

D4R7 PPP Project -

Slovakia

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

Complaint SG/E/2016/07

Initial Assessment Report

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¹ In line with the § 5.6.3 of the EIB-CM's Operating Procedures, the preparation of this Initial Assessment Report has been supported by external expertise. The content and opinions expressed in this report are the sole responsibility of the EIB-CM.

The EIB Complaints Mechanism

The EIB Complaints Mechanism intends to provide the public with a tool enabling alternative and pre-emptive resolution of disputes in cases whereby the public feels that the EIB Group has acted inappropriately, i.e. if they consider that the EIB 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 unsatisfied with the EIB-CM's reply, have the opportunity to submit a confirmatory complaint within 15 days of the receipt of that reply. In addition, Complainants who are not satisfied with the outcome of the procedure before the EIB-CM, and who do not wish to make a confirmatory complaint, have the right to lodge a complaint of maladministration against the EIB with the EO.

The EO was "created" by the Maastricht Treaty of 1992 as an EU institution to which any EU citizen or entity may appeal to investigate any EU institution or body on the grounds of maladministration. Maladministration means poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. The EO gives the following example: 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-CM intends to not only address non-compliance by the EIB to its policies and procedures but also endeavours 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).

Acknowledgements

The EIB-CM would like to thank all people and organisations with whom they have interacted during the investigation of this complaint, and expresses its appreciation to the EIB staff that have provided the required information.

Without the support and valuable contributions of everybody concerned, the preparation of this report would not have been possible.

Table of Contents

EXECUTIVE SUMMARY	5
1. THE COMPLAINT.....	8
2. CLAIM.....	8
3. THE PROJECT.....	9
3.1 Description	9
3.2 Timeline.....	9
3.3 The Promoter, the Borrower and the EIB	10
4. BACKGROUND OF THE COMPLAINT AND METHODOLOGICAL ASSESSMENT	10
5. REGULATORY FRAMEWORK.....	11
5.1 EU Legislation.....	11
5.1.1 EU EIA Directive.....	11
5.2 EIB Policies and Guides	11
5.2.1 EIB Statement of Environmental and Social Principles and Standards.....	122
5.2.2 EIB Environmental and Social Handbook.....	132
6. EIB-CM INITIAL ASSESSMENT	13
6.1 Failure to ensure compliance with national law	14
6.1.1 Details of the Allegation	14
6.1.2 Regulatory Framework	14
6.1.3 Initial Findings	15
6.1.4 Initial Conclusion.....	17
6.2 Failure to ensure compliance with the EIA Directive concerning the assessment of significant environmental impacts	17
6.2.1 Details of the Allegation	17
6.2.2 Regulatory Framework	19
6.2.3 Initial Findings	19
6.2.4 Initial Conclusion.....	20
6.3 Failure to ensure that the Promoter conducts a meaningful public consultation	20
6.3.1 Details of the Allegation	20
6.3.2 Regulatory Framework	20
6.3.3 Initial Findings	21
6.3.4 Initial Conclusion.....	23
7. OTHER ISSUES	24
8. INITIAL CONCLUSIONS AND PROPOSED WAY FORWARD	24
ANNEX 1: CHANGES IN DESIGN OF D4-D1 JUNCTION	25
ANNEX 2: THE PLANNING AND PERMITTING PROCEDURE OF THE D4 HIGHWAY IN NATIONAL LAW	29
LIST OF ACRONYMS.....	33

EXECUTIVE SUMMARY

On 31st May 2016, acting on behalf of the NGO Triblavina (“the Complainants”), 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 Complainants have requested the EIB-CM to review the Bank’s appraisal and monitoring of the Project because they allege that the permitting procedure of the D4 Highway is conducted by the competent authorities contrary to EU and national law. The specific allegations concern (i) the changes to the project design that will conflict with the validity of existing permits and (ii) implications in complying with the EU Directives and EIB standards related to environmental impact assessment and public consultation.

The Project consists of the design, construction, finance, 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 D4 Highway forms part of the Trans-European Transport Network (“TEN-T”) and is supported by the European Fund for Strategic Investments (“EFSI”) initiative. The Bank is only financing the D4 component of the Project.

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 (“Concessionaire” or “Borrower”) – a special purpose vehicle established by the consortium of bidders that won the public procurement tender for the design, construction, finance, operation and maintenance of the Project.

The Bank appraised the Project between March 2015 and May 2016, and signed the Finance Contract with the Borrower in June 2016. The Bank generally requires that projects financed by it within the European Union comply with the law of the Member State, the law of the European Union and the Bank’s policies and guidelines. To this end the Bank carries out several activities during the project-cycle.² Against this background, the mandate of the EIB-CM is confined to reviewing the actions, decisions or omissions related to the allegations that may be attributable to the EIB and not to third parties.³ 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”).⁴ To perform this assessment, the EIB-CM carried out a desk review of the available information and held meetings with the Bank’s Services. A fact-finding mission was held in October 2016 to facilitate meetings with the stakeholders, including the Complainants, the Promoter, and the Representation of the European Commission to Slovakia.

In their **first allegation**, the Complainants allege that the Promoter is conducting the permitting procedure of the D4 Highway contrary to national law. Changes in the design of the Project entailed the removal of collector roads (collectors) from the D4-D1 Junction and onwards on the D1 Highway. The Complainants submit that the removal of collectors is not compatible with the Land Use Plan of Bratislava Self-Governing Region, as well as the existing zoning permits of the D4 Highway. At the time of drafting the present report, the redesigning of the D4-D1 Junction and the construction permitting procedure were still ongoing, and therefore, the EIB-CM could not reach a final conclusion on the first allegation. During the course of this initial assessment, the EIB-CM could however conclude that the Bank had verified the existing permits of the Project and the capacity of the Borrower to implement the Bank’s requirements at the time of appraisal. In addition, the contractual arrangements with the Borrower have set up a reporting framework, where the Borrower shall obtain all necessary authorizations for the D4R7 PPP Project in line with national law, and keep those authorizations effective.⁵ In addition to monitoring legal compliance, the Bank is monitoring the technical development of the Project, including significant changes from the viewpoint of capacity and safety adequacy.

² The Bank’s project cycle comprises the project appraisal, negotiation and signature of the loan agreement, disbursement and monitoring stages. For further details see: <http://www.eib.europa.eu/projects/cycle/index.htm>

³ The EIB Complaints Mechanism Division is not competent to investigate complaints concerning International organisations, Community institutions and bodies, national, regional or local authorities (e.g. government departments, state agencies and local councils). See: Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (31st October 2012), paragraph 2.3.

⁴ European Invest Bank – Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (31 October 2012), available at: http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf

⁵ See: EIB template contractual clauses on environmental matters, available at: http://www.eib.org/attachments/documents/eib_standard_contractual_clauses_on_environmental_information_en.pdf

The **second allegation** is based on the Complainants' claim that the environmental impact of the removal of the collectors from the D4-D1 Junction has not been assessed in line with the EU Directive on Environmental Impact Assessment ("EU EIA Directive"). The Complainants do not agree with the evaluation of the Ministry of Environment of the Slovak Republic ("MoE") that the impact on the environment during construction works of the redesigned D4-D1 Junction is not significant, and that the construction of the redesigned D4-D1 Junction does not require an EIA⁶.

The EIB-CM has observed that Class 13 of Annex II of the EU EIA Directive provides that where there is a change or extension to a road development that has already received statutory approval and that change or extension may have significant adverse effects on the environment, a new EIA is required. As it falls under Annex II, the national authorities have to decide whether an EIA is needed. Concerning the case under consideration, the EIB-CM takes note that the competent national authority (the MoE) decided in October 2016 that the Project does not require a new EIA. According to the presumption of legality that governs, in general, the EIB operations in EU countries, the allegation against the EIB would not be grounded. However, the EIB-CM has also been informed that the Complainants have requested the judicial review of the MoE's decision before national courts, and this review is in progress at the time of writing the present report. This ongoing judicial review does not alter the presumption of legality, although it would require a heightened monitoring from the Bank. The EIB-CM advises the Bank's services to closely monitor the changes in the design with the Promoter and the Borrower during the implementation phase, particularly with a view to mitigate to the maximum extent possible the disturbances during the construction works.

In the **third allegation**, the Complainants state that the EIB has failed to ensure that the Promoter conducted a meaningful public consultation on the design change of the D4-D1 Junction. The EIB-CM found that in 2013, the European Commission opened an infringement proceeding against the Government of the Slovak Republic concerning the transposition of the EU EIA Directive. The infringement affected, amongst others, areas of the law that concerned the way that public consultations were conducted. The Slovakian EIA Act was subsequently amended and the modifications entered into force on 1st of January 2015, by the time the design change of the Junction happened.

The procedures in relation to the design changes for D4-D1 Junction were developing during the Bank's appraisal process and are still on-going at the time of this report. The EIB's Environmental and Social Data Sheet ("ESDS") assessed the overall project at the time of publication (October 2015), noting that public consultation had taken place in relation to the project elements, and also the infringement process opened by the European Commission against Slovakia in 2013 (infringement no. 2013/2034). The EIB-CM notes that, while the ESDS mentioned the infringement process, it did not identify a need for the Bank to have a heightened sensitivity to the public consultation processes, either that done for the initial project review or for future design changes of the D4 Highway.

As regards the contested public consultation, based on an analysis of the documents published on the MoE's website, and the public announcements and decisions made by the MoE, the EIB-CM found that substantial information has been made available to the public. However, and whilst it seems that the public consultation has influenced the process of design changes for the D4-D1 Junction, there are still issues that need to be addressed satisfactorily (e.g. the claimed absence of reasoning behind the removal of collector roads from the junction).

The EIB-CM's initial conclusion is that it would be beneficial that, given the recent infringement proceeding related to the EU EIA Directive and the on-going development of the D4-D1 junction, the Bank continues to monitor the Project with heightened sensitivity, as it follows from its standards and procedures. Furthermore, it is proposed that, in line with the Bank's Stakeholder Engagement Standard, a process to facilitate dialogue is started between the Promoter and the Complainants.

⁶ The referenced decision relates to the Jarovce-Ivanka Sever section of the D4 Highway, where the D4-D1 Junction is located. This Junction forms part of the D4R7 PPP project and it connects the D4 Highway to the D1 Highway. Part of the proposed changes to the D4-D1 Junction that are subject to the complaint are caused by the need to align the Junction with the revised design of the D1 Highway. This is the reason that the Complainants are mentioning both projects.

Mediation as a proposed way forward was not endorsed by an agreement between the Complainants and the Promoter during the external consultation of the draft initial assessment report. Hence the EIB-CM closes the complaint with the present report.

Two other issues were identified during the fact-finding mission of the EIB-CM. The first one concerned the impacts of project design changes on a Natura 2000 site, and the second centred on the procedure of expropriating the properties of deceased persons. These issues are described in Part 7 of the present report.

D4R7 PPP project - Slovakia

Complainant: NGO Triblavina

Date received: 31st May 2016

Project Status: Signed and not disbursed

Board Report: October 2015

Contract amount: up to EUR 500 Million , including an EFSI guarantee

1. THE COMPLAINT

On 31st May 2016, acting on behalf of the NGO Triblavina (“the Complainants”), 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 Complainants raise objections about changes to the Project initiated by the competent authorities in 2016, and the way in which the changes have been implemented. The Complainants state that these changes are non-compliant with EIB policies, the EU Environmental Impact Assessment Directive (“EU EIA Directive”) and national law.

The text box below summarizes the allegations submitted by the Complainants.

Failure to assess the environmental and social impacts of the Project:

- Failure to ensure compliance with national law
- Failure to ensure compliance with the EU EIA Directive concerning the assessment of significant environmental impacts
- Failure to ensure that the Promoter conducts a meaningful public consultation

2. CLAIM

As further clarified during the fact-finding mission, the Complainants request that the Bank:

- Verify that proper due diligence was carried out during project appraisal and monitoring stages;
- Facilitate mediation. During the fact-finding mission, the Complainants stressed that the NGO Triblavina was in favour of the Project and had no intention of delaying the construction. Nonetheless, in their opinion, the Project should also consider the needs of the residents in the area and be implemented in line with national law (in particular, the Land Use Plan of Bratislava Self-Governing Region), the EU environmental Directives and EIB Standards. The Complainants seek dialogue with the Ministry of Transport and Construction regarding the issues raised.

3. THE PROJECT

3.1 Description

The Project concerns the design, construction, finance, 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 construct 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).

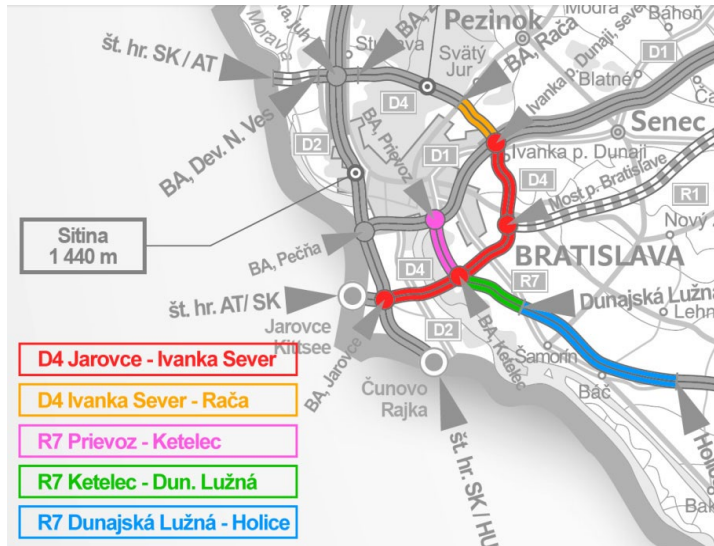


Figure 1. Project D4/R7 Scheme⁷

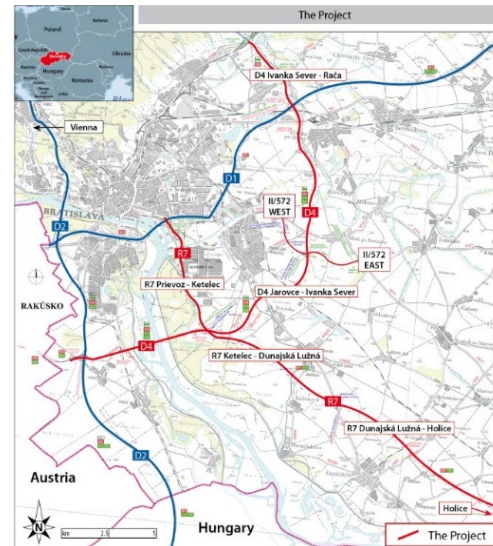


Figure 2. The D4R7 Project in connection with other motorways

The D4 Highway sections of the Project are part of the Trans-European Transport Network (“TEN-T”). The Government of the Slovak Republic considers the Project to be a strategic priority in order to strengthen the country’s importance in the international transportation network, as well as to resolve long-standing transportation issues in the City of Bratislava and its surrounding towns. The D4 Highway consists of two sections: Jarovce-Ivanka Sever and Ivanka Sever-Rača. Figure 2 illustrates the Project’s interconnections with the existing transport infrastructure.

3.2. Timeline

The estimated construction period is 4.25 years and the Project is scheduled for completion in 2020. Operations are expected to start in April 2020 following issuance of the first preliminary occupation permit. The box below presents the timeline of the planning and permitting procedure of the Jarovce-Ivanka Sever section of the D4 Highway:

2011	Environmental impact assessment (Final Decision of the MoE)
2012	Strategic Environmental Assessment of the D4 Highway
2013	Land Use Plan of Bratislava Self-Governing Region
2014	Change of the EIA (Final Decision of the MoE)
2014	Zoning permit of the D4 is issued
2016 Jan 14	MoE announces a notification of change of the EIA for public consultation
2016 Feb 18	MoE puts screening process on hold in order to clarify comments from the public

⁷ <http://www.obchvatbratislavy.sk/uploads/files/ppp-d4r7-feasibility-study-103.pdf>

2016 Jul 11	MoE publishes its screening decision
2016 Aug 1	MoE publishes appeals submitted against the screening decision
2016 Oct 24	MoE publishes its Final Decision
2016 Dec 22	Complainants request the judicial review of the Final Decision of the MoE
2016 Dec	Permitting procedure for the issuance of building permits starts

3.3. The Promoter, the Borrower and the EIB

3.3.1 Promoter

The Project promoter is the Government of the Slovak Republic, represented by the Ministry of Transport and Construction (“MTCD”).

3.3.2 Concessionaire

The Concessionaire or Borrower is Zero Bypass Limited of London, represented by their Slovak branch in Bratislava. Zero Bypass Ltd was selected after carrying out an international tendering process and is a consortium comprised of Macquarie Capital, Cintra Infraestructuras Internacional SL and PORR AG. Zero Bypass Ltd is responsible for the design, construction, operation and financing of the Project. The concession agreement was signed in May 2016.

3.3.3 The EIB

The Project is financed by a consortium of lenders including the EIB. The EIB is financing the two sections of the D4 highway only, as the Bank found during the appraisal of the Project that the R7 expressway did not meet the eligibility criteria put forward in the Bank’s Transport Lending Policy.

The Bank conducted the first stage of its appraisal from March to September 2015. In October 2015, based on the first appraisal report, the EIB’s Board of Directors approved a loan of up to EUR 500 m to support the design, construction and financing of the D4 highway. After the Promoter selected the Concessionaire (in November 2015), the Bank prepared a second appraisal report in May 2016, with a view to assess whether the proposal of the Concessionaire met the financing rules of the Bank.

In June 2016, the Bank signed a EUR 426 m financing agreement with the Concessionaire. The Project also benefits from a guarantee of the European Fund for Strategic Investments (“EFSI”)⁸.

4. BACKGROUND OF THE COMPLAINT AND METHODOLOGICAL ASSESSMENT

On 31 May 2016, the Complainants lodged a complaint with the EIB-CM concerning the Project. In their letter, the Complainants presented allegations that challenged the environmental and social impacts of the Project.

On 14 June 2016, the EIB-CM indicated to the Complainants that the complaint was registered.

Meetings took place with the Bank’s Services responsible for the project appraisal in the first week of October 2016 to understand the background of the project, the status of the implementation and to exchange views on the issues raised by the Complainants.

The EIB-CM then reviewed the relevant documents of the Project, including the Bank’s Environmental and Social Data Sheet (“ESDS”), the Bank’s reports used during the appraisal, the Environmental Impact Assessments (“EIA”) of the Project and other key documents.

⁸ <http://www.eib.org/efsi/>

The EIB-CM hired a group of consultants from the company SWECO A/S (Denmark) to carry out the independent review of the technical and policy background of the complaints. With the support of SWECO consultants, the EIB-CM also reviewed several project documents made publicly available by the Government of the Slovak Republic.

A fact-finding mission was carried out in Slovakia from 19 to 20 October 2016 to visit the site and meet the Complainants and the Promoter. The EIB-CM also met the Representation of the European Commission to Slovakia to keep them informed of the work of the EIB-CM and the preliminary discussions with the parties. In order to preserve the autonomy and confidentiality of the discussions, the EIB-CM met the Complainants separately.

5. REGULATORY FRAMEWORK

5.1 *EU Legislation*

5.1.1 EU EIA Directive

The Complaint concerns the implementation of the EU EIA Directive (Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as amended), in particular, the provisions on public consultation (Articles 5, 6, 7 and 8) and the obligation to assess all significant environmental impacts (Article 4, Annex I, Annex II and III).

According to the EU EIA Directive, all projects that potentially have significant effects on the environment shall undergo a systematic process to identify, predict and evaluate the environmental effects of the project. Particular attention should be given to preventing, mitigating and offsetting the significant adverse effects of the project.

The EIA process shall be open and transparent, and provide opportunities for public involvement, in particular to those people who are most directly affected by, and interested in the proposal, in an appropriate manner that suits their needs. The screening determination and information from the environmental studies must be made available to the public. The decision-maker is obliged to take account of the opinions and concerns raised by the public, which may be relevant to those decisions.

The objectives of an EIA are:

- to influence the design of the project to optimize its environmental performance;
- to identify appropriate measures for mitigating the negative impacts of the proposal;
- to facilitate informed decision making, including setting the environmental terms and conditions for implementing the proposal.

The information to be provided by the developer shall include 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 (Article 5 and Annex 4).

A screening is mandatory for Annex II projects (projects where an EIA assessment is not mandatory but dependent on the environmental impact of the project). The Competent Authority makes a decision on whether EIA is required. The Screening decision must be recorded and made public. The public concerned shall be given early and effective opportunity to participate in the environmental decision-making procedures (Article 6).

5.2 *EIB Policies and Guides*

The relevant EIB policies and guides in relation to the complaint are:

- EIB Statement of Environmental and Social Principles and Standards (2009)⁹
- EIB Environmental and Social Handbook (2013)¹⁰

⁹ http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf

¹⁰ http://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf

5.2.1 EIB Statement of Environmental and Social Principles and Standards

On 3rd February 2009, the EIB's Board of Directors approved the EIB Statement of Environmental and Social Principles and Standards confirming the role of the Bank as a leading institution on environmental and social sustainability. The Statement requires that all projects financed by the EIB must at least comply with:

- Applicable national environmental law;
- Applicable EU environmental law, notably the EU 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.

In the Statement, 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. To this end, the EIB promotes the application of Strategic Environmental Assessment ("SEA") as a tool for identifying and evaluating the potential impacts of plans and programmes. The EIB requires the application of the precautionary principle through the mitigation hierarchy in order to promote more sustainable patterns of developments in the regions it operates in.

The assessment of environmental and social impacts and risk, including their significance and materiality, as well as the development of adequate management plans and programmes are key tools for achieving sound environmental and social performance. In this respect, all EIB-financed operations shall comply with national legislation and international conventions and agreements ratified by the host Country. In addition, operations within the EU, Candidate and potential Candidate countries must comply with EU horizontal and/or applicable sectoral legislation.

In accordance with the Statement, the EIB assumes that for projects in Europe, the EU environmental and social legislation has been correctly transposed into national law, and that national law is being enforced by the responsible authorities. EIB's due diligence therefore focuses particularly on countries and/or specific laws where there is evidence to suggest these assumptions may be false.

The Statement determines that: "The EIB will not finance projects that do not meet its environmental and social requirements as described in the Statement. This includes projects that do not comply with appropriate national and EU environmental and social legislation in force at the time. The requirements of the Bank may go beyond what is legally required. The Bank will not finance projects which result in a violation of human rights."¹¹

The Statement further states that: "The EIB requires that all projects that it finances comply at least with:

- Applicable national environmental law;
- Applicable EU environmental law, notably the EU 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.¹²

The Statement also determines that the EIB requires that the provisions of the EIA Directive are respected, in particular:

- An EIA should be carried out if a project is likely to have a significant impact on the environment;
- For an Annex II project, the decision not to carry out an EIA should be justified.
- The public concerned should be given early and effective opportunities to participate, to express comments on the project and to receive a response to those comments.
- Any residual impacts should be suitably mitigated, compensated and/or offset.¹³

¹¹ EIB Statement of Environmental and Social Principles and Standards, page 10, paragraph 6.

¹² EIB Statement of Environmental and Social Principles and Standards page 16, paragraph 36.

¹³ EIB Statement of Environmental and Social Principles and Standards, page 16, paragraph 37.

5.2.2 EIB Environmental and Social Handbook

The EIB's Environmental and Social Handbook (the "Handbook") was published in 2013. The purpose of the Handbook is to provide an operational translation of the overarching policies, principles and standards put forward in the Statement of Environmental and Social Principles and Standards.

Standard 10 of the Handbook addresses stakeholder management in EIB-financed projects. It outlines a systematic approach to stakeholder engagement whereby the promoter is expected to build and maintain a constructive relationship with relevant stakeholders. It underlines that stakeholder engagement is an inclusive and iterative process that involves, in varying degrees, stakeholder analysis and engagement planning, timely disclosure and dissemination of/access to information, public consultations and stakeholder participation, and a mechanism ensuring access to grievance and remedy.

As a public institution, the EIB actively promotes the right to access to information, as well as public consultation and participation; the right to access to remedy, including through grievance resolution, is equally acknowledged and actively promoted by the EIB. Standard 10 affirms the EIB's expectation that promoters uphold an open, transparent and accountable dialogue with all relevant stakeholders at the local level targeted by its EIB operations.

The Handbook stresses 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. To this end, the EIB promotes the application of strategic environmental assessment ("SEA") as a tool for identifying and evaluating potential impacts of plans and programmes.

According to the Handbook, the Environmental Impact Study ("EIS") is a central part of EIB project evaluation. An EIS should alert the decision-maker, members of the public, and the government of a project's consequences to the environment and to the community at large; it should also explore possible alternatives to the project that might maximise the benefits while minimising the adverse impacts.

The Handbook defines alternatives as different means of meeting the general purposes and requirements of the activity, which may include alternatives to:

- the property on which or location where it is proposed to undertake the activity;
- the type of activity to be undertaken;
- the design or layout of the activity;
- the technology to be used in the activity; and
- the operational aspects of the activity.¹⁴

The Handbook states: "The assessment of environmental and social impacts and risk, including their significance and materiality, as well as the development of adequate management plans and programmes are key tools for achieving sound environmental and social performance. In this respect, all EIB-financed operations shall comply with national legislation and international conventions and agreements ratified by the host Country."¹⁵

The Handbook further states: "The EIB also 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.

6. EIB-CM INITIAL ASSESSMENT

In this section, each allegation of the Complainants is analysed in detail and separately. For each of them, the report will present the initial findings and conclusions based on the outcome of the discussions held with the parties and the documents reviewed.

¹⁴ EIB Environmental and Social Handbook, page 5.

¹⁵ EIB Environmental and Social Handbook, page 12, paragraph 3.

6.1 Failure to ensure compliance with national law

6.1.1 Details of the Allegation

The Complainants challenge the design change of the D4-D1 Junction that is a component of the D4R7 PPP Project. As background information, the Complainants have explained that the design change of the Junction was triggered by the design modification of the widening of the D1 highway.

The Complainants state that in December 2015 the Promoter announced its decision to change the design of the D1 Highway and remove the collector roads originally planned for construction along the D1 highway. Subsequently, on 14th January 2016 the MoE published the EIA screening announcement of the Jarovce-Ivanka Sever section of the D4 Highway, which entailed the removal of collectors from the D4-D1 Junction. From the Complainants' point of view the collector roads should serve two purposes. Firstly, they would have channelled the traffic of the D1 Highway during the construction of the D4-D1 Junction (the new Junction requires the elevation of the existing D1 Highway by 1.5 metres, and during this operation the D1 Highway will be closed). Secondly, as a long-term solution, the collectors would have provided the residents of the nearby villages with enhanced access to the D1 and D4 Highways when commuting to Bratislava. The Complainants contend that without the collector roads of the D1 Highway, the D4 Highway's positive impact on the regional traffic situation (i.e. the alleviation of congestion) diminishes significantly.

Regarding the legal implications of the design change, the Complainants claim that the new technical solution for the Junction D4-D1 (as per the EIA Screening Announcement for the Jarovce-Ivanka Sever section) is not compliant with the Land Use Plan of Bratislava Self-Governing Region, nor with the zoning permit of the D4 Highway. With regard to procedural failures the Complainants have identified the following instances:

- (i) The new technical solution for the D4-D1 Junction, as specified in the EIA Screening Announcement (of 14.01.2016), violates both the zoning permit of the D4 highway and the zoning permit of the D1 highway since the technical solution does not respect parallel collector roads next to D1;
- (ii) The new D4-D1 Junction technical solution violates the Land Use of Bratislava Self-Governing Region, which require a corridor for parallel 2-lane collector roads next to D1 highway;
- (iii) The Complainants consider that the building permits cannot be issued unless the competent authorities change the design of the Jarovce-Ivanka Sever section of the D4 Highway to be in line with the Regional Land Use Plan (with collectors).

The Complainants request that the EIB-CM reviews whether the Bank has fulfilled its obligation to ensure during the project appraisal and monitoring that the Project complies with national law.

6.1.2 Regulatory Framework

The Bank has a general duty to ensure that the financed projects comply with the law of the host country. The aforesaid duty of the Bank usually becomes reflected in the contractual arrangements between the Bank and the Borrower, in the form of disbursement conditions and the Borrower's undertakings. The Bank usually sets forth disbursement conditions and undertakings that may include for example:

- the Borrower's obligation to submit all permits that have been obtained by the time of the signature of the loan agreement;
- the Borrower's obligation to comply with all laws and regulations which it or the project is subject.
- the Borrower's obligation to obtain all permits and authorisations necessary for the implementation of the project, and keep them effective;
- the Borrower's obligation to inform the Bank about any non-compliance by it with any applicable environmental law as well as any suspension, revocation or modification of any environmental approval, and to set out the action to be taken with respect to such matters¹⁶.

¹⁶ See: EIB template contractual clauses on environmental matters, available at: http://www.eib.org/attachments/documents/eib_standard_contractual_clauses_on_environmental_information_en.pdf

Failure of the Borrower to obtain all permits required by national law – and without providing explanation to the satisfaction of the Bank – may activate the Bank’s right to refuse the disbursement of financing, suspend or cancel the undisbursed amount of financing.

The administrative procedure for the issuance of construction authorisations is regulated by the Slovak Construction Act no. 50/1976 as updated through subsequent laws, notably law no. 118/2010 about the land use planning, zoning and building permits.¹⁷

6.1.3 Initial Findings

The Complainants’ first allegation focuses on the Bank’s duty to ensure that the Project complies with national law – in other words, that the D4 Highway undergoes a proper licensing procedure and receives all the permits required by the law of the Slovak Republic. In terms of the temporal scope, the allegation concerns the Bank’s due diligence during the appraisal and monitoring of the Project.¹⁸

To explain the relevance of the allegation to the Bank’s due diligence, the report first outlines the technical context of the design change and the permitting procedure. The second part then examines whether the allegation may fall within the remit of the Bank’s due diligence.

The design change of the D4-D1 Junction¹⁹

The project documentation predicates that the D4 Highway will intersect the existing D1 Highway at Ivanka-Sever. The new junction is grade-separated where the D4 will underpass the D1 Highway. The junction requires that the D1 Highway is elevated by 1.5 metres from its present level. In addition, the Promoter has been planning to extend the existing 2+2 lanes of the D1 Highway so as to accommodate the increased traffic flows. The two road construction projects are scheduled for execution within the same timeframe (2016-2020).

Although the design and construction of the D4 and D1 projects may be seen as separate entities, in practice, the D4-D1 Junction renders the design of the two highways intertwined and interdependent. That is to say, any significant design change at D4 or D1 triggers the redesigning of the D4-D1 Junction, and therefore affects the implementation of the other project.²⁰

This is precisely what happened in 2015 when the Promoter decided to modify the design of the D1 extension project. The original design of the D1 Highway was approved in 2013 and envisioned 3+3 lanes plus 29 km collector roads starting from the D4-D1 Junction and stretching further along the D1 Highway until Trnava²¹. In December 2015 the Promoter announced that it cancelled the collector roads and the widening of D1 would comprise a 4+4

¹⁷ This law defines the objectives and role of the zoning process. It defines zoning documentation and the process of its preparation, approval and updating. It enacts the authorities and offices responsible for the procedures and related decision-making. It furthermore defines what a construction is, who is authorised to carry out engineering, construction and supervision activities, basic construction requirements and approval procedures, building use, maintenance and removal, state supervision and fines. It then moves on to expropriation causes and procedures including compensation rights. The structure of construction authorities respective to different levels of governance is elaborated as well as the special interests they are obliged to protect such as defence, environment, and natural disasters relief.

¹⁸ The Bank carried out a first stage appraisal between March and September 2015 and a second stage appraisal until May 2016. The Finance Contract with the Borrower was signed in June 2016. As such the project monitoring stage started in June 2016.

¹⁹ Please refer to Annex 1 for a short overview of the changes in the design of the D4-D1 Junction, the timing of the MoE’s screening announcements on the changes in the design, as well as some of the diagrams of the junction as published in the screening announcements.

²⁰ The original designs of the D4 Highway and the D1 Highway were both prepared by the Promoter. As of today, the design and construction of the D1 Highway extension project still rests with the Promoter. Upon signing the Concession Agreement of the D4R7 PPP Project, the Borrower received from the Promoter the design of the D4 Highway for further development.²¹ The collectors shall start at the interchange “Vajnory” and end at the interchange “Trnava” from the stationing 13,7 to the 50,3, it means 36,6 km. Exact category should be D33,5/120 + 2x C9,5/80, as approved in 2012/2013 (Announced by MoE on 21.12.2012 see enviportal.sk.

²¹ The collectors shall start at the interchange “Vajnory” and end at the interchange “Trnava” from the stationing 13,7 to the 50,3, it means 36,6 km. Exact category should be D33,5/120 + 2x C9,5/80, as approved in 2012/2013 (Announced by MoE on 21.12.2012 see enviportal.sk.

Figures 3 & 4. The shape and position of the D4-D1 Junction in 2014 and 2016.²³ In 2016 the shape and position of Junction D4-D1 has changed, and the D1 collectors removed.

More detailed design drawings were not available for the Complainants or the EIB-CM to evaluate the real function and traffic engineering details of the collectors. The poor drawings available for public use were one important item for the Complainants as they considered them insufficient to gain a real understanding of the implications of the design change.

During this initial assessment, the EIB-CM was informed that the redesigning of the D4-D1 Junction had not been finalised, and further design changes may occur in the near future.

The planning and permitting procedure of the D4 Highway in national law

During the initial assessment, the EIB-CM made an enquiry into the administrative procedure of issuing the land-use, zoning and building permits, in order to assess whether there are reasonable grounds to believe that the Promoter conducted the permitting procedure contrary to national law. (The details of this analysis are presented in Annex 2).

The EIB-CM has found that the Land Use Plan of Bratislava Self-Governing Region is an administrative measure which itself should respect the legislation, but is not per se a law. In addition, the zoning permit that was issued for the D4-D1 intersection does not contain detailed technical description of the design and does not mention that the intersection should be designed in a way to accommodate six lanes and collectors on D1. The Regional Land Use plan does not mention this either. Therefore, the design change of the D1-D4 junction seems no to require modification of the regional Land Use plan nor the zoning permit in so far as the D4 project is concerned.

At the same time, the zoning permit for the D4-D1 Junction requested that the National Highway Company (“NDS”) carries out an analysis of variants of the D4-D1 Junction design and confirm that the chosen variant is adequate from the viewpoint of capacity and safety.²⁴ To determine whether the design change of the D4-D1 Junction complies with the zoning permit, it has to be examined whether such analysis was done (*ex ante* or *ex post*), and if not, if the zoning permit may not have been fully respected.

The EIB-CM notes that the administrative procedure for the issuance of the building permit, which follows after the zoning permit procedure, is ongoing at the time of writing of the present report.

The Bank’s due diligence and monitoring

The Borrower in the D4R7 PPP project is required to obtain and submit to the Bank all permits and authorisations necessary for the implementation of the Project. The Bank’s document management system shows that the Bank received during the appraisal stage the following documents: (i) the EIAs of the D4 Highway and amendments as issued between 2008-2014; (ii) the Land Use Plan of Bratislava Self-Governing Region, (iii) the Land Use Plan of Bratislava and (iv) the zoning permits of the D4 Highway, including the decisions on appeal. The Finance Contract has set up a reporting framework, where the Borrower shall obtain all necessary authorizations that remained outstanding at the time of signature of the Finance Contract, and keep those authorizations effective. The Borrower also undertakes an obligation to notify the Bank about non-compliance with authorizations and laws that concern the environmental impact of the Project.²⁵ The Bank and lenders are assisted in their monitoring activities by an independent engineer.

²³ Source: EIA Screening Announcement Jarovce-Ivanka-Sever (29.07.2014), available at: <https://www.enviroportal.sk/sk/eia/detail/dialnica-d4-bratislava-jarovce-ivanka-sever>; EIA Screening Announcement Jarovce- Ivanka-Sever (14.01.2016), available at: <https://www.enviroportal.sk/sk/eia/detail/dialnica-d4-bratislava-jarovce-ivanka-sever->

²⁴ The requirement on road safety also derives from EU law. TEN-T projects shall be subject to safety audits in accordance with the Road Infrastructure Safety Management Directive (Directive 2008/96/EC of the European Parliament and of the Council of 19 November 2008).

²⁵ The land-use, zoning and building permits of the Project include provisions on environmental protection amongst other matters. Therefore the construction authorizations deemed to fall under the reporting obligation of the Borrower.

6.1.4 Initial Conclusion

The allegation concerning the changes in the technical design and permitting procedure falls within the Bank’s due diligence and monitoring activities. Given the ongoing permitting procedure of the D4 Highway’s Jarovce-Ivanka Sever section – where the D4-D1 Junction is located – it was not possible to conclude on any maladministration of the EIB in relation to the first allegation

The Bank has a duty to monitor that the final design change to the D4-D1 Junction occurs in a timely manner, in compliance with applicable technical standards and in compliance with the administrative permits. Considering that the construction permits under national law address design changes of the D4 Highway from the viewpoint of road capacity and safety, the EIB-CM considers that the Bank should confirm that the future building permit process will include review of the analysis prepared by the NDS. This may be realised within the frameworks of the ongoing technical monitoring of the Project.

6.2 Failure to ensure compliance with the EU EIA Directive concerning the assessment of significant environmental impacts

6.2.1 Details of the Allegation

The Complainants allege that the environmental impact of the changes to the D4-D1 Junction including the removal of the D1 collectors and subsequent elevation of the D1 to allow the underpass of D4 Highway, have not been assessed. The Complainants do not agree with the MoE’s evaluation, as published in the screening announcement of 14th January, that the impact on environment during construction works of the redesigned D4-D1 Junction is not significant and the construction of the redesigned D4-D1 Junction does not require an EIA assessment. It is further alleged that the impact of the construction works has not been assessed.

The Complainants point out specifically that:

- *“removal of D1 collector will have significant negative impact on all regional transport during construction works of D4, will have impact on D1 technical solution, however is not mentioned at all in any EIA documentation*
- *no updated transport study without D1 highway parallel collectors was provided and published*
- *Impact on transport situation during construction works was not assessed and alternative roads during construction works were not listed and assessed.*
- *D1-D4 junction produces more emission than is acceptable by health limits”*

6.2.2 Regulatory Framework

The regulatory framework consists of:

- Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (EU EIA Directive), Articles 4, 5, 8
- EIB Statement of Environmental and Social Principles and Standards, p. 16, para 37.

Regulation/Policy	Provisions/EIB obligation
EU EIA Directive (2011/92/EC), Articles 4, 5, 8 and Annex II, Class 13	For projects listed in Annex II of the EU EIA Directive, the Competent Authority shall determine whether the project shall be made subject to an environmental assessment. Class 13 of Annex II indicates that an EIA may be required where: “any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment”.
EIB Statement of Environmental and Social Principles and Standards	The EIB finances projects to achieve a number of priority EU policy objectives, not just those of an environmental and/or social nature. Where such a project has significant negative environmental and/or social impacts, by virtue of its size, nature or location, alternatives should be considered and appropriate mitigation and/or compensation measures identified. ²⁶

²⁶ EIB Statement of Environmental and Social Principles and Standards, page 12, paragraph 16.

It is pertinent to highlight that the Bank appraises project proposals within the European Union under the presumption of legality existing at the time of appraisal. According to this tenet “*within the EU, the EIB assumes that EU environmental and social law has been correctly transposed into national law and that national law is being enforced by the responsible authorities. EIB due diligence focuses particularly on countries and/or specific laws where there is evidence to suggest these assumptions may be false*”²⁷. Rebuttal of the presumption of legality may derive from, *inter alia*, judicial proceedings before national or international courts relevant to the Project, or a relevant infringement proceeding opened by the European Commission.

6.2.3 Initial Findings

The MoE approved the EIA of the Jarovce-Ivanka Sever section of the D4 Highway in 2011.²⁸ In 2015 the Promoter introduced new changes in the design of the D4-D1 Junction that included a removal of collectors along the D1 and changes in the elevation of the existing D1 motorway to allow the underpass of the D4 Highway. In the EIB-CM’s view, this redesign is deemed to have a profound influence on the environmental impacts during the construction of the junction, both in terms of the construction works, as well as the traffic situation in the area.

When applied to roads, Class 13 of Annex II of the EU EIA Directive provides that where there is a change or extension to a road development that has already received statutory approval, has completed construction or is under construction (or proceeding to construction) and that change or extension may have significant adverse effects on the environment, a new EIA is required. As it falls under Annex II of the EIA Directive, the national authorities have to decide whether a new EIA is needed. This is done by the "screening procedure", which determines the effects of projects on the basis of thresholds/criteria or a case by case examination. However, the national authorities must take into account the criteria laid down in Annex III of the EIA Directive, which fall into three categories. Relevant examples are given in the following textbox.

1. Characteristics of Projects
 - i. The size of the project
 - ii. The cumulation with other projects
 - iii. Pollution and nuisances
 - iv. The risk of accidents regarding the technology used
2. Location of Projects
 - i. The absorption capacity of the natural environment, paying attention to areas such as wetlands and areas covered by Habitats and Birds Directives
3. Characteristics of Potential Impact
 - i. The extent of the impact
 - ii. The magnitude and complexity of the project

The EIB-CM observes that in the EIA screening announcement of 14th January 2016 the competent national authority (the MoE) concluded that an EIA was not needed of the design changes of the D4-D1 Junction. This seems to be confirmed by the Final Decision of the MoE issued on the 24th October 2016. Based on the information gathered by the EIB-CM, it appears that the MoE made the decision based on the changes presented in the screening announcement.

The EIB has an obligation to ensure that the financed Project complies with EU legislation and national environmental law. In addition, the environmental impacts of Annex I projects (and subsequent changes of activities at the project design, construction and operation stage that falls under Annex II) are assessed if their environmental impact is significant.

Based on the presumption of legality that governs the Bank’s operations in the EU, the EIB-CM takes note that, as stipulated in the EU EIA Directive, the competent national authority has taken a view on whether a new EIA is

²⁷ EIB Statement of Environmental and Social Principles and Standards, page 8, paragraph. 20.

²⁸ Final opinion of the Ministry of Environment of the Slovak Republic No. 318/2010-3.4/ml (28th September 2011) based on: GEOCONSULT, spol. s r.o.: Assessment Report, D4 Highway, Jarovce - Ivanka Sever (April 2010)

required. In February 2017, the EIB-CM was informed that the Complainants requested the judicial review of the administrative decision of the MoE. The case is still pending at the time of writing the present report. Whilst the request for a judicial review does not alter the presumption of legality, this matter should be monitored by the Bank together with the Promoter and the Borrower.

The EIB-CM also takes note that between 2013 and 2015 the European Commission handled an infringement case against the Slovak Republic concerning the incorrect transposition of the EU EIA Directive.²⁹ The infringement proceedings focused on the obligation to assess all significant environmental impacts, access to justice and public participation. The infringement proceeding was closed in early 2015, after the Government of the Slovak Republic amended the Slovakian EIA Act entering into force on 1 January 2015.³⁰

From a technical perspective, the EIB-CM could observe onsite that the proposed changes may bring substantial challenges particularly when redirecting the traffic during the construction of the Junction. The D1 Highway and the parallel national road 61 that serve the central and northern parts of Bratislava are already saturated at certain hours of the day (see: Annex 1).

6.2.4 Initial Conclusion

The EIB-CM's initial assessment has shown that the Bank relied on the "presumption of legality" during the project appraisal and monitoring. For the timeframe of the EIA screening procedure (from January 2016 onwards), the EIB-CM has not found rebutting evidence to this presumption, although it takes note of the judicial review launched by the Complainants in December 2016. Whilst the EIB-CM considers that the allegation against the Bank is not grounded based on the presumption of legality, it advises the Bank to monitor the ongoing judicial review procedure as part of its monitoring activities. The EIB-CM also notices that the Bank has been monitoring significant technical changes through the monitoring and reporting procedures laid down in the contractual arrangements of the Project.

In this context, the EIB-CM recalls that the European Commission identified an important infringement of the EU EIA Directive at the level of national law that coincided with the time of preparing the EIA for this project. Given that the corrective actions at the level of national legislation are relatively recent, a complaint about the project-level application of the EU EIA Directive warrants a close monitoring by the Bank.³¹ The EIM-CM advises that the Bank's monitoring includes a close follow-up, together with other relevant stakeholders (promoter, borrower, co-financiers), of the impacts of the works on the temporary traffic solutions and possible disturbances that this may cause to the affected population.

6.3 Failure to ensure that the Promoter conducts a meaningful public consultation

6.3.1 Details of the Allegation

In the allegation, the Complainants state that the EIB has failed to ensure that the Promoter conducts a meaningful public consultation during the EIA procedure that accompanied the design change for the D4-D1 Junction. The Complainants allege that the relevant EIA documentation – published by the MoE on 14 January 2016 – contained poor drawings and misleading data (contradicting maps) of the design changes, which prevented the public from

²⁹ It has not been possible to obtain the full text of the infringement notice but it is understood that the procedure concerned matters of access to justice, public participation and the obligation to assess all significant environmental impacts. See: D4R7 PPP Project - Environmental and Social Data Sheet (21.10.2015), available at: <http://www.eib.org/infocentre/register/all/63425870.pdf>

³⁰ The Slovakian EIA Act was amended by the Slovak authorities and approved by the Parliament on 14th October 2014, coming into force on 1st January 2015 (314/2014 Z. z.).

³¹ The EIB-CM recalls that the European Commission has competence to pronounce on allegations that concern the violation of EU legislation. In cases where a complaint concerns the breach of EU legislation, the EIB-CM may inform the Secretary General of the European Commission about the complaint and forwards the final Conclusions Report. See: European Invest Bank – Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (31 October 2012), Part IV, paragraph 9.3

formulating an informed opinion. The complaint also indicated that the screening announcement was not communicated adequately. The screening process started on 14 January 2016, and only 10 working days were allocated for the public to submit comments, complaints and proposals.

The Complainants further contend that the Promoter has failed to engage the stakeholders in the process of the design change as required by EIB Standard 10. The Complainants underscore that the collector roads carry strategic importance for regional transport development, and they were integrated into the Regional Land Use Plan after a process of public consultation in 2013. According to the Complainants, the Promoter removed the collectors without consulting the residents and municipalities of Bratislava Self-Governing Region concerning the impact of that design change on regional development objectives.

6.3.2 Regulatory Framework

The Regulatory framework consists of:

- EU EIA Directive, Articles 5, 6, 8 and 9³²
- EIB's Environmental and Social Handbook, Standard 10: Stakeholder Engagement
- Slovak Law on Environmental Impact Assessment no. 24/2006 – those provisions that implement Art 5, 6, 8 and 9 of the EU EIA Directive

Regulation/Policy	Provisions/EIB obligation
EU EIA Directive (2011/92/EC), Articles 5, 6, 8, 9	The public concerned shall be given early and effective opportunity to express their opinion and participate in the environmental decision-making procedures based on appropriate information supplied by the developer.
EIB's Environmental and Social Handbook: Standard 10 on Stakeholder Engagement	A meaningful engagement process allows for the efficient implementation of a financed operation and, in particular, the early and effective identification, assessment, and management of any environmental and social risks, impacts, and opportunities. The views, interests, and concerns of project affected communities and other interested stakeholders are heard, understood, and taken into account throughout the project lifecycle ³³ . As a public institution, the EIB actively promotes the right to access to information, as well as public consultation and participation; the right to access to remedy, including through grievance resolution, is equally acknowledged and actively promoted by the EIB. Standard 10 affirms the EIB's expectation that promoters uphold an open, transparent and accountable dialogue with all relevant stakeholders at the local level targeted by its EIB operations. ³⁴
Slovak Law on Environmental Impact Assessment no. 24/2006	This law defines assessment procedures for strategic environmental state-level documents, assessment of proposed activities, reporting obligations and approval procedures. It moves on to assessment of cross-border impacts. The law defines responsibilities of public authorities related to screening, assessment, and approval procedures. It provides templates for screening, document assessment, assessment of Land Use Plans, final review reports, and impact appendix to legislation proposals. It lists the proposed activities that fall under the scope of environmental impact assessment. Further templates provided are: notice of the change of proposed activity, investment plan, screening criteria, EIA review report and final statement. It transposes the following EU legal documents: Directive no. 85/337/EC, Directive no. 2001/42/EC, Directive no. 2009/31/EC, Directive no. 2011/92/EU and Directive 2014/52/EU.

Concerning this allegation, the Bank undertakes due diligence through a consideration of legality and rebutting evidence to it (referenced in Section 6.2.2).

³² ARTICLE 5 – INFORMATION FROM THE DEVELOPER, ARTICLE 6 - THE OPPORTUNITY OF AUTHORITIES TO EXPRESS THEIR OPINION, INFORMATION OF THE PUBLIC, AND OPPORTUNITIES TO PARTICIPATE IN THE DECISION-MAKING PROCEDURES; ARTICLE 8 - CONSULTATIONS AND INFORMATION TO BE CONSIDERED IN THE DEVELOPMENT CONSENT PROCEDURE; ARTICLE 9: INFORMATION THE PUBLIC IN RELATION TO THE DEVELOPMENT CONSENT

³³ EIB Environmental and Social Handbook; Standard 10: Stakeholder Engagement; page 85, Introduction.

³⁴ EIB Environmental and Social Handbook; Standard 10: Stakeholder Engagement; page 85, paragraph 3.

6.3.3 Initial Findings

The Bank's Standards regard consultation and public participation as a tool to enhance the sustainability of financed projects and contribute to project success.³⁵ The Complainants challenge two qualitative parameters of a meaningful public consultation: (i) the reasonable timeframe of the consultation; (ii) the adequacy of technical information published by the Promoter. In effect, the allegation touches upon the effectiveness of the public consultation during the EIA screening procedure mirrored against the provisions of the EU EIA Directive and stakeholder engagement pursuant to Standard 10 of the Bank's Environmental and Social Standards.³⁶

Regarding the consultation procedure of major design changes to the D4-D1 Junction (see section 6.1.3), the EIB-CM has registered the following events:

- The Slovak National Highway Company ("NDS") submitted to the MoE a screening request for the design change,
- MoE published the notification of the screening and ancillary documentation on its website, giving a deadline of minimum 10 working days for comments by the public,
- MoE published a screening decision (no new EIA needed) on its webpage.
- The public could challenge the screening decision and appeal to the MoE.

The EIB-CM takes note that the public consultation was conducted under the Slovak Environmental Assessment Act that is presumed to transpose correctly the EU EIA Directive at the time of the screening procedure under consideration.

Regarding the specific concerns expressed by the Complainants about the reasonable timeframe and the adequacy of technical information, the EIB-CM notices that the EU EIA Directive provides that Member States shall set forth a "reasonable timeframe" for the consultation period.³⁷ This terminology is defined in the Slovak Environmental Assessment Act (Slovak Law on Environmental Impact Assessment no. 24/2006) as minimum 10 business days. Hence the time allocated for public consultation by the MoE is in line with the requirements of the national law. Concerning the adequacy of the published information, the EIB-CM observes that from the design drawings included in the EIA screening announcement, it is difficult to understand the real function and traffic engineering details of the collectors. The drawings in the screening announcement show that the collectors at the D4-D1 Junction have been removed. However, the text of the screening announcement does not mention and discuss the consequences that this design change entails. In comparison, the parallel EIA screening at the D1 Highway, launched in December 2015, explained the consequences of the removal of the collector roads. This may support the Complainants' claim that the EIA screening procedure of 14th January 2016 did not allow for a real understanding of the implications of the design change of the D4-D1 Junction. (For further details of the screening procedure see: Annex 1).

The EIB-CM also takes note that the screening process was put on hold in February 2016 for several months in order to clarify the comments received from the public, and that some municipalities within Bratislava Self-Governing Region have adopted resolutions in favour of the construction of the collector roads.³⁸ During the Fact-Finding mission of October 2016, the EIB-CM could also gather from the views of the Complainants that the

³⁵ EIB Statement of Environmental and Social Principles and Standards, page 20, paragraph 62.

³⁶ Standard 10 on Stakeholder Engagement stipulates that a meaningful dialogue with the members of the public constitutes a requirement for all projects financed by the Bank, and it applies along the full project cycle (in the present case, during the planning, permitting, construction and operation of the D4R7 PPP project). In case of projects that fall under Annex I of the EU EIA Directive, the mandatory public consultation of the EIA procedure is a possible - but not necessarily stand-alone - forum for promoters and borrowers to discuss with the members of the public emerging issues relevant to the environmental and social impact of the Project.

³⁷ For an EIA procedure, the Directive establishes that a reasonable timeframe entails minimum 30 days. In other EIA procedures Member States and competent national authorities take up competence to determine the reasonable timeframe. See: EU EIA Directive, Article 6 (6) and 6 (7).

³⁸ The EIB-CM received the copy of the resolutions of Chrovatsky Grob (Uznesenie c. 150/2016), Ivanka pri Dunaji (Uznesenie c. 04/2016) and Bernolákovo (Uznesenie c. 5/10/2016)

dialogue with the Promoter had not been optimal. Whilst expressing their support to the Project, the Complainants underlined their request to seek dialogue with the Promoter, as they would like to revert to the project designs that had been agreed before the changes were communicated in January 2016.

Concerning the actions of the EIB, the Environmental and Social Data Sheet (“ESDS”)³⁹ for the D4R7 PPP Project prepared at the time of the appraisal, states that public consultation had taken place (“the planning and environmental procedures included public consultation”). While the ESDS mentioned the infringement proceeding⁴⁰ concerning the transposition of the EU EIA Directive, it did not identify a need for the Bank to have a heightened sensitivity to the public consultation process, either that done for the initial project review or during the project monitoring. The EIB-CM considers such precaution justified in light of the fact that the European Commission handled two relevant infringement cases against the Slovak Republic between 2010 and 2015 (during the preparation of the Project). The infringement proceedings concerned public consultation and environmental assessment.⁴¹ The infringement proceeding on the EU EIA Directive was closed in early 2015, shortly before the Bank started the project appraisal and after the modification of national legislation by the Government of the Slovak Republic⁴². The short period of time lapsed since the new legislation was adopted may bring into consideration a legitimate enquiry about how the new legislation is applied in specific cases. The Bank does not update the ESDS after the Board approval, and therefore the changes occurring in 2016 were not reflected in the ESDS. The Bank does, however, publish the Environmental and Social Completions Sheet (“ESCS”), with information about the implementation of the project, at project completion.

In addition, the Finance Contract for the D4R7 Slovakia PPP Project between the Bank and Zero Bypass Limited includes the condition that the Zero Bypass should promptly inform the Bank if it becomes aware of any protest or complaint.⁴³ This opens up the possibility that, with the right information, the Bank’s services could take action at an early stage (for instance, immediately after the Complainants had submitted their complaint to Zero Bypass in 2016), and initiate a dialogue with the Complainants to obtain a better understanding of the situation. It is not known to the EIB-CM if Zero Bypass made the Bank aware of the complaint by the NGO Triblavina, or indeed other complaints during the public consultation process for the design changes.

6.3.4 Initial Conclusion

The procedures in relation to the design changes to the D4-D1 Junction were developing during the Bank’s appraisal process and are still ongoing at the time of writing of this report. The EIB’s ESDS considered the overall Project at the time of its publication (October 2015), and noted that public consultation had taken place in relation to the project elements and also the infringement proceeding opened by the European Commission against Slovakia in 2013 (infringement no. 2013/2034). However, there are now other developments in the planning and design for D4-D1 junction (e.g. the claimed absence of reasoning behind the removal of collector roads from the Junction) that the EIB needs to take into account.

³⁹ <http://www.eib.org/infocentre/register/all/63425870.pdf>

⁴⁰ EIB Environmental and Social Data Sheet (21st October 2015): *“The current Slovak legislation for environmental assessment is Act no. 24/2006 Coll. That entered into force in February 2006. In 2014 the Act was amended as a result of the infringement opened by the European Commission against the Slovak Republic in 2013 (Infringement no. 2013/2034). The amended Act was adopted by the Slovak Parliament and came into force in January 2015.”*

⁴¹ The European Commission handled two infringement proceedings against the Slovak Republic concerning environmental assessment between 2010-2015. The first infringement revolved around the bad application of the EU Directive on Strategic Environmental Assessment at the level of the D4 Highway project, in terms of the lack of a strategic environmental impact study and public consultation on it. The second infringement proceeding concerned the transposition of the EU EIA Directive at the level of national law, as already referenced in Section 6.2.3. of this Report.

⁴² The Slovakian EIA Act was subsequently amended by the Slovak authorities, and approved by the Parliament on 14/10/2014, coming into force on 1/1/2015 (314/2014 Z. z.).

⁴³ Article 8.1.3. (a) of the Finance Contract for the D4R7 Slovakia PPP between the Bank and Zero Bypass Limited provides that “the Borrower shall promptly inform the Bank if at any time it becomes aware of any material action or protest initiated or any material objection raised by any third party or any genuine complaint received by the Borrower or any Environmental Claim that is to its knowledge commenced, pending or threatened against it with regard to environmental or other matters affecting the D4R7 Project.”

The EIB-CM observes that despite the infringement proceedings on the public consultation at the time of project preparation, the ESDS did not identify the need for the Bank to have a heightened sensitivity to the public consultation process, either that done for the initial project reviews or for the D4 design changes. In addition, and based on an analysis of the documents published on the MoE website as part of the EIA screening procedure, and the public announcements and decisions made by MoE, the EIB-CM considers that the public consultation process has influenced the MoE's decision making regarding the design change of the D4 Highway. In the case of the D1 project, and the request for design change submitted by the NDS to replace the 6 lanes plus collectors with 8 lanes, public complaints resulted in NDS withdrawing the change request. In case of the D4 Highway, the MoE decided to put the screening process on hold for a period of several months in order to clarify the comments submitted by the public.

The EIB-CM's initial conclusion is that it would be beneficial that, given the recent infringement proceedings on the implementation of the EU EIA Directive and the ongoing development of D4-D1 junction, the Bank continues to monitor the Project in accordance to its standards and procedures, placing heightened sensitivity to verify the public consultation process when assessing the implementation of the design changes and environmental impacts of the D4 Highway. Furthermore, it is proposed that a process to facilitate dialogue is started between the parties. In this regard, the EIB-CM considers it appropriate to remind the parties of §1 of EIB Standard 10, which requires Promoters to conduct a meaningful engagement process with stakeholders throughout the project's lifecycle.

7. OTHER ISSUES

During the fact-finding mission, the Complainants took the opportunity to raise two further concerns with the Bank. Firstly they were concerned that the document entitled "Appropriate Assessment of Project impacts on Natura 2000 sites in the area (2014)" did not assess specific access roads. Furthermore, they considered that the new access roads proposed in the 2016 EIA Screening Announcement for the construction works, for example SO 805 and SO 802, are non-compliant with the EU EIA Directive. Their second concern was that the National Highway Company has expropriated the properties of deceased persons in contravention of national legislation, whereby in cases where the inheritor is known, the inheritance procedure has to be completed before expropriation can take place. The Complainants submitted that the current procedures have not followed the applicable law, and that the expropriation decisions were delivered to the inheritors before the inheritance procedures were complete.

8. INITIAL CONCLUSIONS AND PROPOSED WAY FORWARD

The EIB-CM is predominantly compliance-focused. Whenever appropriate, the EIB-CM determines if there is room for problem solving and endeavours to find and propose appropriate solutions whilst taking into consideration the interest of all its internal and external stakeholders. Therefore, in light of the initial findings and conclusions mentioned above, the EIB-CM proposes the following way forward:

Regarding the first allegation, the EIB-CM notes that:

- the construction permitting procedure and redesigning of the D4-D1 Junction are still ongoing;
- the allegation concerning the lack of due diligence of the EIB is ungrounded;
- the EIB is monitoring any proposed significant changes to the Project through its monitoring and reporting procedures set out in the Finance Contract;
- the monitoring of the Bank covers significant design changes to the D4-D1 Junction.

Regarding the second allegation, the EIB-CM considers that:

- the allegation is ungrounded based on the presumption of legality, while observing that the Final Decision of the MoE is under judicial review before national courts;
- the Bank will monitor the environmental impacts during the construction works of the D4-D1 Junction and in particular the temporary solutions to divert the traffic, as well as the developments concerning the judicial review of the Final Decision of the MoE.

Regarding the third allegation, the EIB-CM proposes that:

- in line with the EIB Standard 10 on Stakeholder Engagement, the two parties - NGO Triblavina (representing) and the Promoter - should establish an open and on-going dialogue on the design of the D4-D1 Junction. This should include aspects such as the access of the inhabitants of the municipalities to the D4 Highway, and the mitigation of disadvantages for the inhabitants during the construction of the Junction, with the objective of reaching a solution that is satisfactory to both parties. The Promoter may beneficially explain to the Complainants in detail the present status of the plan to remove D1 collectors and the expected future steps in this regard.

In accordance with Article 5.7.3 of the Operating Procedures of the EIB-CM, the EIB-CM may propose collaborative actions to facilitate the dialogue between the Promoter and the Complainants. This Report already provides some clarifications concerning the changes in the Junction. If the parties so desire, the EIB-CM will facilitate a collaborative conflict resolution process and ensure a continuous dialogue between the parties.

Mediation as a proposed way forward was not endorsed by an agreement between the Complainants and the Promoter during the external consultation of the draft initial assessment report. Hence the EIB-CM closes the complaint with the present Report.

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Head of Division
Complaints Mechanism
28 09 2017

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Deputy Head of Division
Complaints Mechanism
28 09 2017

ANNEX 1: CHANGES IN DESIGN OF THE D4-D1 JUNCTION

The aim of this section is to outline the chronology of the changes made to the design of the D4-D1 Junction.

The Jarovce – Ivanka Sever EIA Report specifies that D1 is a 2 x 3-lane divided highway with parallel 2-lane collectors at the D4-D1 Junction ⁴⁴ (see: Figure A1).

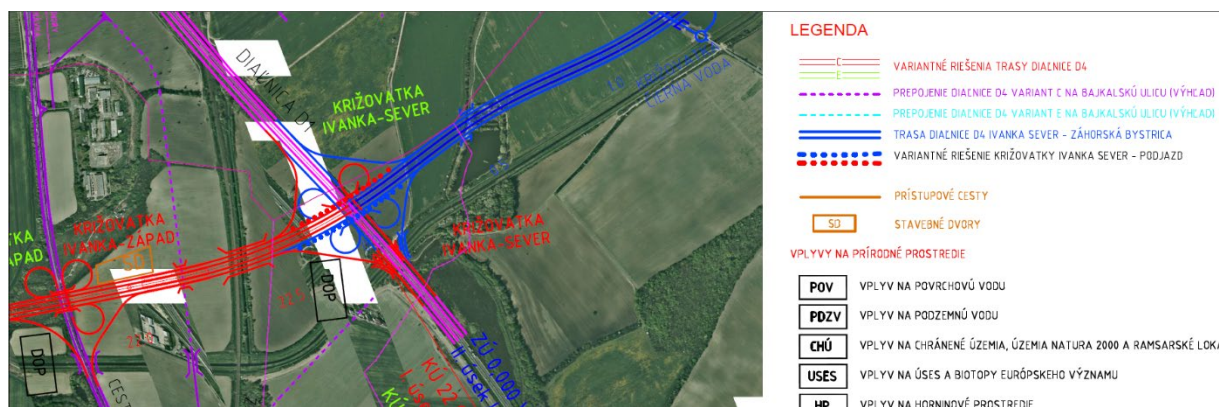


Figure A1. 2010 – Status of D4-D1 Junction (Ivanka Sever) (source: Jarovce-Ivanka Sever EIA)⁴⁵

⁴⁴ Assessment Report; D4 Highway, Jarovce - Ivanka Sever, made in 04/2010, amended April 2011 GEOCONSULT, spol. s r.o. engineering - design and consulting company, Miletičova 21, P.O.Box 34, 820 05 Bratislava 25

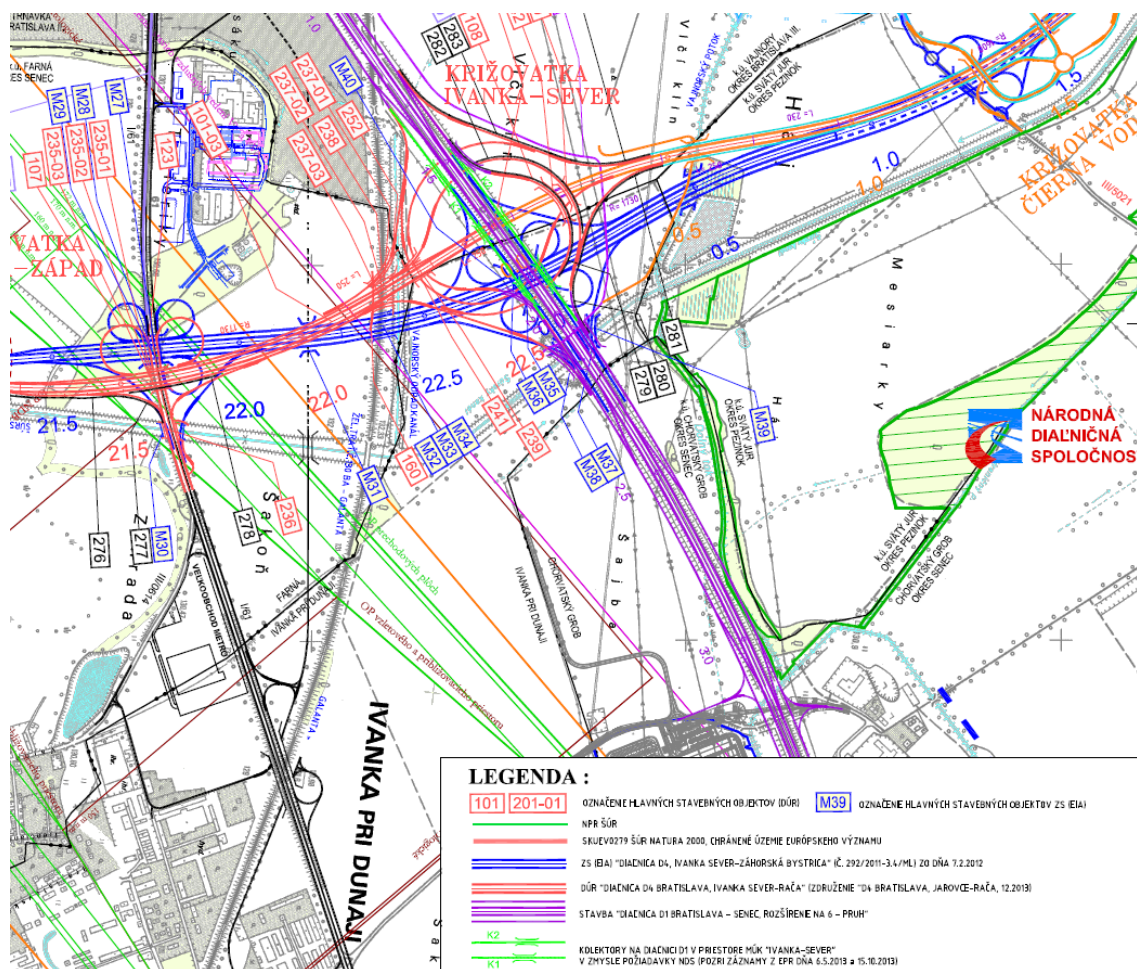
⁴⁵ <https://www.enviroportal.sk/sk/eia/detail/dialnica-d4-usek-jarovce-ivanka-sever/>

The EIAs ^{46, 47} specify that from a traffic-engineering point of view, and in consideration of international, transregional and regional traffic relations, the following projects should be started within 5 years:

- Motorway D1 Bratislava – Trnava, widening to 6 lanes (already in operation);
- Highway R7 Bratislava – Dunajská Lužná;
- Motorway D4 sections from D2 Jarovce to D1, or to junction Rača respectively;
- Motorway D4 – continuation till D2 (Stupava-south);
- Widening of I/61 to 4-lane road with unlimited access;
- Road of regional importance – connector between motorway D1 and road II/502 (connection to bypasses Pezinok and Sv. Jura);
- Motorway D4 – Devínska Nová Ves – state border with Austria;

It is noted that the EIAs do not assess the impact of the construction works on the traffic situation, nor do they consider alternative traffic management during the construction period.

On 5 June 2014, EIA Screening Announcement (No. 1) to the D4-D1 Junction at Ivanka Sever was published on the MoE webpage, and subject to a screening process in line with the EIA Directive (and Slovak law). There was a minimum 10-day period during which the citizens were requested to comment on the suggested changes (a non-technical summary of the project and the changes was also provided). The screening announcement shows that the shape and position of the D4-D1 Junction was altered but D1 still featured collectors (see: Figure A2).



⁴⁶ Assessment Report; D4 Highway, Jarovce - Ivanka Sever, made in 04/2010, amended April 2011 GEOCONSULT, spol. s r.o. engineering - design and consulting company, Miletičova 21, P.O.Box 34, 820 05 Bratislava 25

⁴⁷ D4 Highway, Ivanka Sever - Záhorská Bystrica. Report on Activity Assessment under Art. 31 of the Act no. 24/2006 Coll. on Environmental Impact Assessment. December 2010. HBH Projekt spol. s r.o., organizational unit Slovakia

Highway D4 Bratislava Ivanka Sever – Rača; Notice of Change to the Proposed Works. May 2014. Project Implementation Services, spol. s r. o.

Figure A2. 2014 – The shape and position of the D4-D1 Junction has changed, D1 still features collectors⁴⁸

On 8 December 2015, EIA Screening Announcement to the D1 Motorway (a related project which crosses D4 in the Triblavina junction subject to the complaint) was published on the MoE homepage and subject to an environmental impact assessment screening process in line with the EIA Directive and corresponding Slovak law. This change proposed removal of the collectors and an extension to six lanes on D1 in the section of the D4-D1 Junction. The period in which the public could comment on the proposed change was 10 working days. On 4 January 2016, the Ministry of Environment (MoE) declared that, based on the screening, no adverse environmental impact was expected based on submitted documentation and therefore no renewed environmental assessment is required.

Based on the public complaint and on review by a special committee, the Minister of Environment annulled this decision on 27 April 2016 and returned it to the respective department at the MoE for new review. On 30 May 2016 a notification of the new proceedings was published on the MoE website. Once again a 10 working day period was given for the public to comment on this change. On 18 July 2016 the MoE put the proceedings on hold and requested additional documentation from the contractor, which was furnished on 5th August 2016. This was again accompanied by a period of 10 working days for the public to submit comments (the decision was published on 22nd July 2016). On 20 September 2016 the NDS (Slovak National Highway Company), which submitted the original change request, withdrew the change request, therefore on 23rd September 2016 the MoE terminated the screening process. At the moment, there is therefore no pending administrative process of changing the D1 motorway concept from 6 lanes + collectors to 8 lanes.

In parallel, on 14 January 2016, EIA Screening Announcement (No. 2) to the D4-D1 Junction at Ivanka Sever was published on the MoE website and subject to a screening process in line with the EIA Directive and Slovak law. There was a period of 10 working days during which the public could submit their comments. The screening announcement shows that the collectors on D1 highway have been removed (see: Figure A3). The removal of the collectors is not mentioned and evaluated as it was screened and evaluated in the parallel EIA process related to the change of this within the D1 project as described above.

⁴⁸ <https://www.enviroportal.sk/sk/eia/detail/dialnica-d4-bratislava-jarovce-ivanka-sever>

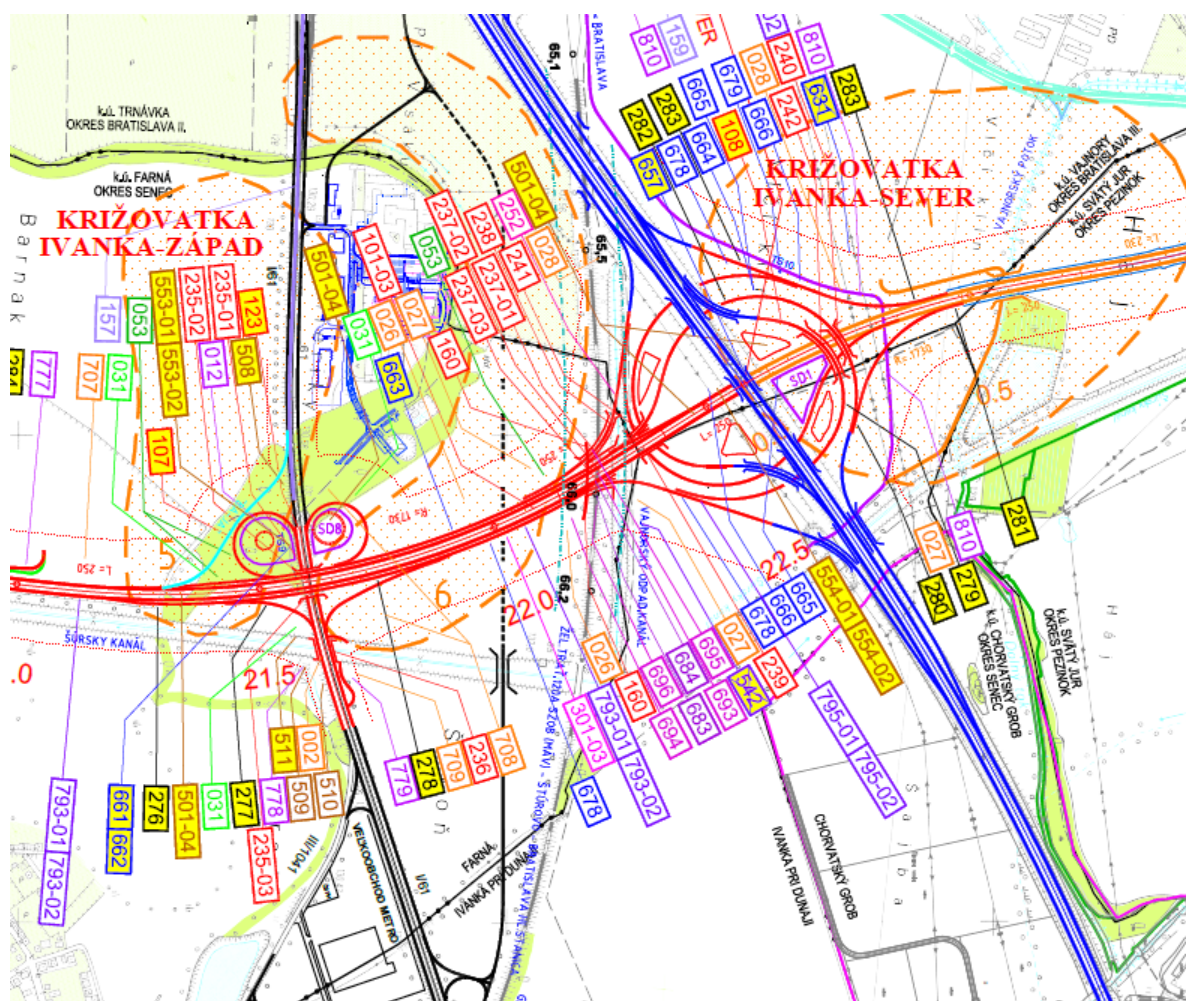


Figure A3. 2016 – The shape and position of Junction D4-D1 has changed, D1 collectors removed⁴⁹

On 18 February 2016, the MoE decided to put the screening process on hold in order to clarify the comments that came from the public as per para. 29 article 10 of the Slovak EIA Act. On 11th July 2016 (published on 15 July 2016) the MoE decided based on the screening that the proposed change to the D4-D1 Junction does not have adverse effect on environment and therefore new EIA is not required. It listed all the comments that came in during the review process including the summary of comments submitted by 15 individual citizens and the response of NDS to their concerns. It also referred to a detailed traffic analysis prepared by Transport Research Institute (VUD) in 2015.

On 1st August 2016, five different complaints (some coming from the same persons who submitted the EIB complaint in question) were received by MoE and published, followed by a sixth one on 3 August 2016, protesting against different aspects of the MoE Screening Decision. These complaints were rejected by the MoE Final Decision on 24 October 2016, addressing the key points from the complaints and explaining why the decision is upheld.

In September 2016, the NDS withdrew the change request to remove the collectors along the D1 and there is no information available that they have resubmitted it at the moment of drafting.⁵⁰ From the Complainants' point of view, the procedure related to the removal of the D1 collector roads from the Project has had several shortcomings and failures:

- The removal of the D1 collectors will have a significant negative impact on all regional transport during the D4 construction works, and it will also have an impact on the technical viability of D4, however it is

⁴⁹ <https://www.enviroportal.sk/sk/eia/detail/dialnica-d4-bratislava-jarovce-ivanka-sever->

⁵⁰ <http://www.enviroportal.sk/sk/eia/detail/-dialnica-d1-bratislava-trnava-krizovatka-triblavina>, please refer to the document dated 23.9.2016 (termination of the proceedings)

not mentioned at all in the EIA screening announcement (note by EIB-CM: this is in fact mentioned in the above referred MoE decision dated 11 July 2016);

- No updated transport study without the D1 highway parallel collectors was provided and published (note by EIB-CM: the study by VUD published in 2015 and available on the project website is referred to in the MoE decision);
- Traffic impacts during the construction period (especially those related to Junction D4-D1, the change of D1 elevation and bridges) were not assessed, and no traffic management plan is provided to mitigate disruptions to traffic. Figure A3 is an extract from EIA Screening Announcement (No. 2) at the D4-D1 Junction. The Complainants consider the changes as not transparent.

ANNEX 2 - THE PLANNING AND PERMITTING PROCEDURE OF THE D4 HIGHWAY IN NATIONAL LAW

The authorization of the construction of the D4 Highway comprises the following documents:

- The EIA carried out by the MoE
- The Regional Land Use Plan prepared and issued by the Self-Governing Region
- Land Use plans of the respective municipalities through the area of which D4 Highway goes
- Zoning permits issued by Construction Authority
- Building permits issued by Construction Authority

At the outset, land use planning, zoning and building permits are regulated by the Slovak Construction Act no. 50/1976 as updated through subsequent laws. EIA is regulated by Law on Environmental Impact Assessment no. 24/2006.

On Land Use plans

Based on the Construction Act, the self-governing region ("Region") appoints a professional to procure zoning materials and zoning documentation.⁵¹ The Region's Land Use Plan is part of the zoning documentation.⁵² The Land Use Plan consists of a binding part and a guiding part. Once approved, the binding part of the Land Use Plan for the Region gains status of a "generally binding administrative decree" issued by the Region. The guiding part of the Land Use Plan helps interpretation of the binding part and has no legal status. Summing up, the Land Use plan is not part of the Slovak legislation, rather, the Land Use plan should respect the legislation.

The Land Use Plan of Bratislava Self-Governing Region⁵³ includes the following sections on Rules for Road infrastructure:

- Section 8.15.: Keep the reserve corridors for future roads and modifications of alignment for motorways and highways:
- Subsection 8.15.1.: D1 – section Bratislava – Bratislava region border – (Trnava) – reconstruction to the full parameters 6-lane motorway with the both sides 2-lane 1-direction collectors with the design category C9,5/80, which shall be part (belongs) to motorway.
- Projects of public interest: (page 29 of the regional Land Use Plan): 1.1. Motorway D1 – section Bratislava – regional border BSK – (Trnava) – reconstruction on fully featured 6-lane motorway with both sides 2-lane 1-direction collectors in the design category C9,5/80, which shall be part of motorway, junctions and connectors on roads included.

The binding part of the Bratislava Self-Governing Region's Land Use Plan in the section regarding road infrastructure states that the "D1 highway should be extended to full-fledged 6 lanes with two-lane one-way collectors on both sides",⁵⁴ however, it does not further specify how and where the collectors should be built. The D4-D1 Junction, which is the subject of the complaint, is only explicitly mentioned in the guiding part of the Land Use Plan⁵⁵.

As regards the allegation that the zoning plan was not respected in the changes, there seems to be no grounds for the claim as the binding part of the zoning plan does not mention the D4-D1 Junction at all, and the guiding part mentions the junctions within an enumeration, without specifying its technical solution. The Complainants may have been referring to the D1 project, which is not financed by the EIB, and for which the change request that would contravene the land use plan has been withdrawn in September 2016.

On zoning permits and construction permits

⁵¹ Slovak Construction Act no. 50/1976, Article 2a,3,8,10

⁵² The zoning plan is not part of the legislation. A Land Use plan is an administrative measure. The Land Use permit however is binding and a construction should not be contrary to the zoning permit issued for it. In case of differences between the zoning permit and the zoning plan, the Land use permit has precedence

⁵³ <http://www.region-bsk.sk/clanok/uzemny-plan-regionu-bratislavsky-samospravny-kraj-626367.aspx>, Príloha č.1 Závazne regulatívy územného rozvoja BSK a verejnoprospešné stavby

⁵⁴ Land-use Plan of Bratislava Self-Governing Region, Section 8.16.1

⁵⁵ Land-use Plan of Bratislava Self-Governing Region, Section 15.2.3

Based on the Construction Act, the zoning permit process begins by depositing project documentation. The zoning permit process is completely independent of the land use planning process as described above. In case of small constructions, the zoning and construction permit process is merged, in case of larger ones such as the roadworks they follow each other.

Once the process is initiated, the Construction Authority requests additional documents if the deposited ones are insufficient. The proposer can withdraw the documents and thus stop the process at any time without needing consent of other involved parties. The Construction Authority has to inform all the known involved parties about the process and begin formal review. The review can be done without oral proceedings in case the zoning documentation had already been formally adopted (this includes the land use plan) but in that case, it has to explicitly inform the involved parties that they have to submit their comments within no less than 7 working days. The Construction Authority also has to issue this information publicly in case of line construction or constructions in public interest (this includes the D4 project).

In determining whether or not to issue the zoning permit, the Construction Authority has to regard the municipal and district land use plans (regional land use plans are not explicitly mentioned in the law) and in their absence, they have to analyse other available documentation (which would also include the regional land use plans). There are four different variants of zoning permits, in this case the relevant one is “decision on placement of a construction”.

The construction permit procedure follows after the zoning permit is issued. The process is described in detail in the Construction Act. Regarding the interfaces with the land use plans and zoning permits, it is explicitly written in para. 62 that the Construction Authority shall examine prior to issuing the construction permit whether the submitted documentation fulfils all the requirements set in land use plan or in the zoning permit. If it does not, it should request changes to be made, otherwise it should not proceed to issuing the construction permit.

Afterward, the State Construction Inspection carries out state supervision and determines whether the construction is being built and used in line with the construction permit. It orders the change in case a discrepancy is found. If this is ignored, the Construction Authority can order the works to stop and they can start only after another decision is issued. If the discrepancy with the construction permit is of such nature that change cannot be made, the Construction Authority decides what to do next.

Regarding the D4 project, the zoning permit for D4 section Jarovce – Ivanka Sever was issued on 29 October 2014. The zoning permit describes the location of this road section, ending with a connection to D1 with Ivanka Sever intersection. It describes the Ivanka Sever intersection as follows: “Grade-separated interchange of D4 with D1 is placed between Ivanka pri Dunaji town and City district Bratislava – Vajnory. It is a grade-separated, spiral interchange of typified shape. D4 and all the interchange branches crossing D1 are routed under D1.”

On page 11 of the zoning permit decision, one of the stipulated conditions for placing the proposed construction as per Ministry of Interior’s comments is to examine the adequacy of the proposed connecting lanes design at Ivanka Sever where it connects to D1 in terms of capacity and safety. This means that there should be an analysis that would have said that the design is indeed the best possible – or at least adequate – proving that capacity and safety considerations were duly considered.

There are no other mentions of the Ivanka Sever designs nor any comments or complaints coming from authorities, individuals or others who submitted comments and requests during the zoning permit request review process.

As the zoning permit for the D4 - Ivanka Sever intersection requested that NDS carry out analysis of variants of the Ivanka Sever intersection design and confirm that the chosen variant is adequate from the viewpoint of capacity and safety. It should be examined whether such analysis was done and if not, the zoning permit may not have been fully respected. As long as NDS can provide such analysis ex post and reason out why it went for the design as described in the zoning permit, the procedure will have been fully legal. The EIB should confirm that the future construction permit process will include review of the analysis by the Construction Authority.

On the effects of mutual non-compliance of land use plans, zoning permits, and construction permits

If a construction is being carried out without or against a zoning or construction permit, the constructing entity (NDS and/or concessionaire in this case) can be fined; the fines are defined in the Construction Act. However, the fine can only be imposed when there is a construction activity ongoing and that activity has been deemed contrary

EIB Complaints Mechanism

to the zoning and construction permits. Before construction starts, there is nothing to fine for. The fine cannot be imposed for breach of land use plan as long as the zoning permit is respected as it is not the constructing entity's responsibility to issue zoning permits in line with the land use plans.

In issuing the zoning permit, the Construction Authority is supposed to respect the land use plans, likewise in issuing the construction permit, it should adhere to the zoning permit. If the Construction Authority does not respect the land use plan and issues a zoning permit that is contrary to the land use plan, citizens can submit a complaint and/or challenge the decision at the court as unlawful conduct of a public authority. The ensuing court proceedings are governed by the Administrative Code. The court can decide on annulling the Construction Authority's decision, i.e. revoke the zoning or construction permit. This may however also ensue in damages incurred to the contractor or investor (such as when significant funds have already been spent based on the issued construction permit and the construction has to be removed) in which case the contractor or investor can likewise use the court proceedings to obtain compensation from the State.

LIST OF ACRONYMS

CMTPR	EIB-CM Principles, Terms of Reference and Rules of Procedure
EC	European Commission
EFSI	European Fund for Strategic Investments
EIA	Environment impact assessment
EIB	European Investment Bank
EIB-CM	Complaints Mechanism of the EIB
EIS	Environmental impact study
EO	European Ombudsman
ESCS	Environmental and Social Completion Sheet
ESDS	Environmental and Social Data Sheet
EU	European Union
MoE	Ministry of the Environment of the Slovak Republic
MTCD	Ministry of Transport and Construction of the Slovak Republic
NDS	Slovak National Highway Company (Národná diaľničná spoločnosť, a.s.)
NGO	Non-governmental Organisation
PPP	Public private partnership
SEA	Strategic environmental assessment
TEN-T	Trans-European Transport Network
VUD	Transport Research Institute of the Slovak Republic