

Complaint SG/E/2015/16

D4R7 PPP Project -

Slovakia

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

Conclusions Report

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Prepared by

Alfredo Abad

Deputy Head of Division

Marta Juhasz

Case Officer

SWECO (environmental, technical and policy expertise)¹

Felismino Alcarpe

Head of Division

Complaints Mechanism

External Distribution

Complainant: INEKO Institute and Nadácia Zastavme Korupciu

Borrower: Zero Bypass Limited

Promoter: Ministry of Transport and Regional Development of the Slovak Republic

Internal Distribution

Management Committee

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Inspector General

EIB services concerned

¹ In line with the § 5.6.3 of the EIB-CM's Operating Procedures, the preparation of this Conclusions Report has been supported by external expertise provided by SWECO. 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>

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	9
3. THE D4R7 PPP PROJECT	9
3.1 Description	9
3.2 Timeline	10
3.3 Stakeholders	10
3.3.1 Promoter	10
3.3.2 Concessionaire	10
3.3.3 The Role of the EIB	10
4. BACKGROUND OF THE COMPLAINT AND METHODOLOGICAL ASSESSMENT.....	11
4.1 Background	11
4.2 Methodological Assessment	11
5. REGULATORY FRAMEWORK OF THE EIB	12
5.1 EU Directives and Policies	12
5.1.1 SEA Directive	12
5.1.2 EIA Directive	13
5.1.3 Directive on Public Access to Environmental Information and Directive on Public Participation related to certain plans and programmes relating to the environment	13
5.1.4 TEN-T and Transport Policy	14
5.2 EIB Policies and Guides	14
5.2.1 EIB Transport Lending Policy	15
5.2.2 EIB Guide to the Economic Appraisal of Investment Projects	16
5.2.3 EIB Statement of Environmental and Social Principles and Standards	16
5.2.4 EIB Environmental and Social Handbook	17
6. EIB-CM ASSESSMENT	18
6.1 Violation of the EU Directive on Public Procurement and the EIB Guide on Public Procurement	18
6.1.1 Details of the Allegation	18
6.1.2 Findings	18
6.2 Failure to Analyse Alternative Project Financing Models	20
6.2.1 Details of the Allegation	20
6.2.2 Regulatory Framework	20
6.2.3 Findings	21
6.3 Failure to Provide Access to Information during the Preparation of the Project	22
6.3.1 Details of the Allegation	22
6.3.2 Regulatory Framework	22
6.3.3 Findings	23
6.4 Failure to Analyse Alternative Transport Modalities	24
6.4.1 Details of the Allegation	24
6.4.2 Regulatory Framework	24
6.4.3 Findings	26
6.5 Failure to Analyse Alternative Road Alignments	31
6.5.1 Details of the Allegation	31
6.5.2 Regulatory Framework	31
6.5.3 Findings	31
6.5.4 Conclusion	33
7. OTHER ISSUES	34
8. CONCLUSIONS AND RECOMMENDATIONS	34
LIST OF ACRONYMS	35

CONCLUSIONS REPORT

EXECUTIVE SUMMARY

On 5th November 2015 Pavel Sibyla, Managing Director of “Nadácia Zastavme korupciu” (Stop Corruption Foundation, Slovakia) and Peter Goliaš, Director of INEKO (Institute for Economic and Social Reforms, Slovakia) submitted a complaint to the European Investment Bank – Complaints Mechanism (EIB-CM) concerning the D4 Highway and R7 Expressway PPP Project (hereinafter: “the Project”). Nadácia Zastavme Korupciu and INEKO (hereinafter: “the Complainants”) raised objections against the decision of the Bank to finance the Project.

The allegations of the Complainants concern the Promoter’s actions during the planning and preparation of the Project. The Complainants challenge the environmental and social impact as well as the public procurement and governance aspects of the Project. Against this background, it is pertinent to highlight that 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 parties².

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, to be procured as a public private partnership (PPP). The Project will construct the southern part of a ring road around the City of Bratislava, and part of the southern expressway network, linking the western and eastern parts of the Slovak Republic. 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 Bank is only financing the D4 component of the Project. The Project is promoted by the Ministry of Transport and Regional Development of the Slovak Republic (hereinafter: “MTRD” or “Promoter.”). The concessionaire under the PPP contract is Zero Bypass Limited (hereinafter: “Concessionaire” or “Borrower”) – a special project vehicle established by the consortium of bidders that won the public procurement tender of 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.

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 Complainants and with the Promoter, and a meeting was also held with the Representation of the European Commission to Slovakia. The chief objective of the fact-finding mission was to clarify the allegations of the Complainants. The EIB-CM also hired a group of consultants to perform an independent review of the technical and policy background of the complaint.

The EIB-CM had launched an Initial Assessment of the case in accordance to the EIB – Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (CMPTR); however, during the course of the investigation, the EIB-CM has been able to reach conclusions on the allegations. The EIB-

² 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: European Invest Bank - Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (October 2012), paragraph 2.3. available at: http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf

CM has therefore drafted a Conclusions Report where the main findings and conclusions are presented.

Summary of findings regarding the allegations

The EIB-CM has broken the complaint down into five allegations, which are presented in the following text together with a description of the findings made.

In their first allegation, the Complainants point out that the Ministry only organised one public procurement tender for the Feasibility Study of the project³, with only one bidder. Furthermore, the Complainants claim that the Ministry's design of the tender created a conflict of interest for the bidder. The Complainants allege that the Bank failed to verify the conflict of interest at the time of its due diligence. The EIB-CM assessment has shown that the public procurement of the Feasibility Study took place before the Bank became involved in the Project. On this basis, the EIB-CM found the allegation to be inadmissible since no action/omission attributable to the EIB has been identified. Besides, and whilst the EIB-CM considers it the Bank's obligation to verify (*ex post*) the integrity and legality of the public procurement in cases where the Feasibility Study influenced the further development of the Project, or the Bank's decision to finance the project, the EIB-CM found no evidence that the Feasibility Study influenced any of these aspects.

In their second allegation, the Complainants challenge the Bank's due diligence during the economic appraisal of the Project contending that (i) the PPP model used for the Project constitutes an inefficient use of public financial resources, and (ii) the Promoter did not study alternative project financing models. Concerning the first point, the Bank takes a neutral position in terms of public or private sector involvement in project finance, as this decision rests with the Promoter. However, it could be pointed out that, generally, the idea of a PPP is to benefit from the winning consortium's technical expertise and organisation, and enable the public sector to harness the expertise and efficiencies that the private sector can bring. Other reasons for a PPP are the linking of construction/supply, operation and maintenance to incentivise and benefit from life-cycle thinking at the outset, as well as private sector financing. The EIB-CM assessment revealed that the Bank Services conducted their own economic cost benefit analysis of the Project, and the results of the first economic appraisal formed the basis of the Board's decision to approve the finance of the D4 component only. On this basis, EIB-CM concludes that the Bank's Services complied with the Bank's applicable policies and the allegation is not grounded.

In their third allegation, the Complainants refer to the Promoter's failure to provide access to information during the preparation of the project. The Promoter maintains a specific website for the Project, which EIB-CM finds satisfies the requirement for access to information at the project level generally. The Bank's policies and guidelines do not specify the information that the Promoter shall disclose generally, apart from the Promoter's specific obligation to ensure access to "environmental information" pursuant to the Aarhus Convention. Some of the information requested by the Complainants may constitute environmental information. After assessing the project documentation, which was available to the Bank at the appraisal stage, the EIB-CM found no reasonable grounds for the Bank to believe at the time of appraisal that the Aarhus Convention and other relevant regulations were contravened in Slovakia. Nor did the Complainants, to the knowledge of the EIB-CM, lodge a case before national courts to validate their right to access to environmental information. On this basis, the EIB-CM concludes that the Bank complied with its due diligence concerning the appraisal of the Project.

³ Within the context of the present complaint, the term of "Feasibility Study" refers to the document that provided a public sector comparator for the Promoter before launching the public procurement of concession works of the D4R7 PPP project. The Promoter commissioned the Feasibility Study through public procurement in 2014. For further explanation see Chapter 6.1.

In their fourth allegation, the Complainants allege that the Bank failed to verify that the Promoter studied alternative transport modalities to the D4 highway and R7 expressway, for example more effective utilisation of the public transport system. The EIB-CM assessment identified a range of national and regional documents that analyse alternative transport modalities and solutions for the area. The Bank had appraised the project within the parameters established by the EIB's Transport Lending Policy⁴ for projects categorised as "road projects". The eligibility criteria for roads projects focuses on projects that are part of the TEN-T network and with high Economic Rate of Return. Inter-modality is not a specific eligibility criterion for individual road projects. Whilst the EIB Transport Policy puts a strong focus on seeking sustainable solutions and furthering EU policy goals on sustainability⁵ the Bank pursues the objective of promoting inter-modality at the general portfolio level.

It can also be argued that the fact that the project is part of the TEN-T network, a strategic intermodal analysis is already done at the time of including the project in the TEN-T project pipeline, and therefore the Bank's operations that meet the TEN-T criteria include an implicit analysis of the intermodal alternatives. These strategic guidelines adopted by the TEN-T have to be developed though at project level by the competent national and regional authorities. In the case under consideration, the Bank took into consideration in its appraisal the plans that were under development by the competent regional authorities.

The EIB-CM considers that the allegation is not grounded as the Project fulfilled the eligibility criteria for projects categorised as "roads" under the EIB Transport Lending Policy, which does not require to carry out an analysis of inter-modality at project level.

In their fifth allegation, the Complainants state that the Bank failed to analyse alternative road alignments. The EIB-CM assessment has identified that alternatives have indeed been evaluated in previous assessments. For example, the Project EIA emphasizes the many interests to consider when deciding on the alignment, including intervention in protected areas where the D4 passes over the Danube, noise impact on housing along the road, the diverse interests of Bratislava Airport, the connection of road I/63 and the connection of feeder roads. Based on their assessment, EIB-CM considers this allegation as not grounded.

⁴ The EIB Transport Lending Policy, establishes the following sectors and subsectors within the policy: RDI, Land Transport (Urban Public Transport, Railways, Roads, Automotive Manufacturing), Waterborne Transport, Civil Aviation

⁵ EIB Transport Lending Policy, page 7 paragraph 15 and 17

CONCLUSIONS REPORT

D4R7 SLOVAKIA PPP

Complainant: INEKO Institute and Nadácia Zastavme Korupciu

Date received: November 2015

Project Status: Signed and not disbursed

Board Report: October 2015

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

1. THE COMPLAINT

On 5th November 2015 Pavel Sibyla, Managing Director of “Nadácia Zastavme korupciu” (Stop Corruption Foundation, Slovakia) and Peter Golias, Director of INEKO (Institute for Economic and Social Reforms, Slovakia) submitted a complaint to the European Investment Bank – Complaints Mechanism (EIB-CM) concerning the D4 Highway and R7 Expressway PPP Project (hereinafter: “the Project”). Nadácia Zastavme Korupciu and INEKO (hereinafter: “the Complainants”) raised objections against the decision of the Bank to finance the Project. The text box below summarizes the allegations submitted by the Complainants.

Failure to assess governance aspects of the project:

- Violation of the EU Directive on Public Procurement and the EIB guide on public procurement
- Failure to analyse alternative project financing models

Failure to assess the environmental and social impacts:

- Failure to provide access to information during the preparation of the project
- Failure to analyse alternative transport modalities
- Failure to analyse alternative road alignments

The Complainants also put forward allegations concerning fraud and corruption in the project preparation phase. Fraud and corruption allegations fall outside the mandate of the EIB-CM⁶.

⁶ §4.2 CMPTR, page 6

2. CLAIM

In the original complaint, the Complainants requested that EIB temporarily suspends its plan to co-finance the Project. At the fact-finding mission in Bratislava, the Complainants modified their request according to the following:

- To verify that the Bank has carried out proper due diligence during project appraisal
- To conclude on lessons learned

3. THE D4R7 PPP 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).

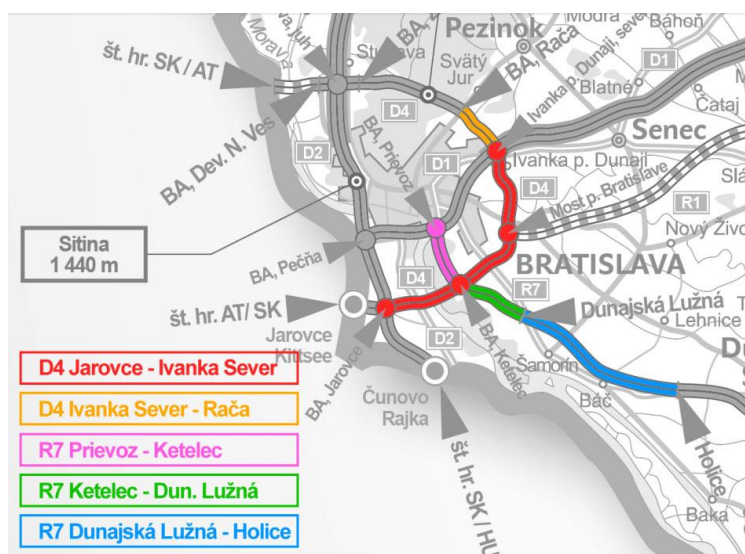


Figure 1. Project D4/R7 Scheme⁸

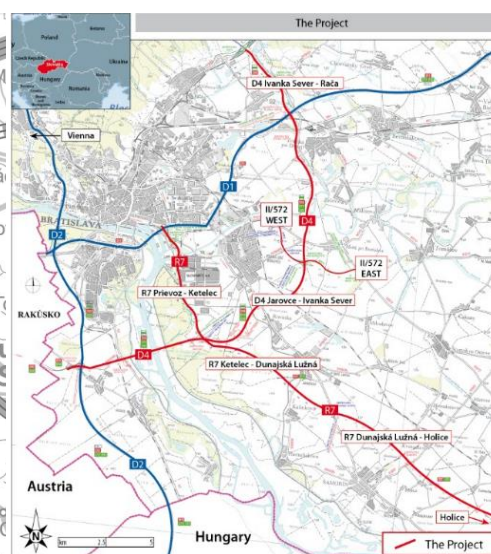


Figure 2. The D4R7 Project in connection with other motorways

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. Figure 2 illustrates the Project's interconnections with the existing transport infrastructure.

The Ministry of Transport, Construction and Regional Development (MTCRD) has developed a specific website for the Project, providing access to extensive information and documentation in both Slovakian and English⁸.

⁸ <http://www.obchvatbratislavy.sk/en/o-projekte>

⁸ <http://www.obchvatbratislavy.sk/en/o-projekte>

3.2 Timeline

The estimated construction period is 4.5 years and the Project is scheduled for completion in 2020. Operations are expected to start in 2019 following issuance of the first preliminary occupation permit. The box below presents the Project timeline for the activities of the Promoter (in italic) and the EIB (in bold):

2007	Government resolution No. 1084/2007: Programme of preparation and construction of motorways and expressways for years 2007-2010
2007-2012	<i>Environmental impact assessment of the D4 Highway</i>
2012	<i>Strategic environmental assessment of the D4 Highway</i>
2014	<i>Tender notice for the Feasibility Study published</i>
2014 Oct	<i>Feasibility study finalized</i>
2014 Dec	<i>The Prior Information Notice on concession for works published in the Official Journal of the European Union and the Official Journal of the Public Procurement Office of the Slovak Republic</i>
2015 Jan	<i>Promoter published the Feasibility Study of the D4R7 PPP Project, carried out by a consortium of international advisors</i>
2015 Jan	<i>Government approved the proposal of the public-private partnership project</i>
2015 Jan	<i>Tender notice on concession for works published in the Official Journal of the European Union and the Official Journal of the Public Procurement Office</i>
2015 Mar-Sep	EIB carried out project appraisal (Stage I)
2015 Oct	EIB Board approved the financing of the project (EIB Board Report)
2016 Jan-May	EIB carried out project appraisal (Stage II)
2016 May	<i>Concession Agreement signed between the Promoter and the Borrower</i>
2016 Jun	Finance Contract signed between the EIB and the Borrower

3.3 The Promoter, the Borrower and the EIB's role

Promoter

The Project Promoter is the Government of the Slovak Republic, represented by the Ministry of Transport, Construction and Regional Development (MTCRD).

Concessionaire (Borrower)

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.

The Role of 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 because the Bank determined 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 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 Stage II 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)⁹.

4. BACKGROUND OF THE COMPLAINT AND METHODOLOGICAL ASSESSMENT

4.1 *Background*

On 5th November 2015, the Complainants lodged a complaint in the EIB-CM inbox concerning the Project. The Complainants raised objections against the decision of EIB to finance the Project, and requested that EIB temporarily suspend its plan to co-finance the Project. The Complainants presented allegations that challenged the environmental and social impacts of the Project, as well as public procurement and governance aspects.

On 20th November 2015, the EIB-CM informed the Complainants that their complaint had been registered and the date by which they could expect a reply from the Bank. Due to the complexity of the inquiry, the EIB-CM decided to extend the timeframe for the handling of the complaint in accordance with Article 10.2 of Title IV "Rules of Procedure" of the EIB-CM Principles, Terms of Reference and Rules of Procedure (hereinafter: "CMPTR"). On 9th June 2016, the EIB-CM contacted the Complainants and informed that it was not in a position to provide a reply by the expected date, but would do so as quickly as possible. A fact-finding mission was carried out in October 2016 to meet with the Complainants and the Promoter.

4.2 *Methodological Assessment*

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 – Stage 1 and 2, the Environmental and Social Impact Assessment (ESIA) of the Project and other key documents. The EIB-CM hired a group of consultants from the company SWECO 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 that were made publicly available by the Government of the Slovak Republic.

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 undertook a fact-finding mission to Slovakia from 19th to 20th 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.

⁹ <http://www.eib.org/efsi>

Although the objective of the preliminary assessment was to carry out an Assessment of the allegations, the quality of the information gathered has enabled the EIB-CM to form an opinion on the content and scope of the allegations and to reach a conclusion. The EIB-CM is therefore publishing this final Conclusions Report.

5. REGULATORY FRAMEWORK OF THE EIB

5.1 *EU Directives and Policies*

The relevant EU Directives and policies in relation to the complaint are:

- The SEA Directive (Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment);
- The EIA Directive (Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment as amended in 1997, 2003 and 2009¹⁰);
- The Directive on Public Access to Environmental Information (Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC);
- The Directive on Public Participation in respect of the drawing-up of certain plans and programmes relating to the environment (2003/35/EC).
- The TEN-T programme and the Transport Policy of the European Union.

5.1.1 SEA Directive

Strategic Environmental Assessment (SEA) is an important tool for integrating environmental considerations into the preparation and adoption of plans and programmes, which are likely to have significant effects on the environment. The SEA Directive provides a consistent framework to include the relevant environmental information into decision-making, and complements the Environmental Impact Assessment (EIA) Directive, as depicted below in Figure 3.

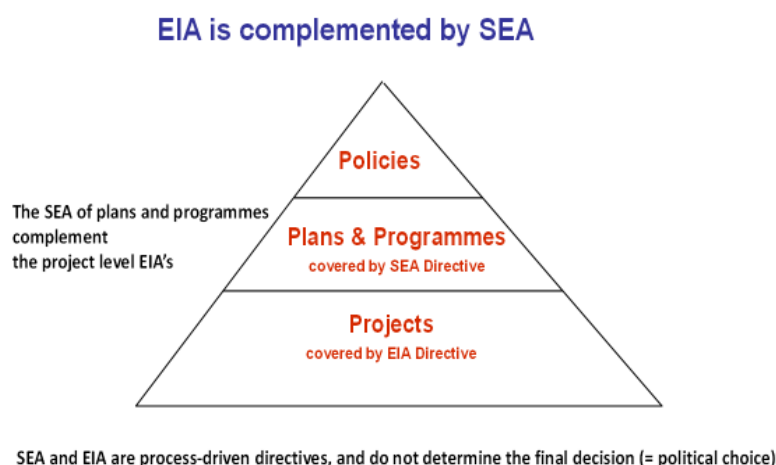


Figure 3. The Relationship between the SEA and the EIA directive

A plan is a set of co-ordinated and timed objectives for the implementation of a policy.

¹⁰ The project EIAs were prepared between 2007 and 2012

The main requirements of the SEA Directive regarding the assessment of a plan are:

- Scoping to agree most significant likely environmental effects in consultation with statutory environmental consultees;
- Preparation of draft Environmental Report;
- Public consultation on draft Environmental Report and related plan;
- Incorporate amendments after consultation, prior to adoption of plan;
- Setting up and applying monitoring system for implementation phase.

5.1.2 EIA Directive

According to the 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).

5.1.3 Directive on Public Access to Environmental Information and Directive on Public Participation related to certain plans and programmes relating to the environment

The European Union is a Party to the Aarhus Convention, effective since May 2005. In 2003, the EC adopted two Directives concerning the Aarhus Convention:

- Directive on Public Access to Environmental Information, and
- Directive on Public Participation in Certain Plans and Programmes Relating to the Environment.

The purpose of both Directives is to ensure effective public participation in decision making. The public should be able to express their opinions and concerns which may be of relevance to a specific decision, and the decision makers should take these into account.

The purpose of the Directive on Public Access to Environmental Information is to ensure that environmental information is made systematically available and distributed to the public. The Directive requires that public authorities make the environmental information they hold available to any legal or natural person on request.

The purpose of the Directive on Public Participation in Certain Plans and Programmes Relating to the Environment is to give the public early and effective opportunities to participate in the preparation and modification or review of the plans or programmes. It states that:

- (a) the public shall be informed about any proposals for such plans or programmes or for their modification or review;
- (b) the public is entitled to express comments;
- (c) due account shall be taken of the results of the public participation;
- (d) the competent authority informs the public about the decisions taken and the reasons and considerations upon which those decisions are based, including information about the public participation process.

Reasonable timeframes shall be provided allowing sufficient time for each of the different stages of public participation.

5.1.4 The TEN-T programme and the Transport Policy of the European Union

The infrastructure development of the Trans-European Transport Network (TEN-T) is closely linked to the implementation and further advancement of the Transport Policy of the European Union.¹¹ The TEN-T programme provides financial support to projects that enhance the interconnection of national infrastructure networks and ensure their interoperability. The TEN-T programme covers all transport modes – air, rail, road, and maritime/inland waterway – as well as logistics and intelligent transport systems. Project proposals are approved for inclusion in the TEN-T programme pursuant to a set of EU Regulations (the TEN-T Guidelines and the Connecting Europe Facility Regulation).¹²

The TEN-T is a policy, which:

- Reinforces the network approach, thereby establishing a coherent basis for the identification of projects and for service provision in line with relevant European objectives.
- Sets standards for all the network – existing and planned parts – which integrate EU legislation in force and lead the way infrastructure-wise to achieving key policy objectives. Existing standards include, in particular, those set in the fields of railway policy, transport telematics or safety. New policy approaches are enabled in fields such as clean power for transport and other innovative areas, the link between TEN-T and urban mobility or sustainable and high-quality services for freight and passengers.
- Highlights the importance of nodes as an integral part of the network: maritime ports and airports as Europe's gateways, inland ports and rail road terminals as key infrastructure for inter-modal transport chains as well as urban nodes as the origin and destination of the majority of journeys on the trans-European transport network.
- Notably through the new core network corridor approach, advances sustainable transport solutions which lead the process towards the achievement of the European Union's long-term transport policy objectives (meeting future mobility needs while ensuring resource efficiency and reducing carbon emissions).¹³

5.2 EIB Policies and Guides

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

¹¹ White Paper on Transport: Roadmap to a Single European Transport Area – towards a competitive and resource efficient transport system, COM(2011)144

¹² See: https://ec.europa.eu/transport/themes/infrastructure/ten-t-guidelines/transport-policy_en

¹³ https://ec.europa.eu/transport/themes/infrastructure/ten-t-guidelines/transport-policy_en

- EIB Transport Lending Policy (December 2011)¹⁴
- EIB Guide to the Economic Appraisal of Investment Projects (March 2013)¹⁵
- EIB Statement of Environmental and Social Principles and Standards (2009)¹⁶
- EIB Environmental and Social Handbook (December 2013)¹⁷

5.2.1 EIB Transport Lending Policy

The EIB is the EU's policy driven bank. Bank lending in the transport sector contributes to multiple EU policy objectives including environmental improvement, regional development, the knowledge economy, and the trans-European networks. The Bank, as a European institution, continuously seeks to focus on activities that are likely to have the greatest impact on furthering EU policy goals.

Chapter 4 of the Transport Lending Policy on "Guiding principles and selection criteria" includes the following guiding principles:

- Mobility is essential for the free movement of people and economic growth. In this context, the EIB will pursue an approach that strives for the most efficient, most economic and most sustainable way of satisfying transport demand. This will require a mix of transport solutions, covering all modes, though carefully planned to control the negative environmental impacts of transport, and
- The EIB will continue its strong commitment to the funding of TENs. The long-term nature of these investments and their essential role in achieving an efficient and cohesive Community-wide transport system continue to make them the backbone of transport investment in the EU and essential for the functioning of the internal market. The relationship between the stock of infrastructure capital and greenhouse emissions is complex, but this does in itself not call into question this continued EU commitment to TENs¹⁸.

Based on these guiding principles, the Transport Lending Policy has formulated operational selection criteria within the land transport sector. While urban public transport rail and multi-modal projects are prioritised within the land transport, lending for road will continue for those projects forming part of the TEN-T and/or situated in less developed regions¹⁹.

Road projects shall demonstrate high forecast economic returns, while other transport modes considered more environmentally friendly require only satisfactory economic returns.. The analysis of road projects shall include a standard risk assessment against key assumptions, and projects shall demonstrate that their economic case is robust to downside scenarios. Where there is tolling, projects shall also be assessed for their financial sustainability.

The EIB also looks to the Trans European Network Transport (TEN-T) Policy as a key source of motivation for lending. The TEN-T is a major element for economic growth and job creation in Europe. The completion of an integrated, technology led and user-friendly transport system is a key factor in the competitiveness of the Union. The TEN-T is essential to facilitate the mobility of people, freight and services and thus to the establishment of an internal market and economic and social cohesion of the Union. The Bank will seek to support the EU priorities of the development of the TEN-T including:

- the creation of high quality infrastructure for all modes;
- the promotion of inter-modality and interoperability between modes;

¹⁴ http://www.eib.org/attachments/strategies/transport_lending_policy_en.pdf

¹⁵ http://www.eib.org/attachments/thematic/economic_appraisal_of_investment_projects_en.pdf

¹⁶ http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf

¹⁷ http://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf

¹⁸ EIB Transport Lending Policy (December 2011) page 3-4

¹⁹ EIB Transport Lending Policy (December 2011) page 4

- the facilitation of the optimum use of existing infrastructure;
- the connection of major agglomerations and regions; and to better connect the Union to the networks of the states of the European Free Trade Association, the eastern and southern neighbours of the EU Member States.

To the extent that the TEN-T policy²⁰ prioritizes certain investments, the Bank shall, through its Value Added (VA) method, also prioritise the same investments. Potential projects are screened and graded for their contribution to EU objectives, their quality and soundness and in particular their economic case and environmental sustainability - as well as the financial and non-financial contribution made by the Bank.

All projects must comply with the Bank's Statement of Environmental and Social Principles and Standards. This Statement commits the Bank to seek to improve the balance between the environmental and social cost and benefits of the projects it finances.

5.2.2 EIB Guide to the Economic Appraisal of Investment Projects

The EIB conducts technical and economic appraisal of the projects it finances. The economic appraisal allows the Bank to judge whether an investment project will contribute to the economic growth and cohesion of the EU and the economic progress of its partners.

Bank appraisal methods must fit within the remit of the Bank. It is not the remit of the EIB to act as a planning agency and decide on the best project option. Most projects are proposed for Bank financing once the project option has been chosen and preparatory work or construction has already begun. Likewise, the Bank does not engage in a budgeting exercise whereby only the projects with the highest returns are financed. Instead, the Bank focuses on ensuring that the projects selected for finance are viable and generate sufficient economic value.

For these reasons, Bank appraisals generally do not formally evaluate project options, and economic appraisals do not consider "do something (else)" counterfactual scenarios. Instead, Bank appraisals aim at yielding an eligible/non-eligible, viable/non-viable opinion. The counterfactuals used in project appraisals follow the "do minimum" criterion for capacity expansion or upgrade projects and the "do nothing" criterion for capacity rehabilitation projects.

The Bank can evaluate project options where it is useful for the promoter and the project. However, such analysis is not the norm for lending operations. Moreover, it is only of use in the few instances when the Bank appraises the project early in the project definition process.²¹

5.2.3 EIB Statement of Environmental and Social Principles and Standards

On 3rd February 2009, the EIB 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 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.

²⁰ https://ec.europa.eu/transport/themes/infrastructure/ten-t-guidelines/transport-policy_en

²¹ EIB Guide: The Economic Appraisal of Investment Projects at the EIB, page 21

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 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.

5.2.4 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.

Standard 10 of the Handbook regards stakeholder management. 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.

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 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 an alternative as a different mean of meeting the general purposes and requirements of the activity, which may include alternatives to:

- (i) the property on which or location where it is proposed to undertake the activity;
- (ii) the type of activity to be undertaken;
- (iii) the design or layout of the activity;
- (iv) the technology to be used in the activity; and
- (v) the operational aspects of the activity.

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. To this end, the EIB promotes the application of strategic environmental assessment as a tool for identifying and evaluating potential impacts of plans and programmes.”²²”.

The Handbook also addresses EIB’s Land Acquisition Policy: “Projects often necessitate land acquisition, expropriation and/or restrictions on land use, resulting in the temporary or permanent resettlement of people from their original places of residence or their economic activities or subsistence practices. When affected persons and communities do not have the choice to refuse such displacement, this process is known as involuntary resettlement. The complexity of displacement must be duly appreciated and its impact and remedy carefully analysed, planned and delivered as it may negatively affect the economic and social well-being of affected people and provoke severe economic and social problems in the origin and host communities.”²³

6. EIB-CM ASSESSMENT

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

6.1 *Violation of the EU Directive on Public Procurement and the EIB Guide on Public Procurement*

6.1.1 Details of the Allegation

The Complainants pointed out in the complaint that only one public procurement tender for the Feasibility Study provider was organised by the Ministry, with just one bidder. According to the complainants, the first objective of the Feasibility Study was to analyse whether implementing the PPP financing model was the right choice in the project realization. The second objective of the tender was to select the consultant for the project realization via the PPP model. Consequently, the selected provider was eligible for additional consultancy services, given that the PPP model proved more suitable. In the opposite scenario, most of the payment amount for the additional advisory services was not to be utilised. As a result, the Ministry’s design of the tender created, according to the Complainants, a conflict of interests for the bidder.

The Complainants consider that the Bank had failed to verify this conflict of interest at the time of its due diligence.

6.1.2 Findings

In 2014, the Promoter launched a public tender for the preparation of a study that compared the alternative project financing models for the design, construction, finance, operation and maintenance of the D4 highway and R7 expressway (hereinafter: the Feasibility Study). The call for bids set forth two objectives: 1) to examine whether the PPP was the optimal financing model, and 2) to select the consultant for the implementation of the PPP project.

²² EIB Environmental and Social Handbook, page 12 paragraph 2

²³ EIB Environmental and Social Handbook, page 52, paragraph 1 and 2

A group of international advisors won the tender of the Feasibility Study and delivered the document to the Promoter on 31st October 2014.²⁴ The advisors subsequently assisted the Promoter during the public procurement of the PPP concession. The procurement notice of the concession works was announced in the Official Journal of the Public Procurement Office as well as in the Official Journal of the European Union in January 2015.²⁵

During the fact-finding mission, the Promoter informed EIB-CM that the procurement of the Feasibility Study was in line with the Slovak Act on Public Procurement, and the methodology of the Ministry of Finance concerning the preparation and public procurement of PPP projects. According to the Promoter, the methodology prevailing at the time allowed the Promoter to procure the first and the second phase of the advisory services through one single bidding process. According to the said methodology the resulting Feasibility Study has to firstly answer the question of whether the project is beneficial to realize and secondly, whether it is advantageous to implement it in the form of PPP or to use the traditional project finance method.²⁶

During the fact-finding mission, both parties (the Complainants and the Promoter) confirmed that they have already held meetings to discuss this matter and others. The Complainants had also participated in seminars regarding the Project and the traffic situation in Bratislava in February 2015 and February 2016.

The public procurement of the Feasibility Study took place before the Bank became involved in the Project. According to the Bank's internal documentation, the Bank started appraising the Project in March 2015. In this regard, the EIB-CM would like to remind the parties that its mandate is confined to the investigation of the decisions, acts and omissions of the Bank.²⁷ It is therefore difficult to determine any action or decision of the Bank on a process that took place before the Bank's involvement, which would make the allegation inadmissible.

However, and during the meeting of October, the Complainants acknowledged the constraints of the EIB-CM remit derived from the timing of the process. Nonetheless, they also emphasised that it is in the Bank's interest to assess the quality of the studies at an early stage because any wrong decision at the beginning of the process will have a cascade effect on the rest of the process.

The EIB-CM observes that the term "feasibility study" normally refers to studies that aim at forming investor decisions since these documents determine the potential outcomes of a project before investments are made. It appears that in the case of the D4R7 PPP Project, the Feasibility Study played a different role. The Promoter commissioned the Feasibility Study in 2014 so as to have a point of reference (an advisory document) for its own decision-making during the selection of, and negotiation with, the winning bidder. In turn, the EIB-CM's enquiry concerns whether the Feasibility Study had influenced any aspects of the Project that the EIB was obliged to verify during its due diligence.

²⁴ The group of advisors included PricewaterhouseCoopers Slovakia, White & Case Ltd. and Obermeyer Zealand Ltd. See: Feasibility Study (2014), page 50, available at: <http://www.obchvatbratislavy.sk/en/dokumenty>

²⁵ The Prior Information Notice on concession for works was published in the Official Journal of the Public Procurement Office no 249/2014 under no 31040 – POP on 22.12.2014 and in the S series of the Official Journal of the European Union no 2014/S 248 – 437483 on 24.12.2014; The Notice on concession for works was published in the Official Journal of the Public Procurement Office no 22/2015 under no 2514 – KOP on 30.01.2015 and in the S series of the Official Journal of the European Union no 2015/S 021 – 033433 on 30.01.2015.

²⁶ The guidelines issued by the Ministry of Finance (Príručka pre výber poradcu pre prípravu a realizáciu PPP projektu) is available at: http://www.finance.gov.sk/Components/CategoryDocuments/s_LoadDocument.aspx?categoryId=6678&documentId=5241

²⁷ CMPTR, §2.3

the EIB-CM takes note that the Bank did not verify the public procurement procedure of the Feasibility Study. The EIB-CM considers though that the Bank's obligation to verify (*ex post*) the integrity and legality of the public procurement procedure of the Feasibility Study may become relevant in cases where it influenced (i) the further development of the Project or (ii) the Bank's decision to finance the project. In the present case, the EIB-CM has found no evidence that the Feasibility Study, commissioned by the Promoter in 2014, influenced any of these aspects. Although the public procurement notice for concession works aimed at selecting a private sector party for the development of the PPP model, the public procurement notice and ancillary documentation did not use the assumptions and results of the Feasibility Study, rather, bidders were invited to submit their own financial and technical proposal.²⁸ Secondly, the appraisal of the project by the Bank involved a socio-economic analysis pursuant to the Bank's own methodology, and independent of the Feasibility Study (See: Section 6.2).

In light of the aforesaid, the EIB-CM found no evidence that the Feasibility Study was used in a single manner for the development of the Project neither by the Bank nor by the Concessionaire. Consequently, the allegation is found to be inadmissible since no action/omission attributable to the EIB has been identified.

6.2 *Failure to Analyse Alternative Project Financing Models*

6.2.1 Details of the Allegation

The Complainants have presented a two-fold allegation. On the one hand, the Complainants contend that the PPP model is not the most financially advantageous option for the development of the Project. According to this view, the PPP model utilised in the Project entails an inefficient use of public financial resources of the Slovak Republic. In the Complainants' opinion, this statement is supported by the economic assumptions and transport data presented in the Feasibility Study. As a second element of their allegation, the Complainants assert that the Promoter did not study alternative project financing models and the Bank failed to verify this point.

6.2.2 Regulatory Framework

The relevant regulatory framework is assessed to comprise:

- Transport Lending Policy
- EIB Guide to the Economic Appraisal of Investment Projects (eligibility of projects)

The relevant regulations and Bank policy as well as the provisions and obligations therein, are presented in the table below.

Regulation/Policy	Provisions/EIB obligation
EIB Transport Lending Policy	Obligation to ensure that the financed project has high economic rate on return ²⁹ . The analysis shall include a standard risk assessment against key assumptions, and projects shall demonstrate that their economic case is robust to downside scenarios. ³⁰
EIB Guide to the economic appraisal of investment projects (eligibility of projects)	The EIB Guide to the Economic Appraisal of Investment Projects stresses that it is not the remit of the EIB to act as a planning agency and decide on the best project option. Most projects are proposed for Bank financing once

²⁸ The Tender Notice for concession works and the ancillary information documents are available at the project website: <http://www.obchvatbratislavy.sk/en/dokumenty>

²⁹ EIB Transport Lending Policy, page 4

³⁰ EIB Transport Lending Policy, page 16

Regulation/Policy	Provisions/EIB obligation
	the project option has been chosen and preparatory work or construction has already begun as in this case. ³¹

6.2.3 Findings

In their allegation, the Complainants challenge the Bank's due diligence during the economic appraisal of the Project. The economic analysis generally serves to determine whether a project is in line with the Bank's financing rules (eligibility criteria). The eligibility criteria - for the purposes of the economic analysis of road projects - are set forth in the EIB Guide to the Economic Appraisal of Investment Projects and the Transport Lending Policy.

The EIB Guide to the Economic Appraisal of Investment Projects stipulates that road projects are assessed via a cost-benefit analysis³² that includes financial and non-financial metrics.³³ The aforementioned EIB Guide also prescribes that the Bank uses its own model to perform the economic assessment of projects for inter-urban roads: the audited version of the Economic Road Investment Appraisal Model (ERIAM).³⁴ It should be stressed that the Bank's policies and guidelines do not foresee an obligation whereby the Bank shall study alternative financial models. The Bank takes a neutral position in terms of public or private sector involvement in project finance, and leaves this decision for the Promoter. Accordingly the Transport Lending Policy provides a neutral statement that *"road projects are expected to demonstrate a high economic rate of return."*³⁵

The Bank's Services appraised the Project in the period March 2015 - May 2016, and prepared two appraisal reports. As above mentioned, the Bank conducted their own economic cost benefit analysis of the project using the audited version of the ERIAM. As a result of the first appraisal, the Bank's Services determined the economic viability of the D4 Highway. The same economic appraisal showed a negative ERR for the R7 expressway meaning that the R7 component did not meet the Bank's eligibility criteria. Therefore, this section was excluded from the Bank's financing. The results of the first economic appraisal formed the basis of the Board decision of October 2015, where the Board approved the financing of the D4 component exclusively. The second-stage appraisal – conducted in May 2016 – affirmed the results of the first appraisal and showed stronger economic results, which stem from the cost reductions achieved. According to the Bank's services, this cost reduction is the result of the competitive tendering process carried out to select the Concessionaire.

The Complainant alleges that the PPP model utilised in the Project entails an inefficient use of public financial resources of the Slovak Republic. As mentioned previously, the Bank takes a neutral position in terms of public or private sector involvement in project finance, and leaves this decision for the Promoter. Generally, the idea of a PPP is to benefit from the winning consortium's technical expertise and organisation, and enable the public sector to harness the expertise and efficiencies that the private sector can bring. The winning Consortium will further assume the financial, technical and operational risk in the project. The PPP shall reduce the total cost in the construction, routine and lifecycle maintenance by benefitting from winning consortiums technical expertise and experience. On the other hand, a public authority has access to cheaper loans than a private company, and generally,

³¹ EIB Guide to the economic appraisal of investment projects, page 21

³² See also the detailed description of the EIB's economic analysis for road projects in the EIB Guide to the economic appraisal of investment projects, pages 181-182.

³³ For example, the benefits of road projects financed by the Bank to comprise, *inter alia*: time savings, vehicle operating cost savings, reduction in accidents and the environmental impact (lower pollution through shorter route or reduced congestion) as well as the reduction in maintenance expenditures if the existing road assets have become very expensive to maintain." See: EIB Guide to the economic appraisal of investment projects, page 182.

³⁴ EIB Guide to the Economic Appraisal of Investment Projects, page 182.

³⁵ EIB Transport Lending Policy, page 4

financing costs will be higher for a PPP than for a traditional public financing, because of the higher cost of capital to the private sector.

Based on the aforementioned, the need to verify whether a PPP is the most financially advantageous option is not part of the Bank's criteria to determine the eligibility of projects to be financed. Therefore, the EIB-CM concludes that the Bank's Services complied with the applicable EIB policies and guidelines when they appraised the Project. Accordingly, the EIB-CM considers that the allegation is not grounded.

6.3 Failure to Provide Access to Information during the Preparation of the Project

6.3.1 Details of the Allegation

The Complainants pointed out in the complaint that: *"Despite multiple requests, the Ministry refuses to make some data public (maybe the data does not even exist), based on which it would be possible to evaluate whether the assumptions and conclusions of the analysis are correct. (...) Further, the Ministry rejects to make the information public. However, without the access to key information, it is not possible for the public to evaluate the extent to which the Project fulfils the expectations and its purpose, which is to eliminate the regular traffic congestions in Bratislava".*

The Complainants also submitted: *"The Ministry also refused to make public the transport engineering documentations connected to the Project-related parts of the road system and their economic assessment, which was requested by one of the authors of this complaint (INEKO)."*

As a part of the fact-finding mission in October 2016, a meeting was held with the Complainants who stressed that they had not received the requested information on the traffic analysis and model use, access to the data used such as origin-destinations surveys, data from the toll system, average speed of cars, traffic counts etc. The Complainant's opinion was that a better traffic model for the Bratislava region is needed, as well as greater transparency on its design, calibration, verification and its use of raw data.

6.3.2 Regulatory Framework

The EIB promotes the right to access to information, as well as public consultation and participation.³⁶ Standard 10 of the Bank's Environmental and Social Handbook 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. This Standard stresses the value of public participation in the decision-making process throughout the preparation, implementation and monitoring phases of a project³⁷.

In addition, the Bank requires that all projects financed by it within the European Union comply with EU and national environmental law as well as the principles and standards of relevant international environmental conventions incorporated into EU law.³⁸ The Aarhus Convention³⁹ provides the principal framework for access to environmental information at EU and national level. Directive 2003/4/EC on public access to environmental information⁴⁰ and Directive 2003/35/EC on public

³⁶ EIB Statement of Environmental and Social Principles and Standards (2009), page 7. paragraph 11

³⁷ EIB Environmental and Social Handbook, page 85

³⁸ EIB Statement of Environmental and Social Principles and Standards (2009), page 16 paragraph 36.

³⁹ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, of 25 June 1998

participation in respect of the drawing-up of certain plans and programmes relating to the environment set a common framework for the implementation of the Aarhus principles in EU Member States:

According to Article 2 of Directive 2003/4/EC (Aarhus Directive), *"environmental information shall mean any information in written, visual, aural, electronic or any other material form on (...) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities (...)"* affecting or likely to affect the environment.⁴¹ The Aarhus Directive further states that *"upon request, public authorities shall reply to requests for information (...), reporting to the applicant on the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling, and pre-treatment of samples, used in compiling the information, or referring to a standardised procedure used."*⁴²

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."*⁴³

Rebuttal of the presumption of legality may derive from, *inter alia*, judicial proceedings before national or international courts relevant to the Project, or infringement procedures opened by the European Commission against a Member State concerning the implementation of the Directives mentioned above.

6.3.3 Findings

The EIB-CM notes that the Complainant's allegation focuses on access to information held by the Promoter, a public authority. At the outset, the transport data requested by the Complainants (traffic analysis and models, data used like origin-destinations surveys, data from the toll system, average speed of cars, traffic counts and road engineering documents) can be construed as generic "information" as well as "environmental information" held by a public authority.

Concerning this Project, during the time of the Bank's project appraisal, the Promoter has created and maintained a webpage where a wide range of documents are available in Slovakian (for example, the Feasibility Study, transport research surveys, the EIAs, presentations, the history and structure of the PPP). Besides, and as indicated in 6.1.2, the complainants and the promoter have had some public and bilateral meetings where they had the opportunity to exchange data and information on these matters. The EIB-CM is not aware that the Complainants or other parties contacted the EIB requesting environmental information at the time of the appraisal.

The Bank's policies and guidelines do not specify the information that the Promoter shall disclose generally, apart from the Promoter's specific obligation to ensure access to "environmental information" pursuant to the Aarhus Convention.⁴⁴ The EIB-CM considers that some of transport data requested by the Complainants might qualify as "environmental information" under the Slovak laws

⁴¹ Directive 2003/4/EC, Article 2.1.

⁴² Directive 2003/4/EC, Article 8.2.

⁴³ EIB Statement of Environmental and Social Principles and Standards (2009), page. 8. paragraph 20.

⁴⁴ EIB Environmental and Social Handbook, page 14.

transposing the Directive and the Aarhus Convention.⁴⁵ For instance, the information about traffic volumes may have an impact on calculation of CO₂ emissions and time savings.

The EIB-CM then examined whether there were reasonable grounds for the Bank to believe at the time of appraisal the Aarhus Convention and Directive 2003/4/EC were contravened during the preparation of the Project. The EIB-CM notes that the Bank appraised the Project under the presumption of legality. The appraisal documents have not registered any signs that the Promoter may have acted contrary to the Aarhus Convention or Directive 2003/4/EC during the preparation of the Project. The European Commission's webpage on infringement proceedings and the case register of the Compliance Committee of the Aarhus Convention did not contain proceedings against Slovakia concerning access to environmental information.⁴⁶ To the EIB-CM's knowledge, the Complainants did not lodge a case before national courts to validate their right to access to environmental information. Therefore the EIB-CM concludes that the Bank complied with its due diligence concerning the appraisal of the Project.

6.4 Failure to Analyse Alternative Transport Modalities

6.4.1 Details of the Allegation

The Complainants pointed out in their complaint that *"the Ministry (...) fails to look at any other possible remedies in its documents related to the Project D4/R7, prepared for the government of Slovakia. It does not offer a comprehensive analysis of possible reasons behind the flow problem in the capital city, and neither has it made an effort to study more of the available solutions. For example, the Ministry has not even evaluated the possibility to utilize more effectively the public transport system in order to improve the road situation. Overall, failing to conduct exhaustive analysis is contrary to existing strategic documents of the European Union and of the government of Slovakia."*

As it appears from the allegation, the Complainants contend that the EIB has failed to verify that the Promoter studied alternative transport modalities to the D4 highway and the R7 expressway.

6.4.2 Regulatory Framework

The EIB is obliged to ensure that the Promoter has studied alternative transport modalities as per:

- EIB Transport Lending Policy
- EIB Statement of Environmental and Social Principles and Standards
- EIB Environmental and Social Handbook

The relevant regulations and Bank policy as well as the provisions and obligations therein, are presented in the table below.

⁴⁵ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed on 25 June 1998, entered into force on 30 October 2001

⁴⁶ It is worth noting that the European Commission opened two infringement cases against Slovakia concerning environmental assessment between 2007-2015. These cases revolved around the implementation of the EIA Directive and the SEA Directive, and concerned public consultation and the obligation to assess all environmental impacts. The Compliance Committee of the Aarhus Convention dealt with a case that concerned the lack of proper public consultation on a nuclear power project. The EIB-CM looked into these cases and found that they do not relate to the present complaint.

Regulation/Policy	Provisions/EIB obligation
EIB Transport Lending Policy	<p>Bank lending in the transport sector contributes to multiple EU policy objectives including environmental improvement, regional development, the knowledge economy, and the trans-European networks⁴⁷.</p> <p>The Bank will seek to support the EU priorities of the development of the TEN-T including:</p> <ul style="list-style-type: none"> - the creation of high quality infrastructure for all modes; - the promotion of inter-modality and interoperability between modes; - the facilitation of the optimum use of existing infrastructure.⁴⁸ <p>Chapter 4 of the Transport Lending Policy on “Guiding principles and selection criteria” includes the following guiding principle (page 3 to 4):</p> <ul style="list-style-type: none"> - Mobility is essential for the free movement of people and economic growth. In this context, the EIB will pursue an approach that strives for the most efficient, most economic and most sustainable way of satisfying transport demand. This will require a mix of transport solutions, covering all modes, though carefully planned to control the negative environmental impacts of transport - The EIB will continue its strong commitment to the funding of TENs. The long-term nature of these investments and their essential role in achieving an efficient and cohesive Community-wide transport system continue to make them the backbone of transport investment in the EU and essential for the functioning of the internal market. The relationship between the stock of infrastructure capital and greenhouse emissions is complex, but this does in itself not call into question this continued EU commitment to TENs.
EIB Statement of Environmental and Social Principles and Standards	<p>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.⁴⁹</p>
EIB Environmental and Social Handbook	<p>The EIB recognises the need for a proactive approach to ensure that environmental and social considerations are taken into account during the early stages of strategic decision-making by promoters so as to have a real influence on the choice of alternative developments⁵⁰.</p> <p><i>“In the absence of an overriding public interest, the EIB will not finance a project where either there has not been a due consideration of alternatives, or significant negative environmental and social impacts remain after mitigation, compensation and/or offset, or the application of the environmental and social requirements of the Bank are such that their implementation would seriously impair the viability of the project. Such a project would be rated “C”, according to the definition found in the Handbook.”</i></p>

⁴⁷ EIB Transport Lending Policy, page 2.

⁴⁸ EIB Transport Lending Policy, page 8.

⁴⁹ EIB Statement of Environmental and Social Principles and Standards, page 12, paragraph 16 states: “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”.

⁵⁰ EIB Environmental and Social Handbook, page 12.

Regulation/Policy	Provisions/EIB obligation
EIB Guide to the Economic Appraisal of Investment Projects	Bank appraisals do not formally evaluate project options, and economic appraisals do not consider “do something (else)” counterfactual scenarios. Instead, Bank appraisals aim at yielding an eligible/non-eligible, viable/non-viable opinion. The counterfactuals used in project appraisals follow the “do minimum” criterion for capacity expansion or upgrade projects and the “do nothing” criterion for capacity rehabilitation projects.
TEN-T and transport policy	The new TEN-T and transport policy approach, advances sustainable transport solutions which lead the process towards the achievement of the European Union's long-term transport policy objectives (meeting future mobility needs while ensuring resource efficiency and reducing carbon emissions).

6.4.3 Findings

The D4 Highway will serve multiple objectives at different levels of intervention. The D4 highway is located on the trans-European transport network (TEN-T)⁵¹ and is part of the Orient-East Med Core Network Corridor⁵². Further to facilitating international traffic demand and the passage of long distance travel around Bratislava, the D4 will also benefit municipal and regional transportation. As a ring road around Bratislava, the D4 Highway is expected to alleviate traffic congestion within and around the city and reduce commuting time from the agglomeration areas to the capital.

During its assessment of the allegation, the EIB-CM identified a range of strategic documents and plans at the national and regional levels, which analyse alternative transport modalities relevant for the Project. These are discussed first, together with specific transport and traffic models that were also identified as developed for the Project. Thereafter, the EIB-CM will assess the role of the Bank in analysing these documents during the due diligence.

Alternative transport studies developed by the Promoter and local authorities Strategic Plans

A ring road around Bratislava has been a priority project for Slovakia and was first identified in the region's masterplan in 1992. The City Council of Bratislava approved a new master zoning plan for the region (or Urban Development Plan or Land Use Plan) in 2007, replacing the former Bratislava plan which was established in 1976. The latest version of the Land Use Plan, effective 10/11/2014, contains the changes in the route of D4 and interchanges.^{53, 54} A SEA of the Land Use Plan is also available.⁵⁵

The IDS – NDSI Support Programme (2009) puts forward a programme to support the development of intelligent transport systems, and includes provision for a National Traffic Information System. This programme analyses the existing situation in Slovakia to identify necessary development measures. It also analyses the traffic prognosis in the short and long term.⁵⁶

⁵¹ https://ec.europa.eu/transport/themes/infrastructure/ten-t-guidelines/transport-policy_en

⁵² https://ec.europa.eu/transport/themes/infrastructure/ten-t-guidelines/corridors/orient-eastmed_en

⁵³ See: www.enviroportal.sk/sk/eia/detail/uzemny-plan-hlavneho-mesta-sr-bratislavy-rok-2007-v-zneni-neskorsich-z

⁵⁴ See: www.bratislava.sk – mapa stranok – strategické dokumenty – Územný plan mesta – zmeny a doplnky 05

⁵⁵ Zákon: 24/2006 novela 408/2011 Z.z. časť SEA

Stav: Záverečné stanovisko, public hearing 11.02.2016 at 4 PM. Full text available at www.enviroportal.sk/sk/eia/detail/uzemny-plan-hlavneho-mesta-sr-bratislavy-rok-2007-v-zneni-neskorsich-z

⁵⁶ Program podpory IDS - NSDI (Program podpory rozvoja inteligentných dopravných systémov Národný systém dopravných informácií)

At the national level, alternative modalities are analysed in the Strategic Plan for the Development of Transport Infrastructure in the Slovak Republic until 2020 (2014).⁵⁷ The Strategic Plan sets out objectives and priorities for the sector, as well as concrete measures to achieve them, including the identification of necessary financial resources. The Strategic Plan covers both public and private transport modes and was subject to a SEA, which was approved by the Ministry of Environment on 17th June 2014.⁵⁸ The Strategic Plan emphasizes that the development of transport infrastructure should be a tool for promoting economic growth, and support the creation of new jobs and increase the competitiveness of the state and its regions.

At the regional level, a Strategic Plan for Public Passenger Transport and Non-motorized Transport (2014) has been developed. The plan addresses public passenger transport on a local and regional perspective with the aim of ensuring sustainable urban and regional mobility. The report presents the results of an analysis of individual modes of transport, which were drawn up by a technical working group on public passenger transport services that operated in 2013.⁵⁹ The plan is included as an annex in the overall Strategic Plan for the Development of Transport Infrastructure in the Slovak Republic 2020.

Also at the regional level, the Master Plan for Regional Transport of Bratislava (UGD BA) (2015) addresses all traffic modes in the area of Bratislava. The Master Plan is published in its entirety on the City of Bratislava website⁶⁰. The UGD BA aims to systematize the problems of transport in relation to relevant legislation, the current national, regional and international concepts of transport development and the latest trends in the field taking into account the needs and potential of Bratislava⁶¹. A public hearing of the Master Plan took place after the first phase of the appraisal of the Bank, on 18th September 2015,⁶² and an SEA of the plan is also available.⁶³

The UGD BA analyses the traffic relations within Bratislava's 20 districts, and proposes a wide range of actions for different transport modes. The proposed actions for public transport aim to increase the capacity and attractiveness of public transport – namely propositions to expand the tramlines, trolleybuses and buses, to expand the network of bicycle paths and improve the conditions for pedestrians. In the result of the prognosis, the modal split in the prognosis is in favour of public transport. The UGD BA foresees the decrease of individual transport in relation to public transport by a couple of percent (very roughly individual transport 53 %/ public transport 47%), which may seem very optimistic in comparison with other European capitals.

As can be seen from the figure below, the traffic survey related to UGD BA does not include the D4 highway.

⁵⁷ Strategický plán rozvoja dopravnej infraštruktúry SR do roku 2020
<http://www.telecom.gov.sk/index/index.php?ids=160211>

⁵⁸ <https://www.enviroportal.sk/sk/eia>

⁵⁹ Stratégia rozvoja verejnej osobnej a nemotorovej dopravy SR do roku 2020
<http://www.telecom.gov.sk/index/index.php?ids=190472>

⁶⁰ <http://www.bratislava.sk/doprava/d-74381/p1=11049958>

⁶¹ See: <http://www.enviroportal.sk/sk/eia/detail/uzemny-generel-dopravy-hlavneho-mesta-slovenskej-republiky-bratislavy>

⁶² See: <http://www.bratislava.sk/uzemny%2Dgenerel%2Ddopravy/ds-11007012/archiv=0&p1=11049979>

⁶³ See: <http://www.enviroportal.sk/sk/eia/detail/uzemny-generel-dopravy-hlavneho-mesta-slovenskej-republiky-bratislavy>



Figure 4. Extract from UGD BA Traffic Model (source: UGD BA traffic model of IT for 2040⁶⁴)

Traffic Models

The VUD (TRI) Traffic model addresses road transport only. It analyses the effect of the D4 Highway on the existing traffic pattern in Bratislava, i.e. the expected shift of traffic volumes from roads going through Bratislava to the D4. The VUD (TRI) model is able to answer questions like what is the mixture of origin – destination trips (cars, trucks) in every selected profile of the road network included in the model.⁶⁵

VUD (TRI) has also developed another model for the Project.⁶⁶ No model and/or data-based analysis of the influence of the D4 highway on the present or future traffic of heavy goods vehicles (HGV) and light vehicles (LV) e.g. as annual average daily traffic (AADT), can be found in the project EIAs^{67,68}.

In June 2015, the Transport Research Institute (TRI) released a draft transport model for the Project. This was the first attempt in the Project's development history to produce a network model to forecast traffic for the Project. The model is based on data contained in the Bratislava general transport model. Additional origin-destination surveys were carried out for the purpose of TRI's work.

⁶⁴ See: http://www.bratislava.sk/ugd/UGD%20BA%20graficka%20cast/modelovanie_dopravy/UGDB_iad_2040R_layout_B_0.pdf

⁶⁵ See: <http://www.obchvatbratislavy.sk/uploads/files/d4-r7-technicka-sprava-k-dopravnemu-modelu-v10-171.pdf>

⁶⁶ See: http://www.vud.sk/about/about_en.html and <http://www.obchvatbratislavy.sk/uploads/files/vud-dopravny-a-ekonomicky-model-181.pdf>

⁶⁷ Assessment Report; D4 Highway, Jarovce - Ivanka North, 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.

⁶⁸ D4 Highway, Ivanka North - 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 North – Rača; Notice of Change to the Proposed Works. May 2014. Project Implementation Services, spol. s r. o.

Actual traffic data for 2014 have been collected for the purpose of updating the Bratislava general transport model and has been calibrated by TRI for the purposes of the D4/R7 transport model.⁶⁹ It forecasts that 33% of all D1 traffic will divert to the new road (D4) in addition to some traffic from other provincial roads.⁷⁰

As the timeline shows above, the Promoter decided to proceed to the implementation of the D4R7 PPP project based on the documents that were available in early 2015, before alternative transport studies and transport models related to the D4 Highway were completed.

The due diligence of the EIB

This allegation touches upon the role of the EIB concerning the support of investments in resource efficient, multimodal transport infrastructure. More specifically, the allegation concerns whether the Bank was bound to consider alternative transport modalities during the assessment of the D4 Highway – a TEN-T road project – pursuant to the applicable EIB Policies.

The Bank's Transport Lending Policy sets forth the Bank's lending priorities and eligibility criteria for projects within the land transport sector. At the outset, the Bank pursues a value added methodology and commits itself to finance projects that enhance resource efficiency and reduce greenhouse gas emissions per transport unit.⁷¹ Potential projects are screened and graded for their contribution to EU objectives, their quality and soundness and in particular their economic case and environmental sustainability - as well as the financial and non-financial contribution made by the Bank.⁷² The Bank prioritizes urban public transport, rail and multi-modal projects within the category of land transportation. Road projects continue to be eligible provided that (i) they form part of the TEN-T and/or situated in less developed regions and (ii) demonstrate a high ERR.⁷³ In all cases, projects are checked for compliance with the EIB Statement of Environmental and Social Principles and Standards, whereby consistency with environmental sustainability is ensured.

The Transport Lending Policy envisages different methodologies for the appraisal of (i) urban public transport projects and (ii) road projects. Whilst inter-modality constitutes an evaluation criterion for projects that fall into the first category,⁷⁴ road projects are considered to support EU policy objectives – such as job creation, social and territorial cohesion, environmental protection – by being part of the TEN-T network or located in less-developed regions and showing a robust ERR. Projects with high ERRs capture the positive externalities associated to the above-mentioned EU policy objectives. Therefore, inter-modality or other sustainable initiatives (i.a. park and ride hubs) are not an eligibility criterion for roads projects, although the Bank promotes the intermodal analysis of transport projects at portfolio level.

The EIB-CM also notes that the TEN-T Guidelines take an integrated approach to transport infrastructure planning, and underscore the principle of inter-modality and interoperability.⁷⁵ The TEN-T programme includes, from a general and strategic perspective, considerations of clean power for transport and other innovative areas, recognize the link between TEN-T and urban mobility or

⁶⁹ EIB Stage 1 appraisal report of September 2015

⁷⁰ EIB Stage 1 appraisal report of September 2015

⁷¹ EIB Transport Lending Policy, page 4

⁷² EIB Transport Lending Policy, page 6

⁷³ EIB Transport Lending Policy, pages 4, 16

⁷⁴ "Urban Transport projects help in reducing congestion and environmental externalities through either the promotion of modal shift from private cars to more sustainable transport modes and/or improvements in transport efficiency, including improved intermodal connections." EIB Transport Lending Policy, page 14, paragraph 52.

⁷⁵ Regulation (EU) No. 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (hereinafter: TEN-T Guidelines), Article 4

sustainable and high-quality services for freight and passengers.⁷⁶ It could then be argued that the declaration of the project as part of the TEN-T carries with itself an analysis of the alternative modes of transport. Albeit the TEN-T Guidelines adhere to the principle of subsidiarity: for urban nodes, such as the city of Bratislava, it remains within the competence of Member States to ensure, where feasible, that TEN-T projects integrate local considerations, such as:

- *“seamless connection between the infrastructure of the comprehensive network and the infrastructure for regional and local traffic and urban freight delivery, including logistic consolidation and distribution centres”* and
- *“mitigation of the exposure of urban areas to negative effects of transiting rail and road transport, which may include bypassing of urban areas”*.⁷⁷

In the case of the D4 Highway, and based on the findings detailed in the above sub-section (Alternative transport studies developed by the Promoter and local authorities) it appears that the alignment of municipal and regional development plans with the TEN-T project was not fully completed at the point in time when it was decided to tender the project. The EIB-CM takes note of the Bank's services view that transport plans are not static and they develop over time. Nevertheless, the existing plans were taken into consideration when the project was appraised by the EIB.

The EIB started the appraisal of the Project in March 2015, after the Promoter had approved the PPP model for the D4R7 road and launched the public procurement of concession works. The EIB appraisal reports of the Project (Stage I appraisal report of September 2015; Stage II appraisal report of May 2016) highlight that the project form part of TEN-T. The reports also make reference to the TRI draft transport model but not to the different strategic plans at the national and regional levels. In this regard, the EIB-CM notices that the Bank's mandate focuses on TEN-T roads, and that the Bank is bound to rely on documentation (including regional and local transport plans and models) prepared by the competent national authorities.

The Bank's reports also analysed the contribution of the D4 Highway to alleviate traffic congestion and thereby to reduce air pollution in Bratislava city and region. The reports also observed that the Master Plan for Regional Transport of Bratislava was under preparation at the time of project appraisal. As indicated in Section 6.2, the economic analysis carried out by the Bank shows a high ERR for the D4 component of the D4R7 PPP. Given that the economic analysis of the R7 road did not meet the criterion of high ERRs, the Bank was not in a position to finance this component.

In conclusion, and while the Bank's reports do not show an analysis of the integration of alternative transport modes into the D4 project (for example park-and-ride initiatives to promote inter-modality or broader regional transport initiatives), the EIB-CM considers that the allegation is not grounded as the Project fulfilled the eligibility criteria for projects categorised as “roads” under the EIB Transport Lending Policy, which do not require to carry out the said analysis at project level. It is however noticed that whilst the EIB Transport Policy puts a strong focus on seeking sustainable solutions and furthering EU policy goals on sustainability, the Bank pursues the objective of promoting inter-modality at the general portfolio level,

⁷⁶ Ibidem.

⁷⁷ TEN-T Guidelines, Article 30, paragraph (d)-(e)

6.5 Failure to Analyse Alternative Road Alignments

6.5.1 Details of the Allegation

The Complainants pointed out in their complaint that: *“Further, the analysis does not study any other alternative solutions for improving the road situation.”*

6.5.2 Regulatory Framework

The relevant regulatory framework comprises the EIA Directive. The relevant regulatory framework comprises the EIA Directive and the EIB Environmental and Social Handbook.

The relevant regulations and Bank policy as well as the provisions and obligations therein, are presented in the table below.

Regulation/Policy	Provisions/EIB obligation
EIA Directive	The developer shall supply, in an appropriate form, an outline of the main alternatives studied and an indication of the main reasons for his choice, taking into account the environmental effects ⁷⁸ .
EIB Environmental and Social Handbook	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. To this end, the EIB promotes the application of strategic environmental assessment as a tool for identifying and evaluating potential impacts of plans and programmes. ⁷⁹

6.5.3 Findings

Two EIAs have been developed for the D4 sections of the Project, one for each road section:

1. From Jarovce at the south-west near the Austrian border to Ivanka North at the interchange of D4 with D1.
2. From Ivanka North to Raca where the D4 highway ends at the 2nd class road No 502 at the foothills of the Little Carpathians (Malé Karpaty). It was originally planned that the D4 highway would continue through a tunnel under the foothills of the Little Carpathians from Raca to Zahodnia Bystrica, but this section is not a part of the present project.

The various different alignment options⁸⁰ of the D4 have been the subject matter of various studies, including:

- “Traffic-urban study of the zero ring around Bratislava” (DOPRAVOPROJEKT, a.s., 02/2002)
- “Highway D4, interchange Jarovce on D2 – interchange Senec on D1” (Alfa 04 a. s., 06/2005)
- “Highway D4, section Jarovce – Ivanka North”, optimisation of the interchanges' positioning on D4 (Geoconsult, s. r. o., 12/2007)
- “Feasibility and expediency study for section D4 Jarovce – Ivanka North – Stupava South – State Border SK/AT” (DOPRAVOPROJEKT, a.s., 09/2009)

⁷⁸ EIA Directive (Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC), as amended.

⁷⁹ EIB Environmental and Social Handbook, page 12 paragraph 2.

⁸⁰ The Bank evaluates project options where it is useful for the promoter and the project. However, such analysis is not the norm for lending operations. Moreover, it is only of use in the few instances when the Bank or, appraises the project early in the project definition process

The EIA of the Jarovce – Ivanka North section of D4 (Assessment Report; D4 Highway, Jarovce – Ivanka North, made in 04/2010, amended April 2011) only considers two alternative alignments for the crossing of Danube either with a tunnel (southern alignment variant) or a bridge (see Figure 6).

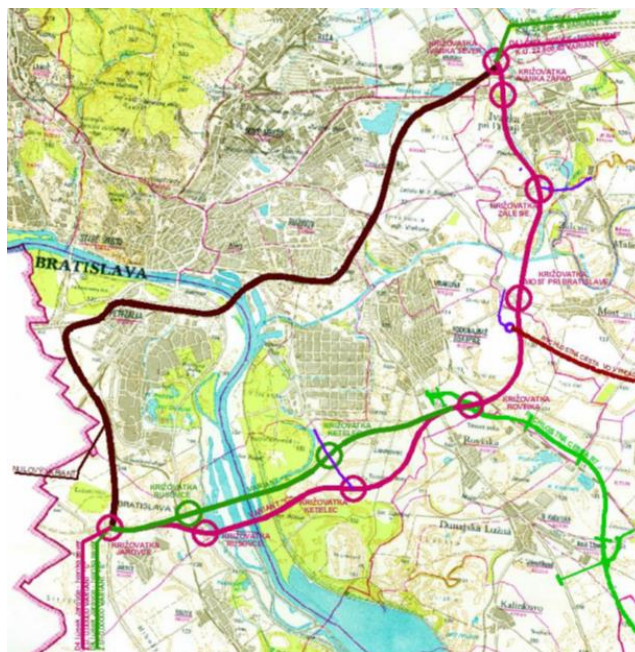


Figure 5. Alternative road alignments (D4 Jarovce Ivanka North EIA; amended April 2011; GEOCONSULT, spol. s r.o. engineering - design and consulting company)

According to the EIA, more alternatives have been evaluated in previous assessments: *“D4 in the section of Jarovce – Ivanka North was based on the comments to the Plan, respectively in terms of the specific requirements set out in Assessment range, technically resolved in the Feasibility and effectiveness study processed in September 2009 by Dopravoprojekt, a.s., while in addition to the basic options “A” purple and “B” red, which have been designed in Plan in accordance with Act No. 24/2006 Coll. (Geoconsult, spol. S.r.o. in December 2007), further options “C” red, “D” blue (tunnel option) and “E” green were solved”*. The EIA emphasizes the many interests to consider when deciding on the alignment, including intervention in protected areas where D4 passes over the Danube, noise impact on housing along the road, the diverse interests of Bratislava Airport, the connection of road I/63 and the connection of feeder roads.

Several different alignments were also considered for the tunnel below the Carpathian Mountain foothills (Male Karpaty) (D4 Highway, Ivanka North – Záhorská Bystrica. Report on Activity Assessment under Art. 31 of the Act no. 24/2006 Coll. On Environmental Impact Assessment), which was later omitted from the project (see Figure 6).



Figure 6. Alternative road alignments (EIA D4 Ivanka North – Zahodnia Bystrica; DECEMBER 2010. HBH Projekt spol. s r.o., organizational unit Slovakia)

Eventually the final alignment was a combination of the tunnel and bridge options (with a bridge over the Danube) on the eastern bank of the Danube (see Figure 7).



Figure 7. Final Alignment (source: <http://www.obchvatbratislavy.sk/en/o-projekte>)

The issue of different alignments evaluated is mentioned in the ESDS of the Bank's appraisal.

6.5.4 Conclusion

Based on the above assessment, the EIB-CM finds that the allegation is not grounded as the discussion was reflected in the EIA.

7. OTHER ISSUES

During the meeting in Bratislava, the Complainants also brought up the issue of expropriations, and the transparency of the associated process. This was discussed thereafter with the Promoter who confirmed that the process was ongoing and in accordance to the Slovakian Law. The EIB-CM also notices that the Finance Contract stipulates that where involuntary resettlement cannot be avoided or prevented as a result of the D4 Project, this will be carried out in accordance EIB Environmental and Social Standards and to the Bank's satisfaction and therefore recommends the Bank to continue its commitment to these principles in the remaining negotiations.

8. CONCLUSIONS AND RECOMMENDATIONS

In the case at hand, it is important to highlight that the EIB-CM is predominantly compliance-focused and that within its remit, and whenever appropriate, the EIB-CM determines if there is room for problem solving. EIB-CM then 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 above mentioned Findings and Conclusions, the EIB-CM proposes the following:

Regarding the first and second allegations, the EIB-CM proposes:

No further actions as these allegations concern issues that outside the EIB's influence or not grounded.

Regarding the third allegation, the EIB-CM proposes:

No further actions as the Promoter and Complainants have acknowledged that they are engaged in an ongoing discussion on these matters. From the Bank's perspective, the issues raised by the complainants concerning accessing specific data on traffic volume may lead to internal discussions on an effective disclosure.

Regarding the fourth allegation, the EIB-CM proposes:

The allegation is considered not grounded. However, the Bank can follow up issues related to inter-modality and inter-operability between modes as part of its engagement at country level with government counterparts and local actors in the Slovak Republic.

Regarding the fifth allegation, the EIB-CM proposes:

No further actions as this allegation is considered not grounded.



F. Alcarpe
Head of Division
Complaints Mechanism
03.04.2017



A. Abad
Deputy Head of Division

03.04.2017

LIST OF ACRONYMS

AADT	Annual average daily traffic
CMPTR	Complaints Mechanism 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
ERIAM	Economic Road Investment Appraisal Model
EO	European Ombudsman
EU	European Union
HGV	Heavy goods vehicles
INEKO	Institute for Economic and Social Reforms
KPIs	Key Performance Indicators
LARF	Land Acquisition and Resettlement Framework
LV	Light vehicles
MoE	Ministry of Environment of the Slovak Republic
MTCRD	Ministry of Transport, Construction and Regional Development
NDS	Slovak National Highway Company: Národná diaľničná spoločnosť, a.s.
NGO	Non Governmental Organisation
NTS	Non-Technical Summary
PPP	Public-Private Partnership
SEA	Strategic Environmental Assessment
SEP	Stakeholder Engagement Plan
TEN-T	Trans-European transport network
TRI	Transport Research Institute
UGD-BA	Master Plan for the Regional Transport of Bratislava
VA	Value Added
VUD	Výskumný ústav dopravný, a.s. Žilina: Transport Research Institute, JSC