

S7 Expressway

Complaint SG/E/2015/14

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

Final Initial Assessment Report

31 July 2017

EIB Complaints Mechanism

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Complaints Mechanism

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External Distribution

Complainants: Stowarzyszenie Pracownia na rzecz Wszystkich Istot, CEE Bankwatch Network
Promoter: Generalna Dyrekcja Dróg Krajowych i Autostrad

Internal Distribution

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The EIB Complaints Mechanism

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

Complainants that are not satisfied with the EIB-CM's reply may submit a confirmatory complaint within 15 days of the receipt of that reply. In addition, complainants who are not satisfied with the outcome of the procedure before the EIB-CM and who do not wish to make a confirmatory complaint have the right to lodge a complaint of maladministration against the EIB with the 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. Some examples, as cited by the European Ombudsman, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal to provide information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group's activities and to project cycle-related policies and other applicable policies of the EIB.

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

For further and more detailed information regarding the EIB Complaints Mechanism please visit our website: <http://www.eib.org/about/cr/governance/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 Complainants, 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;

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- determine if further work by the EIB-CM is necessary and/or possible to resolve the issues raised by the Complainants (such as, but not limited to, investigation, compliance review, facilitation or mediation between the parties).

Acknowledgments

The EIB-CM would like to thank all the people and organisations with whom they have interacted during the investigation of this complaint, and expresses its appreciation to the EIB staff for providing the required information. Without the support and valuable contributions of everybody concerned, the preparation of this report would not have been possible.

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EXECUTIVE SUMMARY

In September 2015, the European Investment Bank's Complaints Mechanism (EIB-CM) received a complaint via email sent jointly by the Polish non-governmental organisation Stowarzyszenie Pracownia na rzecz Wszystkich Istot and Bankwatch. The complainants alleged that the EIB failed to correctly assess the validity of the environmental decision and the environmental impacts of the road construction project S7 Expressway (Gdansk-Warsaw-Krakow). Specifically, the complainants took the view that the EIB should not accept an environmental decision which was issued anew without carrying out a renewed Environmental Impact Assessment. In addition, the complainants questioned certain environmental impacts, especially cumulative impacts and impacts upon biodiversity, the assessment of project alternatives and the planning of a wildlife crossing.

The complaint concerns an investment loan for the construction of several non-continuous sections of the S7 expressway in Poland between the cities of Gdansk and Krakow (162 km in total). The borrower for the project is Bank Gospodarstwa Krajowego (BGK), the fully State-owned National Promotional Bank of Poland, which borrows the money on behalf of the National Road Fund, an entity established by the Polish government to manage the financing of the expansion of the Polish national road network. The promoter of the project is the General Directorate for National Roads and Motorways (GDDKiA). The sub-section concerned by the complaint is a 7.7 km-long section stretching from the town of Skarżysko-Kamienna to the Voivod Border. For this section, an EIA was undertaken in 2007 and an environmental decision was issued by the competent authority in 2008.

In order to assess the allegations, the EIB-CM undertook a fact-finding mission to meet with the complainants, the promoter and the regional environmental agency. During the mission, the EIB-CM was informed that the complainants had submitted their concerns to the European Commission and had based their allegations on an alleged violation of EU law. It appears that the European Commission, based on the information received from the complainants, has sent to the Polish authorities a request for information via the EU Pilot procedure. The procedure is currently ongoing. Therefore, the EIB-CM considers it appropriate that the EIB shall continue to follow up with the European Commission on the outcome of the Commission's procedure.

With regard to the complainants' allegation relating to the supposedly invalid environmental decision, the EIB-CM focused therefore on the appraisal that was carried out by the EIB. In this regard, the EIB-CM learned that the competent Administrative Court had declared the original environmental decision to be invalid in 2013. It appears that a new environmental decision was issued in 2014. The EIB-CM's assessment indicated that the EIB's appraisal was carried out correctly with respect to this issue.

Moreover, the EIB-CM reviewed the complainants' allegations relating to the EIB's environmental due diligence, namely with regard to the assessment of cumulative impacts, the assessment of protected species and habitats nearby, the assessment of project alternatives and the planning of a wildlife crossing.

In this context, it is necessary to emphasise that, when being informed about the issues related to biodiversity and the environment, the EIB's operational services have agreed with the Borrower and the Promoter, in application of the principle of precaution, to put on hold the disbursement of the loan for this

particular section until further notice, despite the fact that the contractual disbursement conditions are deemed to be fulfilled in line with the relevant requirements.

Moreover, the EIB-CM has found that two project alternatives and their respective impacts on the environment/biodiversity have been analysed. With regard to cumulative impacts, the EIB-CM was made aware of the proposed extension of an industrial park nearby, which seems to raise concerns of additional impacts on the Natura 2000 area. It is unclear whether the industrial park is going to be built. With regard to the remaining issues, noting the objective of an appropriate assessment procedure, the EIB-CM has found that the environmental decision foresees a monitoring procedure in order to keep track of potential impacts on biodiversity. Moreover, it is foreseen that, should monitoring indicate such a need, additional measures must be implemented.

The EIB-CM considers it appropriate to point out to the complainants that the environmental decision of the Polish authorities foresees a number of mitigation measures to minimize impacts on the environment as well provides for a monitoring of these measures. Therefore, the complainants may forward any evidence of negative environmental impacts to the authorities as long as monitoring is still ongoing. Also, the EIB-CM found that the Environmental and Social Data Sheet made approval of the project conditional on the construction of large animal crossings.

Proposed way forward

There are two sets of proposals for the way forward, one for the EIB's operational services and one for EIB-CM.

The EIB-CM suggests that the EIB's operational services:

- continue the dialogue with the promoter with the aim of not disbursing funding allocated to the project component in question before the EU Pilot and any subsequent related proceedings are settled, all within the framework of the Financial Contract and applicable rules of the EIB;
- take into account the outcome of the EU Pilot and any subsequent related proceedings in the EIB's monitoring activities in relation to the project component.

The EIB-CM asks the EIB's operational services to provide it with any relevant updates/outcomes once they become available.

The EIB-CM will:

- determine, on the basis of the outcome of the EU Pilot, any subsequent related proceedings and possible relevant updates/outcomes provided by the EIB's services, whether a detailed assessment of the allegations in question (e.g. appropriate assessment and compensatory measures, alternatives, cumulative impact) is necessary;
- consider, in the event that the European Commission's decision requires new measures to be taken and provided there is willingness on the part of the actors involved, offering the EIB-CM's assistance by providing the possibility of collaborative resolution processes (as per the EIB-CM's operating procedures, this may include the facilitation of information sharing,

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dialogue/negotiations or joint fact-finding missions) to ensure the continuation of cooperation between the promoter and the complainants.

Initial Assessment Report

Complainants: Stowarzyszenie Pracownia na rzecz Wszystkich Istot and CEE Bankwatch Network

Date received: 24 September 2015

Confidentiality requested: No

Subject of complaint: Environmental impact of the project

1. THE COMPLAINT

1.1 On 24 September 2015, the European Investment Bank's Complaints Mechanism (EIB-CM) received a complaint via email sent jointly by the Polish non-governmental organisation Stowarzyszenie Pracownia na rzecz Wszystkich Istot and Bankwatch (the complainants). The complainants alleged that the EIB failed to correctly assess (i) the validity of the environmental decision of the project and (ii) the environmental impacts of the road construction project S7 Expressway (Gdansk-Warsaw-Krakow). A more detailed account of the complainants' allegations is displayed below (see table 1).

TABLE 1 – SUMMARY OF ALLEGATIONS

- The complainants alleged that the project lacks a valid environmental decision. Specifically, the complainants referred to the fact that the issuing of a new environmental decision was not in line with EU law. Therefore, the complainants took the view that the EIB should not accept the new environmental decision.
- Related to the above, the complainants considered that the EIB had not carried out correctly its environmental assessment of the project, namely with respect to the following issues:
 - (i) The **impact of the project on habitats and species** located within and outside the Natura 2000 site "Lasy Skarżyskie" nearby is considered to be very negative and the implementation of the project supposedly **destroys/endangers the habitats of protected butterfly species**;
 - (ii) There was **no assessment of the cumulative impacts** of the project;
 - (iii) There was an **insufficient assessment of alternatives**;
 - (iv) **No wildlife crossing** for large mammals has been planned along the 8 km road section and the only wildlife crossing for medium-sized animals is directed towards a row of buildings nearby.

2. THE CLAIM

The complainants requested that:

- the EIB shall not *"disburse the loan for the project until all environmental standards, including procedural standards, comply with the EIB's environmental principles and standards"*;
- the EIB shall not *"apply the principle of legality¹ for this project but shall conduct [its] own analysis of [the] project [and] compliance with its environmental principles and standards"*.

3. THE PROJECT

- 3.1 In 2013, the EIB approved an investment loan of up to EUR 788 million for the construction of several non-continuous sections of the S7 expressway in Poland between the cities of Gdansk and Krakow (162 km in total), together with two connecting sections (22 km in total). The borrower for the project is Bank Gospodarstwa Krajowego (BGK), a State-owned Polish bank. The promoter of the project and final beneficiary of the loan is the General Directorate for National Roads and Motorways (GDDKiA), the body responsible for the construction, maintenance and operation of the national road network throughout Poland.
- 3.2 The EIB may finance up to 40% of the project cost with the rest being funded by EU Cohesion Fund grants and by budgetary contributions from the State.
- 3.3 All of the sections of the expressway were identified to fall under Annex I to the Environmental Impact Assessment (EIA) Directive 2011/92/EU and were therefore subject to a full EIA procedure including the implementation of public consultation procedures. The various procedures commenced in 2005 and resulted in 14 different Environmental Decisions (ED) being issued over the period 2008-2012 by the respective Competent Authorities in the four concerned regions.
- 3.4 The present complaint concerns a 7.7-km long section stretching from the town of Skarżysko-Kamienna to the Voivod Border. This entails the construction of 2 x 2 lane expressways. As for this section, an EIA was undertaken in 2007 and an environmental decision was issued by the competent authority in 2008.

4. BACKGROUND TO THE COMPLAINT

- 4.1 On 8 September 2014, the complainants sent a letter to the EIB's Civil Society Unit containing an overview of the environmental and legal issues related to the project and the section in question. The complainants took the view that the EIB should not finance a road construction which, in their opinion, violated the EIB's transport lending policy and European and Polish environmental law and failed to meet requirements and standards of nature protection. Moreover, the complainants invited the Bank to reconsider its decision to grant this loan and to request amendments to the documentation to take into account alleged impacts on wildlife. On 1 October 2014, the EIB's operational services sent a reply outlining the Bank's position on the matters and proposed a meeting with the complainants in order to discuss the issues raised.

¹ Specifically, the complainant refers to the principle of presumption of legality as the assumption that within the European Union *"EU environmental legislation was transposed to national legal system [sic] and is properly implemented"*.

- 4.2 On 3 December 2014, a meeting took place between the EIB's operational services and the complainants in the EIB's office in Warsaw. This meeting was followed by subsequent exchanges with the Bank's services during the first half of 2015.
- 4.3 On 19 December 2014, the EIB's operational services contacted the European Commission to understand the status/timeline of the complaint submitted to them. Since then, the services have been in regular contact with the European Commission to check the progress of the complaint.
- 4.4 A meeting took place in January 2015 between the complainants and the promoter (with the EIB's operational services attending as an observer) to discuss the environmental value of the project site as well as the efforts undertaken to minimise environmental impacts. On 26 October 2015, the EIB's services met with the local community, the complainants and the promoter with a view to helping find a compromise on the design.

5. WORK PERFORMED BY THE EIB-CM

- 5.1 In September 2015, and due to the fact that the complainants were not satisfied with the action taken up to that point, this complaint was lodged with the EIB-CM.
- 5.2 After declaring the complaint as admissible, the EIB-CM contacted the complainants and the EIB's services to collect the relevant documentation pertaining to the project/sub-section. In January 2016, the EIB-CM undertook a fact-finding mission to the site to meet separately with the complainants on the one hand and the promoter and the regional environmental agency of Kielce on the other.
- 5.3 During the mission, the EIB-CM was informed that the complainants had submitted their concerns on an alleged violation of EU law to the European Commission. Subsequently, the EIB-CM exchanged views with the European Commission to gain further information on the status of the complaint that was submitted to the Commission and the further procedure. The EIB-CM learned that the European Commission had registered the complaint and decided to request information from the Polish authorities via the EU Pilot procedure.
- 5.4 Throughout the handling of the complaint, the EIB-CM communicated regularly with the European Commission to receive updates on the status of the procedure. As the procedure is, at this point in time, still ongoing, the EIB-CM decided to proceed with its investigation, insofar as possible, and to draft its Initial Assessment Report.

6. GENERAL REGULATORY FRAMEWORK

- 6.1 *The EIB Complaints Mechanism mandate*
 - 6.1.1 The EIB-CM policy and operational procedures apply to complaints of maladministration lodged against the EIB Group (Article 4.1 of Section II – "Principles" of the EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure – CMPTR). Complaints may concern any alleged maladministration of the EIB Group in its actions and/or omissions (Article 4.1 of Section IV "Rules of Procedure" of the EIB's CMPTR).
 - 6.1.2 In the context of the handling of admissible complaints and pursuant to Article 4.2 of Section III – "Terms of Reference" of the CMPTR, the EIB-CM, inter alia, gathers and reviews existing information on the subject under complaint, conducts appropriate inquiries with a view to assessing whether the EIB Group's policies and procedures have been followed and fosters

adherence to the EIB Group's policies, in particular those regarding good administration, disclosure and transparency. The EIB-CM is independent from operational activities and thus ensures that each complaint is dealt with by the highest standards of objectiveness whilst safeguarding the interest of all the internal and external stakeholders of the EIB Group according to Article 2.1 of Section III – "Terms of Reference" of the CMPTR.

6.2 *Environmental standards*

6.2.1 For its assessment, the EIB-CM took into consideration the EIB's relevant policies, particularly, the EIB Statement of Environmental and Social Principles and Standards², the EIB Environmental and Social Practices Handbook (version 2010) and the EIB Transport Lending Policy³.

6.2.2 Moreover, the EIB-CM took into account Directive 2011/92/EU [the so called EIA Directive], which sets forth rules concerning the environmental assessment of projects, and Directive 92/43/EEC (the so called Habitats Directive), which sets forth the rules for the protection of certain habitats and species of EU interest.

7. **INITIAL FINDINGS**

For each of the two allegations set in paragraph 1 of this report, paragraph 7 presents:

- the allegation(s);
- the (relevant) regulatory framework; and
- the initial findings.

7.1 **Allegation**

7.1.1 The complainants alleged that the EIB had agreed to fund the project in question despite the lack of a valid environmental decision. The complainants took the view that the EIB thereby violated its own policies and EU law. In this regard, the complainants provided an account of the procedural background of the allegations and stated that:

- the environmental decision, through which the EIA for the section in question was concluded, was issued by the competent authority in 2008;
- the permit for the construction of the road ("ZRID") was issued in 2010;
- the environmental decision was annulled by the competent authority due to a violation of Article 6.3 of the Habitats Directive in the context of the environmental assessment of the project;
- the environmental decision was ultimately cancelled in 2013 by the Regional Administrative Court and that this should have led to the retroactive cancellation of the road construction permit;
- nonetheless, the Regional Administrative Court had upheld the road construction permit in 2013 and that, thereby, the Court did not observe the principle of precedence of EU law over Polish legislation;
- the competent authority had issued a corrective environmental decision in 2014;

² http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf

³ http://www.eib.org/attachments/strategies/transport_lending_policy_en.pdf

- the National Administrative Court had ruled in 2015 that it was legally possible to uphold the construction permit on the basis of a corrective environmental decision.

The complainants took the view that the EIB should not accept the new environmental decision.

7.2 Regulatory Framework

7.2.1 The EIA Directive determines which projects are subject to an Environmental Impact Assessment (EIA) (Article 4) and states that Member States are required to “ensure that, before development consent is given” these projects “are made subject to [...] an assessment with regard to their effects on the environment” (Article 2.1). The EIA Directive further specifies that such assessment shall “identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on [...] biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC [...]” (Article 3.1). The Directive requires, amongst other things, that “Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned [...] have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive” (Article 11.1).

7.2.2 Regarding the national laws that were brought up in the context of the complaint, Article 31 of the Act of 10 April 2003 on Special Rules for Preparing and Implementing Road Investment Projects states that the final decision on road investment realisation permits (“ZRID”) cannot be annulled, if the application for the annulment of that decision was lodged after the expiry of 14 days from the day on which the decision becomes final and the investor has started the construction of the road (paragraph 1 of Article 31). As per paragraph 2 of the same article, in the case of an action against the decision regarding a road investment realisation permit, which was immediately enforceable, the administrative court after a period of 14 days from the date on which the construction of the road started can only state that the decision infringes the law for the reasons listed in Articles 145 or 156 of the Code of Administrative Procedure.

7.3 Initial Findings

7.3.1 In the course of its inquiry, the EIB-CM learned that the complainants had lodged a complaint (see paragraph 5.3) to the European Commission in which they referred to the alleged non-compliance of certain provisions of national law with the EIA Directive and a breach of the Habitats Directive because the expressway section at issue was approved despite its likely significant effects on the nearby Natura 2000 site Lasy Skarżyskie. Therefore, the EIB-CM contacted the Commission to learn further details about these complaints. The EIB-CM was informed that the European Commission has initiated two procedures related to the issues raised by the complainants. One, an EU Pilot, concerns compliance of the section of the expressway in question with the EIA and Habitats Directives. The other falls under infringement proceedings⁴ and concerns compliance of the relevant national legislation with the EIA Directive with respect to access to justice. The EIB-CM observes that whilst the infringement procedure tackles issues of a general nature, the issues being addressed by the EU Pilot are directly related to the case under consideration. The EIB-CM notes

⁴ Infringement number: 20162046.

that the procedures for both cases are still ongoing at the time of drafting of this report. As the outcome of these procedures may be relevant for any further handling of this complaint and for the project at hand, the EIB-CM considers it appropriate that the EIB shall continue to follow up with the European Commission on the outcome of the ongoing procedures.

- 7.3.2 For this reason, the EIB-CM's assessment has focused on the appraisal of the project that the EIB carried out. In this context, it is important to bear in mind that the complainants' allegation concerns the legality of the environmental decision through which the environmental assessment of the project was concluded by the competent authority and of the related construction permit ("ZRID"). Specifically, the complainants objected to the issuing of a new environmental decision without requiring a new EIA to be carried out and took the view that this would not be in line with the EIA Directive.
- 7.3.3 In this context, the EIB-CM takes note that the original environmental decision (issued in 2008) was declared invalid due to the lack of an assessment of impacts on the Natura 2000 area "Łasy Skarżyskie" nearby (proposed in 2009, designated in 2011)⁵. Subsequently, a new environmental decision (dated 20.01.2014) was issued.
- 7.3.4 At the time of the appraisal and as reflected in the project documentation (dated September 2013), several environmental issues of importance were identified by the EIB. This set of issues contained, amongst others, potential impacts on Natura 2000 sites and took account of the risks related to the fact that the project extended over several years and over a changing legal situation. Moreover, it was reflected that the procedures remained partially pending and that, therefore, the provision of *"a copy of the approval of the Supplemental EIA performed under Section 88 of the EIA Act 2008 or evidence that no such supplemental EIA is required"* and, specifically for the Voivod Border to Skarżysko-Kamienna section, *"a copy of the Environmental Decision, expected later in 2013"*⁶, were determined as conditions for a disbursement of funds.
- 7.3.5 Likewise, the project documentation reflected that the proposal for designation of the Natura 2000 area took place after *"the obtainment of the environmental decision"* (dated 30.10.2008). Finally, it is stated that, although initially *"the evaluation of the impact on this area wasn't performed"*, the *"evaluation was performed during the supplemental environmental impact assessment"*.
- 7.3.6 In this regard, it is important to note that the supplemental Environmental Impact Assessment contained an assessment of potential impacts on the Natura 2000 area nearby. Related to this, the subsequent environmental decision states that the *"information about the project that is available at the time of the environmental constraints decision [...] make it possible to evaluate at this stage the environmental impact of the project and to define the conditions of its performance"*. Furthermore, it is stated that consequently *"no decision is made to require conducting a repeated assessment of the environmental impact as a part of the procedure concerning the issue of the permit for the performance of the road project"*. The EIB-CM considers that the EIB had carried out correctly its appraisal with regard to the allegation set out in paragraph 7.1.1.

⁵ The site is protected under the Habitats Directive (site code: PLH260011) and the species that are present include certain bird, butterfly species as well as wolf. The information is obtained from Natura 2000 - Standard Data Form.

⁶ Environmental and Social Datasheet, S7 EXPRESSWAY (GDANSK-WARSAW-KRAKOW), 19 November 2013.

7.4 Allegation

- 7.4.1 The complainants alleged that the EIB had not properly carried out the environmental due diligence of the project, namely with the following allegations:
- a. The **impact of the road on habitats and species** protected under the Natura 2000 site "Lasy Skarżyskie" is deemed significant and the implementation of the project will endanger the **habitats of protected butterfly species**;
 - b. No assessment of the **cumulative impacts** of the projects was performed;
 - c. The **assessment of project alternatives** is deemed insufficient;
 - d. **No wildlife crossing for large mammals** has been planned along the road section and the wildlife crossing for medium-sized animals leads directly into a line of buildings.

7.5 Regulatory Framework

- 7.5.1 Generally, the EIB Statement of Environmental and Social Principles and Standards (version 2009) requires that financed projects *"are acceptable in environmental and social terms [...]"* (paragraph 1). In addition, paragraph 2 of the Statement sets forth that it is the promoter's responsibility to prepare, implement and operate projects financed by the Bank and that they *"are also responsible for the fulfilment of Bank requirements, especially for legal compliance"*.
- 7.5.2 Regarding the environmental assessment of projects, paragraph 18 states that, where environmental impacts are likely to be significant, *"the Bank requires a formal EIA"* and that such EIA *"should integrate an assessment of project alternatives [...]. For a project that requires an EIA, the Bank or its authority will not finance the project before the EIA has been completed per the requirements of the Bank."*
- 7.5.3 Specifically regarding impacts on biodiversity, paragraph 68 states that the *"EIB approach to biological diversity is grounded in the principles and standards of the EU Habitats and Birds Directives [...]"*. Moreover, paragraph 70 states that *"the promoter must demonstrate that a range of alternatives and their impacts on biodiversity has been analysed"*. The same paragraph further specifies that the *"promoter is also required to apply the mitigation hierarchy, i.e. to take appropriate measures to avoid, minimize or rehabilitate/mitigate impacts that may damage biological diversity. Where residual adverse impacts on biodiversity remain, the promoter may propose biodiversity offsets, where appropriate."*
- 7.5.4 Regarding legal requirements, paragraph 72 sets forth that the *"EIB does not finance projects located in protected sites unless they are consistent with the relevant legal requirements and site management plans."* And, regarding Natura 2000 sites, paragraph 73 states that, *"any project likely to have a significant effect, either individually or in combination with other projects, should be subject to the protection regime described in Article 6 of the Habitats Directive"*.
- 7.5.5 Regarding the environmental assessment of projects, paragraph 101 of the EIB Environmental and Social Practices Handbook (version 2010) mentions amongst the Bank's tasks, inter alia, the following activities:
- "Where an EIA is required, confirms the boundary of the project and the area of influence covered by the EIA and that this is in line with the EIA Directive, confirms that the main stages of the EIA are complete and documented (screening, scoping, studies, public consultation, planning consent/authorisation, and public informed of decision);"*

- *Reviews the environmental substance of the project using EIA documents and additional studies or where an EIA is not required, or is not yet completed, whatever sources of information are available, including appropriate site visits, if practicable;*
- *Ensures that the biodiversity assessment in accordance with the Habitats 92/43/EEC and Bird 79/409/EEC Directives has been carried out either as part of an EIA or separately and Forms A/B or equivalent filled out for projects located in the EU Member States and accepted by the relevant Competent Authority. [...]"*

- 7.5.6 With regard to the assessment of the quality of an EIA, paragraph 128 establishes that the Bank should take into account whether a *"description of the aspects of the environment likely to be significantly affected by the proposed project including, in particular, population, fauna, flora incl. biodiversity, soil, [...] landscape and the inter-relationship between the above factors"*, and a *"description of the measures envisaged to prevent, reduce and where possible compensate and offset any significant adverse effects on the environment [...]"* have been adequately covered.
- 7.5.7 In line with Article 6.3 of the Habitats Directive, *"any [...] project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the [...] project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."*
- 7.5.8 Article 6.4 of the Habitats Directive, referred to in Article 6.3 thereof, states that in case of a negative assessment, a project may be implemented provided that certain criteria are met, including implementation of compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.
- 7.5.9 Without prejudice to their obligation to ascertain that the project will not adversely affect the integrity of the Natura 2000 site concerned, unless Article 6.4 of the Habitats Directive is applied, the competent authorities may include in the subsequent EIA decision and/or decision to grant development consent any applicable mitigation measures and, where appropriate, monitoring measures.

7.6 Initial Findings

- 7.6.1 The EU Pilot, referred to in paragraph 7.3.1 of the report, concerns compliance of the section of the expressway in question with the EIA and Habitats Directives. As set out in paragraph 7.4.1, the allegation concerns the negative impact of the project on the protected habitats and species; the lack of assessment of the cumulative impact; insufficient assessment of project alternatives; the lack of wildlife crossings, i.e. the application of the EIA and Habitats Directives with respect to the section of the expressway in question. Therefore, the outcome of the EU Pilot is relevant for the allegation made.
- 7.6.2 The project was subject to an Environmental Impact Assessment. The EIA for the section in question was carried out in 2007 and the assessment of impacts upon a Natura 2000 area nearby (proposed in 2009, designated in 2011) took place during the subsequent preparation of a supplementary EIA. The complainants took issue with certain aspects of the environmental assessment related to the sub-section and specifically of the assessment of impacts on biodiversity.

- 7.6.3 One of the factors that come into play in this context is the principle of presumption of legality, which is related to the transposition of EU law into Member States' legislation. Related to this principle, the EIB's role in the context of the environmental assessment at the time of the appraisal focused on the specific tasks listed in the relevant standards such as the EIB Statement of Environmental and Social Principles and Standards and the EIB Environmental and Social Practices Handbook.
- 7.6.4 In this context, the EIB has to confirm the boundaries/area of influence covered by the EIA and that the main stages of the EIA have been completed. In addition, the EIB reviews the EIA and confirms whether descriptions of potential environmental impacts and the respective prevention/mitigation measures have been determined. Regarding impacts on biodiversity (to which most of the complainants' allegations relate), as set out in paragraph 135 of the Handbook (2010 version), the EIB's approach and commitment are grounded in the principles and practices contained in the EU Nature Directives, including the Habitats Directive. Article 6.3 of the Habitats Directive prohibits the competent authorities from authorising the project unless an appropriate assessment, when carried out, concludes that the project will not adversely affect the integrity of the Natura 2000 site concerned. The only exception to this rule is if compensatory measures, as set out in Article 6.4 of the Habitats Directive, are introduced. In the event that the competent authority concludes that the project will not adversely affect the integrity of the Natura 2000 site concerned, a subsequent (EIA/environmental) decision could include information about the mitigation and monitoring measures concerning biodiversity. In the event that compensatory measures must be introduced, pursuant to Article 6.4 of the Habitats Directive, they could also be included in addition to mitigation measures in the subsequent (EIA/environmental) decision.
- 7.6.5 Upon a review of the project documentation (Environmental and Social Data Sheet), the EIB-CM has identified that the documentation mentions, amongst other things, "*habitat and community severance*" among the environmental impacts of the projects and lists the planned mitigation measures such as "*restrictions during construction; installation of acoustic barriers; construction of small, medium and large animal crossings; drainage and wastewater treatment systems; re-plantation of greenery; construction of pedestrian facilities and access roads for local residents; as well as ex-post impact assessment.*" With reference to these mitigation measures, the same section states that "*subject to the conditions outlined above, the project is acceptable from an environmental and social perspective*".
- 7.6.6 Moreover, the project documentation sets forth that the disbursement of the loan is conditional upon the provision of an opinion of the competent authority for nature conservation on the expected impact of the project on protected areas and species (Form A/B). This Form has been provided to the EIB (dated 1.9.2010) and therein it is specified that a significant adverse impact on nature protection sites nearby is not expected as long as the conditions stated in the environmental decision are observed.
- 7.6.7 In addition, the Statement of Environmental and Social Principles and Standards requires that alternatives have been analysed and that the mitigation hierarchy has been applied (avoid, minimise, mitigate impacts).
- 7.6.8 Alternatives are essentially different ways in which the developer can feasibly meet the project's objectives⁷. The appropriate number of alternatives depends on the circumstances and type of project. The EIA Directive itself does not place a requirement on the number of alternatives, so as

⁷ European Commission's Guidance on EIA Scoping.

long as they are relevant and reasonable (Article 5.1.d). The EIB-CM found that two alternatives and their respective impacts on the environment/biodiversity had been analysed. For a period of time, the complainants and the promoter discussed new variants in the area of the controversy, but these discussions were suspended in 2016. Aware of the ongoing EU Pilot (see paragraph 7.3.1) and the agreement between EIB's operational services and the borrower and the promoter to put on hold the disbursement of the loan for this particular section until further notice (see paragraph 7.6.12), the EIB-CM plans to reassess the situation concerning alternatives following the completion of the ongoing EU Pilot.

- 7.6.9 During its fact-finding mission, the EIB-CM was made aware of the proposed extension of an industrial park nearby which appears to raise concerns of additional impacts on the Natura 2000 area. The complainants further stated that the spatial development masterplan of 2008, which foresees the proposed extension, is still valid. According to the complainants, the *"only way to prove that the industrial zone plans have been shelved would be to present a resolution of the Skarżysko-Kamienna City Council amending the current spatial development masterplan (Studium UikZP)"*. Aware of the ongoing EU Pilot (see paragraph 7.3.1) and the agreement between EIB's operational services and the borrower and the promoter to put on hold the disbursement of the loan for this particular section until further notice (see paragraph 7.6.12), the EIB-CM plans to reassess the situation concerning cumulative impacts following the completion of the ongoing EU Pilot.
- 7.6.10 Regarding the application of the mitigation hierarchy when assessing environmental impacts, the environmental decision contains a number of mitigation measures. However, it should be noted that, as briefly presented in paragraph 7.6.4, there is a difference between mitigation measures and compensatory measures, as set out in Article 6.4 of the Habitats Directive. With respect to mitigation, it is also important to take into account that the environmental decision provides for a monitoring procedure. Moreover, it is provided for that should monitoring indicate such a need, additional measures must be implemented. As it is foreseen to keep track of the effects, the EIB-CM therefore deems it appropriate to point out that the complainants may forward any evidence of environmental impacts to the Polish authorities as long as the monitoring is ongoing.
- 7.6.11 Related to that, it is important to take into account that the S7 expressway is not located within the Natura 2000 area nearby (Lasy Skarżyskie) and that there are no site-specific management plans pertaining to the Natura 2000 area that would set forth conditions/requirements relating to mitigation measures such as the moving of plants/butterflies.
- 7.6.12 In this context, it is important to underline that, when being informed about the issues related to biodiversity and the environment, the EIB's operational services have agreed with the Borrower and the Promoter, in application of the principle of precaution, to put on hold the disbursement of the loan for this particular section until further notice, despite the fact that the contractual disbursement conditions are deemed to be fulfilled in line with the relevant requirements.
- 7.6.13 Up to the time of drafting of this report, the procurement of the main works is ongoing and is expected to be completed in the second half of 2017. Therefore, no expenditure is currently taking place and, hence, there is no basis for requesting EIB finance/disbursement in connection with this section.

8. INITIAL CONCLUSIONS AND PROPOSED WAY FORWARD

- 8.1 During the course of the EIB-CM's inquiry, the EIB-CM was informed that the European Commission was handling a complaint related to issues that are examined in this report. As the outcome of this procedure may have significance for the EIB-CM's assessment of the allegations at hand, the EIB-CM communicated with the Commission with a view to establishing the expected length and the further process. As the procedure remains ongoing, the EIB-CM deemed it appropriate to proceed by carrying out its Initial Assessment, the outcome of which is presented in this report.
- 8.2 The assessment especially focused on distinguishing the allegations that are related to the complaint submitted to the European Commission from the allegations left unconcerned. This distinction is also meant to flag existing gaps that may be relevant in the event that a further assessment is required after the European Commission has concluded its procedure.
- 8.3 In this respect, the EIB-CM considers it appropriate that the EIB shall continue to follow up with the European Commission on the outcome of the procedure.
- 8.4 Regarding the complainants' allegations, the EIB-CM's review has shown that mitigation measures are foreseen and monitoring of such measures is required. Therefore, the complainants may submit any evidence of negative environmental impacts to the authorities as long as the monitoring is ongoing. The EIB-CM also found that the Environmental and Social Data Sheet made approval of the project conditional on the construction of large animal crossings.

8.5 Proposed Way Forward:

There are two sets of proposals for the way forward, one for the EIB's operational services and one for EIB-CM.

The EIB-CM suggests that the EIB's operational services:

- continue the dialogue with the promoter with the aim of not disbursing funding allocated to the project component in question before the EU Pilot and any subsequent related proceedings are settled, all within the framework of the Financial Contract and applicable rules of the EIB;
- take into account the outcome of the EU Pilot and any subsequent related proceedings in the EIB's monitoring activities in relation to the project component.

The EIB-CM asks the EIB's operational services to provide it with any relevant updates/outcomes once they become available.

The EIB-CM will:

- determine, on the basis of the outcome of the EU Pilot, any subsequent related proceedings and possible relevant updates/outcomes provided by the EIB's services, whether a detailed assessment of the allegations in question (e.g. appropriate assessment and compensatory measures, alternatives, cumulative impact) is necessary;
- consider, in the event that the European Commission's decision requires new measures to be taken and provided there is willingness on the part of the actors involved, offering the EIB-CM's assistance by providing the possibility of collaborative resolution processes (as per the EIB-CM's operating procedures, this may include the facilitation of information sharing,

dialogue/negotiations or joint fact-finding missions) to ensure the continuation of cooperation between the promoter and the complainants.

F. Alcarpe
Head of Division
Complaints Mechanism
31.07.2017

A. Abad
Deputy Head of Division

31.07.2017