative impact on the white-tailed eagle.

In the investigation stage, the EIB-CM will contract the services of a team of independent experts to advise on the technical and environmental aspects of the allegations. The EIB-CM may also carry out a site visit and stakeholder engagement, as per §5.6 of the EIB Complaints Mechanism Operating Procedures (2013).

## INITIAL ASSESSMENT REPORT

**D4R7 PPP project - Slovakia**

**Complainant:** NGO Triblavina

**Date received:** 31 August 2018

**Confidential:** no

**Project Status:** Signed/partially disbursed/under monitoring

**Board Report:** October 2015

**Contract amount:** Up to EUR 500m, including an EFSI guarantee

### 1. THE COMPLAINT

- 1.1. On 31 August 2018, the NGO Triblavina (the "Complainant") submitted a complaint to the European Investment Bank's Complaints Mechanism ("EIB-CM") concerning the D4 Highway and R7 Expressway PPP project (the "project"). The Complainant raised concerns about the environmental impacts associated with the design changes to the D4 Highway, the compliance of the technical design of the Danube bridge with international agreements and the project's compliance with national law.
- 1.2. During the initial assessment, the Complainant provided the EIB-CM with a court decision annulling one of the EIA screening decisions for the project and indicating the need for a full EIA for the design changes. The Complainant also submitted news articles in the Slovak media about alleged unauthorised materials extraction in Bratislava's "Nivy" and "Zitny Ostrov" areas.
- 1.3. The text box below summarises the allegations submitted by the Complainant.

#### SUMMARY OF ALLEGATIONS

The allegations concern the implementation of the EIB's requirements, which falls within the remit of the borrower and the promoter. The EIB-CM is examining whether the EIB has failed to monitor the contested technical and environmental issues in accordance with the applicable regulatory framework. The allegations can be summarised as follows:

##### 1. Non-compliance of the project's technical design with international agreements.

The Complainant alleges, "The consortium altered the bridge on the D4 motorway over the Danube, as it is now lower and has more pillars. The span of the original pillars was 222 m, and is now only 170 m. The width of the navigable channel in the Danube based on international treaties is a minimum of 150 m, and the narrowing of the pillar span to 170 m only allows for 10 m of buffer space on each side, significantly increasing the risk of collision. The new bridge has not complied with international agreements defining the navigable height of 10 m above the highest navigable water level."

##### 2. Negative impact of the project on a Natura 2000 site.

The Complainant takes the view that "there has been widespread degradation of habitat in Natura 2000 protected bird areas as an embankment has cut off a portion of the river, which is now "dying",

as the water has warmed as a result of its insufficient connection to the rest of the waterway." The Complainant attached photos in support of this claim. The Complainant also alleges that construction waste has been dumped into embankment structures, causing the death of fish.

### **3. Non-compliance of the project with EU/national law on environmental impact assessment.**

#### **3.1. Fragmentation.**

The Complainant alleges, *"The consortium is making drastic changes to the project and yet they have been divided up into 30 new EIA proceedings. The public has no way of determining what is going on, and up to 3 EIA processes are being conducted in parallel on some sections and separately for each individual change. This renders environmental impact assessment meaningless, as the changes are not assessed on a cumulative basis."*

#### **3.2. Absence of a meaningful public consultation.**

The Complainant argues, *"Residents only learned that a 400 m-long bridge from the original project had changed to an embankment once construction started. People are drawing information from the noise, including, for instance, word-of-mouth information that the new bridge over the Danube has been completely changed and optimised with respect to cycling equipment. People are not being informed."*

#### **3.3. Failure to assess significant environmental impacts.**

In the view of the Complainant, *"once the building permits were issued, the consortium made the decision to drastically change the project to achieve lower investment costs. The design speed was reduced from 120 km/h to 100 km/h, the motorway was narrowed by 1 m, the expressway by 7 m, the planned 400 m-long bridge in Jarovce was changed to an embankment structure, the lengths of noise barriers were optimised, the design and position of the pillars installed in the Danube were changed and hundreds of other important changes were made. No environmental impacts were assessed for the new project (only screening was performed). The change in the project is drastic and requires a new EIA. The new project has radically changed the conditions for wildlife migration."*

#### **3.4. Failure to provide access to justice.**

The Complainant argues that *"a lawsuit was filed in 2016 against the Ministry of the Environment's decision that the change in the design of the D4 Jarovce - Ivanka Sever motorway segment was not subject to assessment, but no hearing has been set on this matter as of yet."*

### **4. Non-compliance of the project with national law**

#### **4.1. Illegal extraction of materials.**

The Complainant alleges that illegally extracted materials have been used for the project's construction works: (i) contaminated soil from the landfills in the Nivy district of Bratislava; (ii) illegal gravel mining in the "Zitny Ostrov" area, which is also a source of drinking water. The Complainant referenced media reports about ongoing criminal investigations into the aforementioned issues by the national police authorities.

#### **4.2. Absence of valid building permits.**

The Complainant maintains that *"the consortium is building based on a new project that lacks building permits, meaning they are building illegally and it's an illegal project. The EIA screening process is still in progress, which is a condition for the issuing of building permits. This most certainly is not a geological survey as claimed by the consortium; machinery is being used on the project for installing large diameter piles as is clear from the attached photo."*



## 2. CLAIM

The Complainant requests that the Bank:

- block the construction of this project for which the concessionaire lacks building permits;
- re-evaluate the financing of a project for which laws have been breached;
- oversee the removal of contaminated soils and construction waste in embankment structures;
- prohibit the construction of the dangerous piles in the channel of the Danube;
- order a new EIA process, given the quantity of changes involved, to assess the impacts of the modified motorway and expressway on a cumulative basis;
- ensure that the impacts of the changes on bicycle transport, wildlife migration corridors and noise conditions are assessed by an accredited Slovak organisation;
- oversee the implementation of the compensatory measures resulting from the original EIA.

## 3. THE PROJECT AND THE ROLE OF THE EIB

3.1. The project concerns the design, construction, financing, operation and maintenance of two sections of the D4 highway with a total length of 27 km, and three sections of the R7 expressway with a total length of 32 km. The project will complete the southern part of the ring road around the City of Bratislava and part of the southern expressway network, linking the western and eastern parts of Slovakia (see Figure 1).

3.2. The D4 Highway is part of the Trans-European Transport Network ("TEN-T"). It consists of two sections: "Jarovce-Ivanka Sever" and "Ivanka Sever-Rača" (see Figure 1).

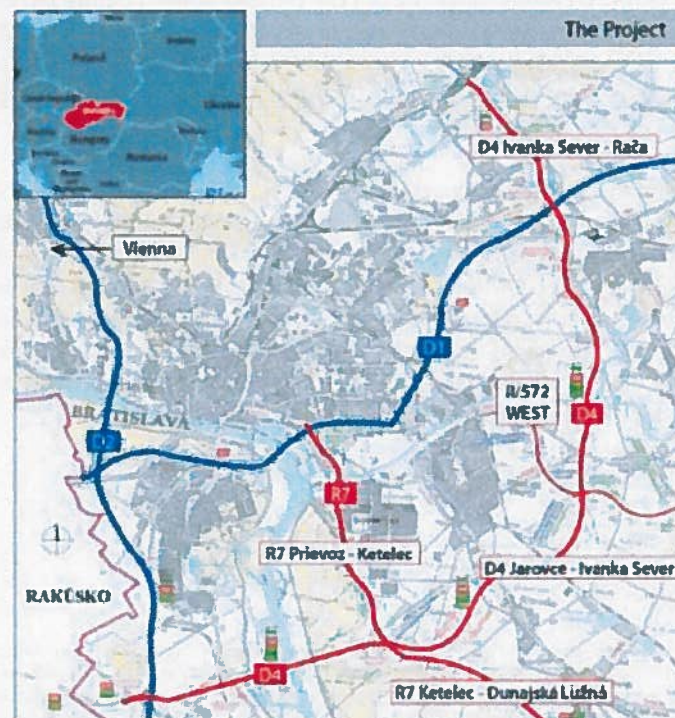


Figure 1: The two sections of the D4 Highway

- 3.3. The project promoter is the Government of the Slovak Republic, represented by the Ministry of Transport and Construction (“MTCDC”). The concessionaire or borrower is Zero Bypass Limited, based in London, a special-purpose vehicle responsible for the design, construction, operation and financing of the project. The concession agreement was signed in May 2016 and the construction work started in the same year.
- 3.4. The project is being financed by a consortium of lenders including the EIB. The EIB is financing the two sections of the D4 Highway. In June 2016, the Bank signed a EUR 426m financing agreement with the Concessionaire. The project also benefits from a guarantee from the European Fund for Strategic Investments (“EFSI”)<sup>2</sup>.
- 3.5. A Lenders’ Technical Adviser (“LTA”) is assisting the lenders with the monitoring of inter-alia, the technical, environmental, and health and safety aspects of the project implementation. The Independent Engineer’s role, as defined in the Independent Engineer Agreement between the Independent Engineer, MTCDC and the Concessionaire, includes, inter-alia, confirming the contractually requested quality and progress, monthly reporting, as well as certifying the invoicing of payments by the borrower and the D4R7 construction joint venture. In this context, the Independent Engineer issues opinions and reports on, inter alia, (i) the changes to the design of the project and (ii) ecological and biodiversity measures to be implemented as part of the works. These reports are made available to the lenders.

#### **4. BACKGROUND OF THE COMPLAINT**

- 4.1. While the present complaint chiefly concerns the Danube Bridge section of the project, it is relevant to mention that, in 2016, the Complainant submitted a complaint on environmental matters relating to another component of the project: the intersection of the D4 and D1 Highways (the “D4/D1 interchange”). Both the Danube Bridge and the D4/D1 interchange are located on the Jarovce-Ivanka Sever section of the project. The EIB-CM’s report on the aforementioned case is available under the following link: <http://www.eib.org/en/about/accountability/complaints/cases/sg-e-2016-07-d4r7-slovakia-ppp>
- 4.2. When handling the aforementioned complaint, the EIB-CM’s methodology took account of a relevant infringement proceeding closed by the European Commission in 2015<sup>3</sup>, and the ongoing court case relating to the EIA screening decision for the Jarovce-Ivanka Sever section of the D4 Highway. The EIB-CM noted that, while the ongoing judicial review did not alter the presumption of legality in relation to the EIA Directive, it indicated the need for a heightened monitoring from the Bank. As a result of its enquiry, the EIB-CM suggested mediation between the promoter and the Complainant. Mediation as a way forward was not endorsed by an agreement of the parties, therefore the case was closed in 2017.

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<sup>2</sup> See: <http://www.eib.org/efsi/>

<sup>3</sup> Between 2013 and 2015, the European Commission handled an infringement case against the Slovak Republic concerning the incorrect transposition of the EIA Directive. The infringement proceedings focused on the obligation to assess all significant environmental impacts, access to justice and public participation. The infringement proceeding became closed in early 2015, after the Government of the Slovak Republic amended the Slovakian EIA Act entering into force on 1 January 2015. See also EIB-CM Initial Assessment Report on case SG/E/2016/07: D4R7 PPP project, weblink provided in §4.1.

## 5. **WORK CARRIED OUT BY THE EIB-CM**

- 5.1. On 31 August 2018, the Complainant lodged a complaint with EIB-CM concerning the project. On 14 September 2018, the EIB-CM indicated to the Complainant that the complaint was registered.
- 5.2. As part of the EIB-CM's initial assessment, meetings took place with the EIB services responsible for the project to help the EIB-CM understand the situation with regard to project's implementation and to exchange views on the issues raised by the Complainant.
- 5.3. The EIB-CM has also had exchanges with the European Commission to enquire about the situation regarding notification of the project's environmental compensatory measures pursuant to Article 6(4) of the Habitats Directive (92/43/EEC).

## 6. **APPLICABLE REGULATORY FRAMEWORK**

### 6.1. *The EIB's Complaints Mechanism*

6.1.1. When performing its activities, the EIB is bound by European Treaties and its Statute as well as by the relevant legislative and regulatory framework of the European Union. The EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure ("CMPTR") apply to complaints of maladministration by the EIB Group in relation to its activities, in support of and for the implementation of the aforementioned policies and regulatory framework. "Maladministration" refers to instances where the Bank fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Maladministration may also relate to the environmental and social impact of a project financed by the EIB.<sup>4</sup>

6.1.2. The mandate of the EIB-CM is confined to reviewing the actions, decisions or omissions related to allegations that may be attributable to the EIB and not to third parties. The EIB Complaints Mechanism Division is not responsible for investigating complaints concerning international organisations, EU institutions and bodies, or national, regional and local authorities (e.g. government departments, State agencies and local councils).<sup>5</sup>

### 6.2. *EU legislation applicable for the project*

6.2.1. The Habitats Directive (92/43/EEC)<sup>6</sup> deals with the conservation of protected areas. The first subparagraph of Article 6(4) requires that, if, in spite of a negative assessment of the implications for the Natura 2000 site and in the absence of alternative solutions, a plan or project must nevertheless be carried out, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. The Member State shall inform the Commission of the compensatory measures adopted.

<sup>4</sup> EIB – Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (2012), part II, paragraph 1.2.

<sup>5</sup> Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (2012), paragraph 2.3.

<sup>6</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, consolidated version available under <http://data.europa.eu/eli/dir/1992/43/2013-07-01>.

6.2.2. The complaint also concerns the application of the EIA Directive (2011/92/EC)<sup>7</sup> to the project, in particular, the provisions on public consultation (Articles 5, 6, 7 and 8) and the obligation to assess all significant environmental impacts (Article 4, Annexes I, II and III).

### 6.3. *The EIB's Environmental and Social Standards*

6.3.1. The applicable standards in this case comprise the EIB Statement of Environmental and Social Principles and Standards (2009)<sup>8</sup> and the EIB Environmental and Social Handbook (2013).<sup>9</sup> The EIB requires that all projects financed by it within the European Union must at least comply with:

- applicable national environmental law;
- applicable EU environmental law, notably the EIA Directive and the nature conservation directives, as well as sector-specific directives and "cross-cutting" directives;
- the principles and standards of relevant international environmental conventions incorporated into EU law.<sup>10</sup>

6.3.2. The EIB requires that the provisions of the EIA Directive be respected.<sup>11</sup> In addition, the EIB assumes for projects within the European Union that EU environmental and social legislation has been correctly transposed into national law, and that national law is being enforced by the responsible authorities. The EIB's due diligence therefore focuses particularly on countries and/or specific laws where there is evidence to suggest these assumptions may be false.<sup>12</sup>

### 6.4. *The legal documentation associated with the EIB's financing operation*

6.4.1. The legal documentation associated with the EIB's financing of this project includes undertakings for the borrower and the promoter, related to the implementation of the compensatory measures adopted for the project. The borrower also undertook to (i) to provide evidence that the European Commission has been notified of the compensatory measures (ii) to implement the project in compliance with national law, and (iii) to obtain all building permits necessary for the implementation of the D4 sections.

6.4.2. The technical description in the finance contract stipulates that the project will be constructed according to Slovak technical standards and Eurocodes for civil structures in addition to requirements of the concession agreement.

6.4.3. The borrower has adopted an Environmental and Social Management Plan ("ESMP") for the project. The Lender's Technical Adviser ("LTA") is assisting the lenders in the monitoring of the project's compliance with the technical, environmental and social requirements.

<sup>7</sup> Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as amended.

<sup>8</sup> See: [http://www.eib.org/attachments/strategies/eib\\_statement\\_esps\\_en.pdf](http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf).

<sup>9</sup> The project was appraised and approved under the 2013 version of the EIB Environmental and Social Handbook. The Handbook was updated in October 2018, and the latter version is publicly available on the EIB's website under [http://www.eib.org/attachments/strategies/environmental\\_and\\_social\\_practices\\_handbook\\_en.pdf](http://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf).

<sup>10</sup> EIB Statement of Environmental and Social Principles and Standards, page 16, paragraph 36.

<sup>11</sup> EIB Statement of Environmental and Social Principles and Standards, page 16, paragraph 37.

<sup>12</sup> EIB Statement of Environmental and Social Principles and Standards, page 8, paragraph 20.

## 7. INITIAL FINDINGS

### 7.1.1. *Non-compliance of the project's technical design with international agreements*

7.1.2. At the time of appraisal, the EIB recorded that the main bridge across the Danube river ("Danube Bridge") was to be approximately 900 m in length with a main span of 220 – 360 m, and that the project was to be designed to Slovakian road design standards and Eurocodes for civil structures. Subsequently, the finance contract referenced the aforementioned national and EU technical standards as the EIB's technical requirements (see §6.4.2). The EIB-CM notes that the project's design changed after the EIB's appraisal, and the LTA has been assisting the lenders with the monitoring of the project's technical aspects (see §6.4.3).

7.1.3. The allegation revolves around the question of whether the design change to the Danube Bridge may affect the navigability of the Danube, a key inland waterway in Europe and part of the TEN-T network. In this regard, the EIB-CM takes note of the following relevant international treaties to which the Slovak Republic is a party:

- The European Agreement on Main Inland Waterways of International Importance ("AGN") establishes standards and parameters for the minimum height under bridges<sup>13</sup>, further developed in the UNECE Blue Book.<sup>14</sup>
- The Belgrade Convention confers an obligation on state parties to maintain a "Good Navigation Status" ("GNS") for the Danube<sup>15</sup>. The treaty body established under the Belgrade Convention – the Danube Commission – has issued recommendations defining the requirements of physical infrastructure (including bridges) from the perspective of GNS.<sup>16</sup>

7.1.4. In the investigation stage, the EIB-CM will assess the LTA and Independent Engineer's reports as well as other relevant monitoring documents with respect to the EIB's requirement to implement the project in line with national law and the EIB's technical requirements (see §6.4.1-6.4.2).

### 7.2. *Negative impact of the project on a Natura 2000 site*

7.2.1. At the time of appraisal, and based on the project's EIA, the EIB identified significant negative impacts of the project's construction work and operation on the protected bird area "Dunajské luhy" (SKCHVU 007) – in particular, on the black kite (*Milvus migrans*), white-tailed eagle (*Haliaeetus albicilla*) and black stork (*Ciconia nigra*) bird species –, requiring mitigation and compensatory measures.<sup>17</sup> Accordingly, the EIB's loan conditions included an obligation

<sup>13</sup> European Agreement on Main Inland Waterways of International Importance (AGN), of 19 January 1996 (UNECE Transport Agreements and Conventions No. 6)

<sup>14</sup> [https://www.unece.org/trans/main/sc3/bluebook\\_database.html](https://www.unece.org/trans/main/sc3/bluebook_database.html)

<sup>15</sup> Convention regarding the Regime of Navigation on the Danube, Belgrade, 1948. It is noted that a similar obligation is established in the TEN-T Regulation. See: 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 trans-European transport network and repealing Decision No 661/2010/EU, Article 15(3)(b)

<sup>16</sup> See for example: Danube Commission Recommendations on minimum requirements for standard fairway parameters, hydrotechnical and other improvements on the Danube (2012)

<sup>17</sup> The EIB's appraisal recorded, among others, the following likely environmental impacts associated with the project. "The construction of the project is expected to have impacts on air, water, soil, flora, fauna, landscape, cultural and historic monuments, archaeological, geological sites, carbon and climate change, and areas protected under specific legislation, including Natura 2000 sites. [...] Specific areas of impact include nature conservation areas in the River Danube basin involving the destruction of natural habitats and from the effects of noise, vibration, air and light pollution. Environmental mitigation measures have been incorporated in the design to minimise impact both during construction and operation; these include direct measures such as anti-noise measures, animal passages and crossings and vegetation planting. Compensation measures have been proposed to offset – in part – expected significant negative environmental impacts. [...] The D4

to provide evidence that the European Commission has been notified of the compensatory measures (see §6.4.1).

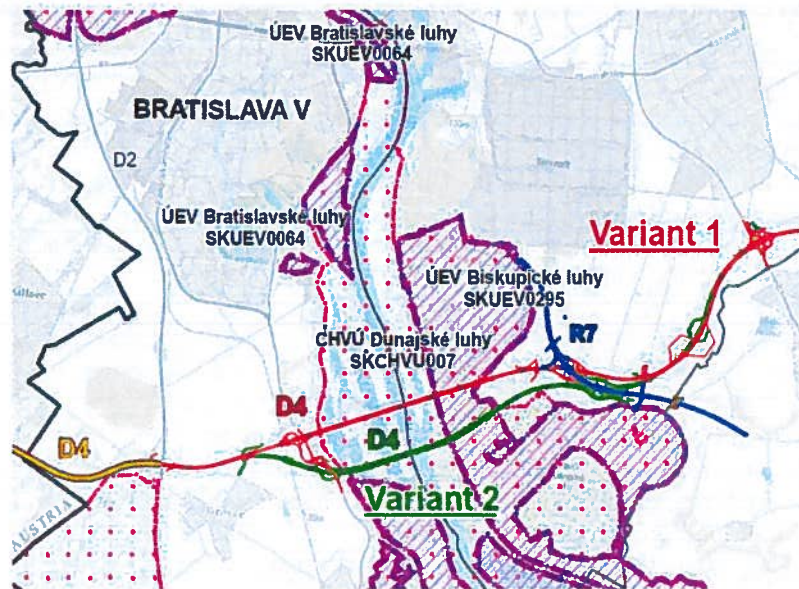


Figure 2: the D4 Highway crossing the Natura 2000 area

- 7.2.2. In November 2016, the borrower submitted to the EIB evidence attesting that a package of compensatory measures had been sent for information to the European Commission in March 2016, in accordance with Article 6(4) of the Habitats Directive.<sup>18</sup> The compensatory measures involved the reforestation of agricultural land, revitalisation of adjacent grasslands and alluvial wetlands, changing the status of existing forests, and transferring farming/economic land to new alluvial forests. The compensatory measures were scheduled to be implemented before the construction work significantly impacted the habitat on the Natura 2000 site (i.e. before the destruction of sizeable forest areas).
- 7.2.3. The LTA reported in November 2017 that the promoter had changed some of the land plots originally earmarked for compensatory measures due to land expropriation issues.<sup>19</sup> The Ministry of the Environment (“MoE”) issued its approval for changes to the compensatory measures in accordance with national law on 28 April 2017.<sup>20</sup> The EIB received the aforementioned documents as part of the project monitoring framework.
- 7.2.4. The monitoring information available for the EIB-CM’s initial assessment indicates that the implementation of the compensation measures has been delayed (see: Table 1). Only one of the nine measures has been fully implemented in line with the notification to the European Commission pursuant to the Habitats Directive (see §7.2.2). Given that the construction work

*motorway directly crosses or encroaches on Natura 2000, Ramsar Convention and nationally designated sites at the D4 Janovce – Ivanka Sever section.” See D4R7 PPP project Environmental and Social Datasheet (21.10.2015) under <http://www.eib.org/en/infocentre/registers/register/63425870> (accessed on 14.12.2018).*

<sup>18</sup> The notification provided preliminary information on the compensatory measures, indicating that the final version would be submitted after acquisition of the land for the specified measures.

<sup>19</sup> The project’s Biodiversity Management Plan – a component of the ESMP – describes the modified environmental compensatory measures. The Biodiversity Management Plan is available at the following website: <http://www.d4r7.com/svc/stream/media/downloads/Download/Biodiversity%20Management%20Plan>.

<sup>20</sup> MoE Decision No. 1094/2017-6.3 of 28.04.2017, as amended by opinion of 23.5.2017.

has already been ongoing, there is currently a significant negative impact on the white-tailed eagle. This appears to be inconsistent with the requirements of the Habitats Directive.

*Table 1: Status of implementation of the compensatory measures*

Compensatory measure ("KO")	Implementation progress
KO1 concerns afforestation to improve the conditions for the night roosting of the white-tailed eagle	Not started
KO2 also concerns afforestation	Not started
KO3 is to be partly afforested, partly converted to grassland	Not started. It is noted that the land plot is owned by the National Highway Company ("NDS")
KO4 has been converted to grassland in the field, but not on paper	Partial implementation (land was converted in practice but not on paper. Formally, it is still arable land, which needs to be reclassified as grassland to prevent any ploughing up in the future)
KO5 concerns grassland conversion	Fully implemented in line with the notification.
KO6 concerns an increase in the water flow and revitalisation of the Biskupické arm of the Danube	The work has started in the western part of the area only. However, it is unclear if the gravel is being extracted as a compensatory measure or for use as construction material elsewhere.
KO7 comprises two plots which are currently unprotected forest fragments	The forest segments should be protected by being declared as "special-purpose forests" ( <i>lesy osobitného určenia</i> ). To this end, NDS has to submit a request to the Slovak Nature Conservancy, which will take charge of the procedure. There is no evidence that NDS has taken action so far.
KO8 involves afforestation	While NDS has already acquired most of the land, it appears that implementation has not started. The zoning decision is also missing.
KO9 concerns conversion to grassland	NDS is already the owner but implementation has not started.

7.2.5. In the investigation stage, the EIB-CM will review the relevant project documentation, as well as the EIB's relevant actions and decisions in the context of the applicable regulatory framework.

7.3. *Non-compliance of the project with EU/national law on environmental impact assessment*

7.3.1 The EIB-CM noted the decision of the Regional Court of Bratislava, dated 22 November 2018, annulling the EIA screening decision of the Ministry of the Environment ("MoE") for the Jarovce-Ivanka Sever section of the project, and indicating the need for a new procedure for a full EIA assessment of the design changes.<sup>21</sup> In the investigation stage, the EIB-CM will review the EIB's monitoring with respect to the allegation.

7.4. *Non-compliance of the project with national law*

7.4.1. The Complainant has brought to the attention of the EIB news articles in the local media about ongoing criminal investigations into unauthorised materials extraction. The EIB-CM noted that the Special Building Office of the Slovak Republic ("SBO") carried out a site inspection and took samples from the embankment in May 2018 and October 2018, resulting in two compliance reports.

<sup>21</sup> Decision of the Regional Court of Bratislava of 22 November 2018 (Sp. zn. 65347/2016).

- 7.4.2. Considering the allegation about the absence of a valid building permit for the Danube Bridge section, it is noted that in November 2018 a new building permit was issued for the project and it became effective on 4 December 2018.<sup>22</sup> The building permits are reported to EIB in accordance with the finance contract, and the environmental compliance of the project is monitored by the LTA (see §6.4).
- 7.4.3. The EIB-CM's investigation will review the relevant monitoring information and assess the EIB's monitoring of the project's compliance with national law.

## **8. INITIAL CONCLUSIONS AND PROPOSED WAY FORWARD**

- 8.1. In light of preliminary findings, the EIB-CM identified the need to carry out an investigation into the allegations. The EIB-CM will contract the services of independent experts to advise on the technical and environmental aspects of the allegations. The EIB-CM may also carry out a site visit and stakeholder engagement, as per §5.6 of the EIB Complaints Mechanism Operating Procedures (2013).
- 8.2. The EIB-CM's initial assessment served to identify the relevant environmental and technical monitoring components in the EIB's monitoring framework. On the one hand, the Independent Engineer produces monthly and quarterly reports on the project, inter alia confirming the contractually requested quality and progress as well as certifying the invoicing of payments by the borrower and the D4R7 construction joint venture. These reports are made available to the lenders. An LTA assists the EIB with the technical, environmental and social monitoring of the project on behalf of all lenders, including reviewing progress of works, considering material changes/variations and other technical assistance as required.
- 8.3. In the investigation stage, the EIB-CM will review the aforementioned monitoring reports as well as other relevant project documents. While the EIB-CM has not reached a conclusive opinion on the allegations, the initial assessment established the following facts about the project's compliance with applicable EU environmental law.
- Concerning the application of the EIA Directive in the context of the project, the EIB-CM noted the decision of the Regional Court of Bratislava, dated November 2018, to annul one of the EIA screening decisions granted to the project in 2016 and indicate the need for a full EIA procedure for the design changes.
  - As regards the negative impacts on the Natura 2000 site located within the project's area of influence, in 2016 the competent national authority (the Ministry for Environment or "MoE") sent for information to the European Commission a set of compensatory measures, pursuant to Article 6(4) of the Habitats Directive. This notification was also received by the EIB in 2016, as one of the loan conditions under the finance contract. In 2017, the originally planned compensatory measures were changed, and the modifications were approved by the MoE in April 2017. It appears, however, that the implementation of the compensatory measures has been subject to a significant delay. The construction work in the Natura 2000 area has already been ongoing, and the delay in the implementation of the compensatory measures means that the project is currently

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<sup>22</sup> Resolution of the Ministry of Transport and Construction No. 94/2018 (19 November 2018).



having a significant negative impact on the white-tailed eagle. These compliance issues are relevant for the EIB's project monitoring, which will be further investigated in the next stage.

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**LIST OF ACRONYMS**

<b>AGN</b>	European Agreement on Main Inland Waterways of International Importance
<b>CMTPR</b>	EIB-CM Principles, Terms of Reference and Rules of Procedure
<b>EC</b>	European Commission
<b>EFSI</b>	European Fund for Strategic Investments
<b>EIA</b>	Environmental impact assessment
<b>EIB</b>	European Investment Bank
<b>EIB-CM</b>	Complaints Mechanism of the EIB
<b>EO</b>	European Ombudsman
<b>ESDS</b>	Environmental and Social Data Sheet
<b>ESMP</b>	Environmental and Social Management Plan
<b>EU</b>	European Union
<b>GNS</b>	Good navigation status
<b>KO</b>	Compensatory measure
<b>LTA</b>	Lenders' Technical Adviser
<b>MoE</b>	Ministry of the Environment of the Slovak Republic
<b>MTCDD</b>	Ministry of Transport and Construction of the Slovak Republic
<b>NGO</b>	Non-governmental organisation
<b>PPP</b>	Public-private partnership
<b>SBO</b>	Special Building Office of the Slovak Republic
<b>TEN-T</b>	Trans-European Transport Network
<b>UNECE</b>	United Nations Economic Commission for Europe