



DTŚ Expressway II Poland

Complaint SG/E/2012/10

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

4 March 2014



EIB Complaints Mechanism

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Complainant:

Stowarzyszenie Gliwiczanie dla Gliwic' Association

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The EIB Complaints Mechanism

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

If complainants are unhappy with the outcome of the EIB-CM's procedure, a confirmatory complaint can be submitted by the complainant within 15 days of the receipt of the EIB-CM's reply. Complainants who are not satisfied with the outcome of the EIB-CM's procedure and who do not wish to make a confirmatory complaint may also bring a complaint of maladministration against the EIB to the European Ombudsman.

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

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

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

EXECUTIVE SUMMARY	5
1. COMPLAINT	7
2. BACKGROUND INFORMATION	7
3. LIAISON WITH THE PROMOTER	8
4. ADMINISTRATIVE & LEGAL PROCEEDINGS	10
5. EIB FOLLOW-UP WITH THE PROMOTER	10
6. APPLICABLE REGULATORY FRAMEWORK	11
7. FINDINGS	12
8. CONCLUSIONS	13

CONCLUSIONS REPORT

EXECUTIVE SUMMARY

On 16 July 2012, _____ on behalf of the association 'Stowarzyszenie Gliwiczanie dla Gliwic' (hereinafter the complainant) lodged a complaint with the EIB-CM concerning the DTS expressway project, co-financed by the EIB and the European Commission. In her letter, the complainant alleged breach of national and EU environmental law. In particular, the complainant alleged:

- Inappropriate location of the project within an area of flood risk;
- Lack of simulation and studies regarding the project impact on human safety in case of floods; and
- The project's construction permit was issued in breach of national law due to the absence of the Regional Water Management Authority (RWMA).

In further correspondence, the complainant informed the EIB-CM that she had lodged a complaint with the national courts in Poland as well as with the European Commission, which is the competent authority to deal with alleged infringements of EU law by EU Member States.

The Project

DTS Expressway II concerns the construction of the Western section (15.8 km) of a high capacity urban highway between the agglomeration of Katowice and Gliwice (some 31 km in Total) via Chorzow, Swietochlowice, Ruda Slaska and Zabrze. The DTS expressway II is a continuation of the DTS expressway I, also partially financed by the EIB, which consisted of the construction of a 13 km long section of urban expressway in the Greater Katowice area. The Promoter is _____ an engineering company specialised in the management of investment projects. The range of services covers the full replacement investment and its components as programming, preparation, implementation and supervision of the implementation, maintenance and design which is responsible for all activities relating to the design, construction, financing and operation of the proposed projects. The main decision-making body of the (DTS S.A.) is its meeting of shareholders. A 5-member Supervisory Board is headed by a representative of the Silesia voivodship.

Findings & Conclusions

With regard to the Complainant's concerns regarding the project location within a flood risk zone and the alleged lack of simulation studies of the project's impact in case of floods, it appears that an initial assessment for flood risk had been carried out by the Meteorological and Water Management National Research institute, which had identified historical and possible floods. The Promoter also confirmed that in light of the initial identified risk areas, additional precise and detailed maps of flood hazards will be drawn up together with a mathematical hydraulic modelling for the rivers indicated in the initial flood map. However, the National and EU laws do not forbid the implementation of projects located in areas of flood zones.

In addition, it appears that the Promoter obtained the required permissions by the water law pursuant to Article 11d section 2 of the Act of 10 April 2003 on special rules for preparation and implementation of projects in national roads and provided the EIB with a copy of the final construction permit for the contested section that was issued on 2 December 2013.

However, it is important to highlight that the complainant also lodged a complaint with the European Commission which from a preliminary analysis of the complaint, did not identify any breach of EU Law at that stage. However, due to the ongoing national court reviews at the time of the lodged complaint, the Commission had discontinued its review on the case, considering the possibility to reassess the case in light of the expected national court decision. The EIB-CM takes note that the national courts had subsequently dismissed the complainant's allegations and considered them ungrounded.

From the gathered information as well as the findings reached by EIB-CM's inquiry into the raised allegations, it appears that the EIB had actively verified, in line with the EIB standard procedures, that the Promoter as well as the competent authorities had taken the necessary measures to identify the project's impacts in order to avoid, reduce and mitigate them and to ensure the compliance with the EIB standards as well as with the applicable regulatory framework. In light of the reported findings, the EIB-CM closes the file with no recommendations.

CONCLUSIONS REPORT

Complainant: Complainant: [redacted] on behalf of 'Stowarzyszenie Gliwiczanie dla Gliwic' Association

Subject of complaint: Alleged breach of EU and national environmental law

1. COMPLAINT

1.1 On 16 July 2012, [redacted] on behalf of the association 'Stowarzyszenie Gliwiczanie dla Gliwic' (hereinafter the complainant) lodged a complaint with the EIB-CM concerning the DTS expressway project co-financed by the EIB and the European Commission. In her letter, the complainant alleged breach of national and EU environmental law. In particular, the complainant alleged lack of flood protection studies and that the project had not obtained all the necessary construction permits for the project.

1.2 Summary of the allegations

The complainant alleged the following:

- Inappropriate location of the project within an area of flood risks;
- Lack of flood protection studies for the project;
- Lack of simulation and studies regarding the project impact on human safety in case of floods; and
- The project construction permit was issued in breach of national law due to the absence of the Regional Water Management Authority (RWMA).

2. BACKGROUND INFORMATION

2.1 DTS Expressway II concerns the construction of the Western section (15.8 km) of a high capacity urban Motorway between the agglomeration of Katowice and Gliwice (some 31 km in Total) via Chorzow, Swietochlowice, Ruda Slaska and Zabrze. The DTS expressway II is a the continuation of the DTS expressway I, also financed by the EIB, which is the construction of a 13 km long section of urban expressway in the Greater Katowice area. The new Motorway will play a significant role as a collector-distributor for local traffic in the conurbation. In the future, the expressway is expected to be connected to the east and west with the A4 Motorway, which is designed to bypass the Greater Katowice area to the south. The implementation of the project is divided into six main sections:

Town	Section	Contracts	Kilometres
GLIWICE	From the junction with DK 88 to Baildona Street	G2 G2/1, G2/2, G2/3	0 – 4+037,37
	From Baildona Street to the junction with Kujawska Street	G2/4,	4+037,37 - 5+320,00
	From the junction with Kujawska Street to the town boundary	G1,	5+320,00 – 8+119,85

Town	Section	Contracts	Kilometres
ZABRZE	From the town boundary to the area of the junction with Roosevelta Street	Z4	8+119,85 - 8+660,00
	From the junction with Roosevelta Street to the junction with De Gaulle'a Street and a local street	Z3	8+660,00 -11+100,00
	From the junction with De Gaulle'a Street to Wolności Street	Z1	11+100,0 -13+000,0
	From Wolności Street to the boundary with Ruda Śląska	Z2	13+000,0-15+800,0

2.2 The Promoter is Drogowa Trasa Srednicowa S.A. (DTŚ S.A.) an engineering company specialised in the management of investment projects and it is responsible for all activities relating to the design, construction, financing and operation of the proposed project. The main decision-making body of the (DTŚ S.A.) is its meeting of shareholders; a 5-member Supervisory Board is headed by a representative of the Silesia voivodship.

2.3 On 26 July 2012, the EIB acknowledged receipt of the complaint. The complainant was informed of the fact that the EIB-CM was carrying out a review of her complaint as well as the date by which she might expect a formal reply from the CM. On 21 February 2013, the EIB Secretary General informed the complainant that due to the complexity of the inquiry, it was necessary to extend the time frame for the handling of the complaint in line with article 10.2 of the EIB Complaints Mechanism Policy.

2.4 Following a preliminary analysis on the admissibility of the complaint, the CM deemed it appropriate to carry out further inquiries with a view to verifying whether a possible instance of maladministration had been committed by the EIB's services in their appraisal of the project or in their monitoring of the Promoter's compliance with the conditions attached to the loan. These conditions include compliance with Polish law. In this context the CM reviewed, *inter alia*, the EIB due diligence and further information provided by the Promoter on the issues at stake in relation to the alleged lack of assessment of the flood risks as well as the relevant permits in this respect.

2.6 Previous complaints

2.6.1 The current complaint should be seen in the context of earlier contacts of the complainant with the EIB services in several (*ex ante* and *ex post* appraisal) phases of the project cycle with a view to obtaining information on the project and drawing the EIB's attention to the association's concerns on the project. Finally, in December 2009 the complaining association lodged a complaint with the EIB-CM as well as the European Commission regarding, *inter alia*, breach of EU and national law in the implementation of the project. In particular, the complainant alleged lack of public consultation and lack of assessment for negative environmental impacts of the project (EIA).

2.6.2 As a result of the EIB-CM's inquiry, it appeared that a full EIA, including public consultations, had been carried out by the national authorities, in line with the applicable legal framework and the EIB social and environmental standards. The European Commission also concluded that there had been no breach of Community Law. The complainant was informed of the results of the EIB-CM inquiry in November 2011.

3. LIAISON WITH THE PROMOTER

3.1 The Promoter's reply

3.1.1 In light of the raised allegations the EIB requested further information from the Promoter (DTŚ) on the issues at stake. Therefore on 18 September 2012, the Promoter provided the EIB with further information. In its reply, the Promoter explained that the complainant had lodged several complaints with national bodies as well as with the Prime Minister in response to which they had received a reply from the Ministry of Transport. In addition, the Promoter stated that the information in which the complainant is basing her allegations is wrong and inaccurate.

3.1.2 With regard to the alleged inappropriate location of the project due to its vicinity to flood risk areas, the Promoter highlighted that the location of the project in flooding risk areas does not imply that the project should not be implemented in such a location. The Promoter stated that several similar projects in Poland are also located in flood risk zones and that the project at stake is not an exception from the normal practice. In this regard, the Promoter highlighted that the flood risks are carefully assessed and mitigated. Therefore, the Promoter emphasises that areas of flood risk are not exempted from development and projects.

3.1.3 The Promoter indicated that The National Water Management Authority issued an initial flood risk assessment plan that at an initial stage contained very general maps. However the Promoter states that the National Water Management Authority affirmed that the initial flood risk assessment is required by the Directive 2007/60/EC on the assessment and management of flood risks.

3.1.4 In this context, the Promoter informed the EIB-CM that an initial risk assessment for the contested project had already been carried out by the Institute of Meteorological and Water Management National Research Institute, Regional Offices in Gdynia, Kraków, Poznań, Wrocław, and consulted with the National Water Management Authority.

3.1.5 The Initial flood risk assessment identified significant historical floods as well as floods which may occur in the future which constituted the basis for determining areas subject to flood risk. The Promoter indicated that the precise flood hazard and flood risk maps will be drawn up for the areas which are subject to flood risk and indicated in the initial flood risk assessment will be finalised by December 2013. In addition, mathematical hydraulic modelling will be carried out for the rivers indicated in the initial flood risk assessment and pursuant to article 88d section 2 of Water Law Act, boundaries presented on the flood risk maps will be also considered for the study of the country development, plan of the voivodeship area development, local area development plan and in decision on approving investment localization or decision on construction conditions.

3.1.6 The Promoter informed the EIB-CM that the project had obtained all the required permissions required by the water law. Pursuant to article 11d section 2 of the Act of 10 April 2003 on special rules for preparation and implementation of projects in national roads, the Promoter had obtained a positive decision from the Director of the Regional Water Management authority in Gliwice on project involving construction of water facilities and execution of structure or works in the areas located in direct flood risk.

3.1.7 However, the Promoter emphasised that the project had obtained the necessary positive environmental decisions from the Directorate General of Environmental Protection in Warsaw as well as the environmental conditions in line with the Act of 3 October 2008 on the access to environmental information and environmental protection and public participation which implements the relevant EU directives.

3.2 The Ministry of Transport's reply

3.2.1 On 27 September 2012, the Ministry of Transport informed the EIB by letter that it has already dealt with a similar complaint from the same NGO when it had raised allegations regarding the project location as well as environmental irregularities. As a result, the Ministry of Transport had enquired and liaised with national authorities (the Directorate General for Environmental Protection, the Mayor of the city of Gliwice, DTŚ S.A. and the Marshal's office in Katowice) and had, on 21 June 2012, provided the complainant with a reply.

3.2.2 In summary, the Ministry stated that it has not found instances of breach of law and that DTŚ S.A. at that stage of the project had complied with the national and EU law and had obtained all the required permissions and administrative decisions for the implementation of the project, including public consultations. In addition, the Ministry highlighted that the issues related to the flood problems had been addressed by the competent authorities within the process of the administrative decisions.

4. ADMINISTRATIVE & LEGAL PROCEEDINGS

4.1 In the course of handling the complaint, the complainant provided the EIB with further correspondence and information regarding the association's complaints against the project that had been lodged with the national authorities and courts. The complainant informed the EIB-CM that she had lodged complaints with the European Commission and had provided the reference of the registered complaint.

4.2 Voivode Administrative court

The Complainant provided the EIB with a copy of hearing's minutes of the of the Voivode Administrative Court in Warsaw regarding the complaint (case file No: t IV SAWa 1728/11) that had been lodged by the complainant's association as well as another NGO regarding the decision on the environmental conditions for the implementation of the project in section G1, G2, Z3 and Z4.

4.3 Complaint to European Commission

4.3.1 On 14 November 2012, the Complainant brought a complaint with the European Commission (hereinafter the Commission) in which she challenged, *inter alia*, the environmental aspects of the project and reiterated the allegations she had raised with the EIB-CM.

4.3.2 With regard to the complainant's allegations regarding the decision on the environmental conditions on the consent of the project implementations, the Commission highlighted its role in supervising the appropriate application of the EU law in line with article 17 section one of the Treaty on the Functioning of the European Union (TFEU).

4.3.3 In this context, the Commission took note that the decision that the complainant had challenged, had been appealed by the complainant in the national courts and that the case was still under the assessment by the national courts as well as the national administrative authorities at the time of Commission reply. In this context, the Commission informed the complainant that due to the ongoing national proceedings by the national courts and in line with its procedural principles, the EC does not deem it appropriate to continue its review on the case and therefore the complaint will be closed.

4.3.4 However, the Commission highlighted that once the national court process would have been concluded; the Commission would remain open to consider any continuing concerns of the complainants, following the conclusion of the national proceedings. With regard to the complainant's allegations regarding the breach of the Flood Directive, the Commission highlighted that the Directive is aimed to establish frames for the assessment and management of flood risks in order to reduce negative effects on human life, environments, cultural heritage and economic activity. The Commission also highlighted that the Directive does not prohibit specific projects in areas considered at flooding risk which is for Member States to consider.

4.3.5 Finally, the Commission concluded that on the basis of the information presented, the Commission does not consider that the Polish Authorities had failed in applying the requirements of the Flood Directive and therefore closes the file.

5. EIB FOLLOW-UP WITH THE PROMOTER

5.1 In light of the information provided by the complainant as well as the Promoter, the EIB services liaised with the Promoter in order to remain informed regarding the ongoing court proceedings that had been brought by the complainant regarding the project.

5.2 In this regard the Promoter informed the EIB on 23 August 2013 that on 7 March 2013, the Voivodeship Administrative court had issued a decision dismissing the allegations raised by the NGOs concerning the decision of the Director General for environmental protection.

5.3 On 1 October 2013, the Promoter informed the EIB that on 26 September 2013, the National Administrative Court rejected the cassation complaint lodged by the Complainant NGO against the EIA and provided a copy of the Court's decision dismissing the court case Ref: IV SW/Wa 1728/11.

5.4 On 2 December 2013, the Promoter informed the EIB that the Ministry of Transport had issued the final construction permit for the section G2 after having being appealed against by the complainant NGO. The Promoter confirmed that the final binding decision had been issued on 6 November 2013 and provided the EIB with a copy of the decision.

5.5 On 23 January 2014 the EIB requested the Promoter to provide information regarding the flood risk maps which were to be completed by December 2013 as mentioned by the Promoter and reported in 3.1.5 of this Report. In this regard, on 17 February 2014, the Promoter informed the EIB that on 22 December 2013 the National Water Management Authority had finalised the flood risk maps and had published them on its website. (The Promoter provided the link to the map.) Finally, the Promoter reiterated that the flood risk was analysed in detail in the course of administrative EIA proceeding followed by the issuance of the environmental decision which is currently binding and valid. In addition, the Promoter stated that the analysis conducted by the DTŚ S.A. as well as the flood risk and danger maps confirm that the Project design had taken into consideration the possible flood risks.

5.6 EIB services' mission

On 5 September 2013, the EIB competent services carried out a monitoring mission to Poland. Within the monitored projects, the EIB competent services followed up on the contested project with a view to obtaining information on the on-going legal and administrative proceedings that were lodged by the complainant. The EIB services followed-up the advance of the works in the remaining sections of the DTS II project, in particular the preparatory works on section G2 where the cut and cover tunnel is to be located.

6. APPLICABLE REGULATORY FRAMEWORK

6.1 The scope of the EIB Complaints Mechanism

6.1.1 On the basis of part IV, Article 2.3 of the Complaints Mechanism Principles, Terms of Reference and Rules of Procedures "the EIB Complaints Mechanism is not competent to investigate complaints concerning International organisations, Community institutions and bodies, national regional or local authorities." This provision should be read in conjunction with the considerations on the allocation of responsibilities as regards the environmental impact assessment of projects.

6.2 Allocation of responsibilities

6.2.1 Pursuant to Article B.2.2 120 of the EIB Social and Environmental Practices Handbook 2007 (the Handbook), the EIB is responsible for checking whether the Promoter has fulfilled the following requirements: a full EIA process (including the public consultation and approvals/planning consent), the identification of the impacts and appropriate measures to avoid, reduce or mitigate these impacts, the consideration of alternatives, the proposed mitigation and compensation measures and associated mitigation plan and public disclosure, while carrying out a due diligence on the assessments carried out by the national authorities.

6.2.2 The EIB verifies that the competent authorities have taken all necessary measures to ensure the compliance of the assessment with the EIB's environmental standards as well as with the relevant community and national legislation. Therefore, the EIB's role is to verify the compliance with its requirements as well as with community and national legislation.

6.2.3 In addition, it is worth emphasising that the Finance Contract incorporates all the key elements constituting the basis of the EIB's decision that had been identified in the discussions between the Bank and the Promoter during the project preparation, appraisal and negotiation. In that regard, §§192 et seq. of the Handbook lay down the Environmental and Social conditions which may be applied to Finance Contracts stipulated by the EIB in order to ensure the environmental acceptability of the project during implementation and operation. In §193 the conditions are stipulated for disbursement (e.g. environmental conditions which must be fulfilled to the satisfaction of the EIB prior to any fund being disbursed by the EIB on either the whole project or a part of the project). Non-compliance with these conditions might result in a halt to the disbursement of the EIB's loan. Both the EU scheme and the Polish legal system provide specific environmental regulations which are applicable to the motorways' development and construction process.

6.3 EU Law

Directive 2007/60/EC

6.3.1 The Directive aims to establish a common framework for assessing and reducing the risk that floods within the European Union pose to human health, the environment, property and economic activity. The Directive covers all types of floods, both along rivers and in coastal areas. There are also other risks, such as urban floods and sewer floods, which must also be taken into account.

6.3.2 In line with this Directive, Member States must carry out a preliminary assessment of risks for each river basin district or part of a district located in their territory, a flood risk maps identifying all areas posing a risk of flooding and indicating the probability (high, medium or low) of flooding for each of those areas and the potential damage for local populations, property and the environment, a flood risk management plans, for each river basin district. Where the area concerned extends into several countries, the Member States must cooperate in preparing, as far as is possible, a single management plans. When preparing a management plan, appropriate levels of protection must be established for each river basin, sub-basin and stretch of coastline and measures must be drawn up to achieve those levels of protection.

7. FINDINGS

7.1 With regard to the Complainant's concerns regarding the project location within a flood risk zone as well as the alleged lack of simulation studies of the project's impact in case of flood incidences, it appears that the National and EU laws do not forbid the implementation of projects located in areas of flood zones. Nevertheless, the applicable law as well as the EIB standards require project impacts as well as flood risks to be assessed and mitigated accordingly.

7.2 From the gathered information, it appears that an initial assessment for flood risk had been carried out by the Meteorological and Water Management National Research institute identifying historical and possible floods. The Promoter also confirmed that in light of the initial identified risk areas, additional precise and detailed maps of flood hazard will be drawn up together with a mathematical hydraulic modelling for the rivers indicated in the initial flood risk assessment. In addition, the Promoter had obtained a positive decision from the Director of the Regional Water Management authority in Gliwice on project involving construction of water facilities and execution of structure and works in the areas located in direct flood risk in line with article 11d section 2 of the Act of 10 April 2003 on special rules for preparation and implementation of projects in national roads.

7.3 With regard to the alleged illegality of the construction permit and the breach of national law due to the absence of the decision of the regional water management authority, in this regard and in accordance with the gathered information and reported in § 3.1.6, § 3.1.7, it appears that the Promoter obtained the required permissions by the water law on the basis of Article 11d section 2 of the Act of 10 April 2003 on special rules for preparation and implementation of projects in national roads and provided the EIB with a copy of the final construction permit for the contested section that was issued on 2 December 2013.

7.4 The EIB-CM also takes note that the complainant had raised the issue with the national courts and that the national courts had dismissed the complainant's allegations as reported in § 5.3 of this Report. In addition the complainant also brought a complaint with the European Commission regarding, inter alia, alleged breach of environmental law and breach of the flood directive. It is the European Commission which is the competent authority to deal with alleged infringements of EU law by EU Member States.

7.5 In this context, the EIB-CM highlights that with regard to the alleged breach of flood Directive, the Commission did not identify a breach of EU law at that stage. However, due to the ongoing national court reviews at the time of the lodged complaint, the commission had discontinued its review on the case and considered the reassessment of the complaint in light of the expected court decision. In this regard it is important to recall that, in a more advanced stage; the National Court declared the allegations ungrounded as reported in § 7.4 of this Report.

8. CONCLUSIONS

8.1 From the gathered information and the review conducted in relation with the raised allegations, it appears that the EIB had actively verified, in line with the EIB standard procedures, that the Promoter as well as the competent authorities had taken the necessary measures to identify project's impacts and to avoid, reduce and mitigate them to ensure the compliance with the EIB standards as well as with the applicable regulatory framework. In light of the reported findings, the EIB-CM closes the file with no recommendations.

8.2 Finally, the complainant should be provided with additional information on the EIB Complaints Mechanism through the relevant webpage of the EIB's website.

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4 March 2014

O. El Sabee
Complaints Officer

4 March 2014